

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Utah Department of Health DATE: November 19, 2007
Docket Nos. A-07-40 and
 A-07-75
Control Nos. UT/06/003/MAP
 and UT/2007/001/MAP
Decision No. 2131

DECISION

The Utah Department of Health (Utah or State) appealed determinations issued by the Centers for Medicare & Medicaid Services (CMS) disallowing a total of \$5,898,258 in federal Medicaid funding for graduate medical education (GME) payments made for State fiscal years (SFYs) 2003-2005. The appeals were consolidated by agreement of the parties.

As explained in detail below, we uphold CMS's determinations. Section 602 of Utah's Medicaid State plan provides that the State's aggregate yearly GME payments, or annual GME payment pool, may not exceed annual limits calculated pursuant to a methodology that uses a base year and Consumer Price Index (CPI) to account for inflation. We conclude that CMS reasonably interpreted the language of Utah's State plan to determine that Utah claimed FFP exceeding the annual payment pool limits for SFYs 2003-2005. The disallowances reflect payment pool limits properly calculated through the use of a SFY 2002 base year amount of \$19.7 million and the medical care services CPI for the western region.

Utah argues that its interpretations of the State plan's GME payment provisions to calculate varying disallowance amounts are reasonable, consistent with the language and history of the provisions, and entitled to deference. We find, however, that the State's interpretations are unreasonable in light of the language of the plan and its historical context. In particular, we conclude that it is unreasonable to interpret the language of the plan, in light of the context in which it was written, as supporting use of a SFY 2001 base year, as urged by Utah. We also conclude that the language of the plan precludes use of a

national CPI such as that advanced by the State, to determine the annual payment pool limits.

We further reject the State's alternative argument that the disallowance for SFY 2003 in particular should be eliminated because the actual amount paid for GME for SFY 2003 was approximately the same as that set forth in the State plan's estimated payment pool amount for that year and because CMS raised no objection to the amount of the payment during the state plan amendment approval process. We conclude that neither the plan's estimate nor CMS's knowledge of the proposed SFY 2003 payment pool excused the State's claiming FFP in excess of the GME payment pool limits. We also conclude that a proposed State plan amendment revising the GME payment provision does not "preempt" the disallowance for the second half of SFY 2005, as Utah argues, since the record indicates that the proposal is not "pending," and since Utah has cited no authority for reversing a disallowance on such grounds. Finally, we reject the State's arguments that the disallowances should be reversed on equitable grounds and because, in Utah's view, the GME payments did not violate any federal law or policy. Utah's excessive GME payment claims violated Medicaid statutes and regulations requiring states to follow the payment methodologies in their state plans and prohibiting states from claiming FFP in excess of allowable costs. The Board is bound by these laws and regulations. Accordingly, we sustain the disallowances in full.

This decision is based on the parties' written briefs and exhibits submitted pursuant to 45 C.F.R. § 16.8(a)-(c), and the oral argument held on October 12, 2007.

Law and regulations

The federal Medicaid statute, found in title XIX of the Social Security Act (Act),¹ provides for joint federal and state financing of medical assistance for certain needy and disabled persons. Act §§ 1901, 1903. Each state that chooses to participate administers its own Medicaid program under broad federal requirements and the terms of its own "plan for medical assistance," or state plan, which must be approved by CMS on

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.

behalf of the Secretary of Health and Human Services (HHS). Act §§ 1901, 1902; 42 C.F.R. §§ 430.10-430.16. The state plan is a comprehensive written statement describing the nature and scope of the Medicaid program and specifying the methods and standards to be used by the state to set payment rates for each type of covered service. 42 C.F.R. §§ 430.10, 447.201, 447.252(b). Payments to providers for inpatient hospital services must be made at rates determined in accordance with the methods and standards in the plan. 42 C.F.R. § 447.253(i).

State plans must be amended as necessary to take into account "[c]hanges in Federal law, regulations, policy interpretations, or court decisions." 42 C.F.R. § 430.12(c)(1)(i). CMS reviews proposed state plan amendments (SPAs) to "determine whether the plan continues to meet the requirements for approval" and "[t]o ensure the availability of FFP" 42 C.F.R. § 430.12(c)(2).

Once a state plan or SPA is approved, the state becomes qualified to receive federal reimbursement, or federal financial participation (FFP), for "an amount equal to the Federal medical assistance percentage [FMAP]. . . of the total amount expended . . . as medical assistance under the State plan." Act § 1903(a). Section 1905(a) of the Act defines the term "medical assistance" as "payment of part or all of the cost" of specified services and care when provided to Medicaid eligible individuals.

During the period at issue, neither the Act nor the Medicaid regulations explicitly addressed Medicaid payment for GME.² CMS, however, permitted states to support GME as a component of the cost of Medicaid inpatient and outpatient hospital services. See 72 Fed. Reg. at 28,931. Accordingly, states developed payment rates for GME using their own methods and standards, subject to the requirement at section 1902(a)(30)(A) of the Act that a state plan must--

provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and

² CMS issued a proposed rule on May 23, 2007 to "clarify that costs and payments associated with [GME] programs are not expenditures for medical assistance that are federally reimbursable under the Medicaid program." 72 Fed. Reg. 28,930 (2007).

services and to assure that payments are consistent with efficiency, economy, and quality of care. . . .

When claimed in connection with inpatient hospital costs, GME payments, together with base and other inpatient hospital payments, were subject to Medicaid "upper payment limits," promulgated under the authority of the foregoing section of the Act and defined as "the amount that would be paid for the services furnished by the group of facilities under Medicare payment principles." 42 C.F.R. §§ 447.250(b), 447.253(b)(2), 447.272(b).

Background of the disputed claims

Prior to 2001, Utah's Medicaid program did not support GME expenses as a component of inpatient hospital services payments. Utah Br. at 6. In March of 2000, the State submitted a proposed SPA to fund GME costs through its Medicaid program, but after unsuccessful negotiations with CMS, Utah withdrew the SPA on May 17, 2001. Utah Exs. 2-3. By transmittal dated August 27, 2001, the State submitted a new GME amendment, identified as SPA 01-018, for CMS to review. Utah Ex. 9. CMS and the State thereafter exchanged a number of questions, answers and comments about the proposed amendment. Utah Exs. 11-13, 16-19. After Utah revised the amendment based on some of those communications, CMS approved SPA 01-018 on March 19, 2002, with an effective date of October 1, 2001. Utah Ex. 20. SPA 01-018 included the following provision:

602 Payment Pool- The payment pool is defined as appropriated state funds that will be used to draw down Federal Medical Assistance Program [sic] (FMAP). The annual payment pool will be determined prior to the beginning of each year on July 1st. The first year of this plan will begin 10-1-01 and [be] adjusted accordingly.

Utah Ex. 74.³ Thus, the annual "payment pool," or aggregate amount of "appropriated state funds" to be used for Medicaid GME payments, would be set prior to the beginning of each SFY, which runs from July 1 to June 30. The amendment also provided that the first year of the plan would begin October 1, 2001, the second quarter of SFY 2002, and that it would be "adjusted accordingly."

Utah's Medical Education Council (UMEC), which administers Utah's State Medical Education Program, is responsible for allocating Medicaid GME funds among participating hospitals. Utah Br. at 8; Utah Code Ann. §§ 63C-8-101 - 63C-8-105. By letter dated April 24, 2002, David Squire of UMEC notified the State that UMEC had "completed the allocation of the FY 2002 Medicaid graduate medical education payment to each participating teaching hospital." Utah Ex. 22. The letter summarized the "total amount to be paid each hospital for fiscal year 2002" as \$19,719,568. Id.⁴ In a letter dated June 7, 2002, Drs. Betz and Schwitzer of UMEC notified the Chief Executive Officer of the University of Utah Hospital that the State was beginning to distribute the SFY 2002 GME pool funds. Utah Ex. 24. The letter stated that the Hospital would receive its allocation of GME supplemental payments in the amount of \$15,294,418, the majority of the SFY 2002 GME pool funds, and that "this is current fiscal year funding for July 1, 2001 through June 30, 2002." Id.

³ The Utah State Legislature meets each year beginning in January, and budget appropriations for the upcoming fiscal year are usually finalized by March. Utah Ex. 88, ¶ 5. According to Kent Roner of the Department of Health, "[u]nder both SPA 01-18 and SPA 02-14, the Utah Legislature appropriated funds to the University of Utah used for the non-federal share of the GME payment pool. There is a second appropriation of State funds to the Department, which the Department may use and in some years did use, to support the GME pool." Id., ¶ 12.

⁴ According to the Utah Office of the State Auditor, "[t]o calculate the GME payment amount for State fiscal year 2002, the Utah Medical Education Council, in coordination with the Department, determined the amount of available appropriated State funds (\$5,844,880) then calculated the federal portion (\$13,874,688) by applying an average of the FMAP rates applicable to Utah during State fiscal year 2002 (70.36%). GME disbursements for State fiscal year 2002 totaled \$19,719,568." Utah Ex. 50, at DOH [Department of Health] 0161.

In September 2002, the State proposed a new plan amendment, SPA 02-014, to create a separate indirect medical education funding pool. Utah Ex. 28. During the course of negotiations between CMS and the State over the proposed revision, CMS asked the State to clarify section 602 of the State plan. Utah Ex. 29 at 2. Specifically, CMS wrote that it found the existing wording of section 602 "ambiguous." Id. CMS continued:

The description of the payment pool should contain more information that [sic] just "appropriated state funds." The actual funding amount of the pool should be explicit in the plan. Alternatively, the methodology used to determine the actual funding amount of the pool could be detailed in the plan. Please add language to the plan that will accurately describe the level of funding in the health professional education pool.

Id. Following the State's response to CMS's request for clarification and subsequent communications between the State and CMS, CMS approved a final revision of section 602 on May 27, 2003, with an effective date of July 1, 2002. Utah Exs. 37, 75. As approved, that section reads:

602 Payment Pool - The annual payment pool will be determined prior to the beginning of each year on July 1. Fiscal year 2001 was the first effective year of the "payment pool" and resulted in the payment of \$19,719,568 being allocated to the teaching providers. The amount in the payment pool will be adjusted annually by an amount not to exceed the consumer price index for the western region published by the U.S. [D]epartment of Labor. Assuming a 3.8% annual CPI adjustment, the amount of the pool from fiscal year 2003 onward is estimated to be:

<u>Fiscal Year Ending</u>	<u>Direct Graduate Medical Education Payments</u>
6/30/2003	\$22,250,000
6/30/2004	\$23,095,500
6/30/2005	\$23,973,129
6/30/2006	\$24,884,108
6/30/2007	\$25,829,704

Utah Ex. 75. The approved amendment also added a new section establishing a separate funding pool for indirect medical education. Id.

The Utah Office of the State Auditor (SAO) conducts annual audits of State agency financial statements and major federally funded programs and activities. After conducting the audit for SFY 2004, SAO concluded that the State had paid Medicaid GME amounts to teaching providers in excess of the amounts allowed under the State plan for SFYs 2003 and 2004. Utah Ex. 50, at DOH 161-162. Specifically, SAO found that the State had determined the payment pools for those years using the "same methodology" it used under SPA 01-018, section 602. That is, the State first "determined the amount of available appropriated State funds . . . then calculated the federal portion . . . by applying an average of the FMAP rates applicable to Utah" Id. According to SAO, there was no evidence that Utah considered whether the amounts in the payment pools had been adjusted annually by amounts not exceeding a consumer price index until after the audit was underway and the auditors had told the State that it appeared to have made GME payments exceeding the allowable amounts for SFYs 2003 and 2004. CMS Ex. 1, ¶ 7.

Further, SAO concluded that the revision of section 602 in SPA 02-014 contained conflicting information as to whether 2001 or 2002 should be considered the base year for the purpose of calculating each year's payment pool limit. Utah Ex. 50, at DOH 501-502. SAO also stated that the revised State plan did not make clear which CPI should be used to determine the annual GME payment pool limits and the amounts of the overpayments. Id. After explaining why it believed 2002 was intended to be the base year, and why it believed that the CPI for medical care services for the western region should be applied, SAO calculated the federal portion of the GME overpayments to be \$1,035,882 for SFY 2003 and \$2,551,264 for SFY 2004. Id.⁵

SAO subsequently issued its audit report for SFY 2005, concluding, for the same reasons explained in the prior year's report, that Utah had made Medicaid GME payments in excess of what was allowed under the State plan for SFY 2005. Utah Ex. 59, at DOH 232-233. SAO determined that the federal portion of the overpayment for SFY 2005 was \$2,311,112, based upon a 2002 base

⁵ SAO wrote that if the calculation used 2001 as the base year, the federal portion of the GME overpayment would be \$259,810 for SFY 2003 and \$1,702,836 for SFY 2004, "for a total questioned cost of \$1,962,646." Utah Ex. 50, at DOH 162.

year and applying the CPI for medical care services for the western region. Id.⁶

In response to the audit reports, Utah disagreed with "the presentation of data" as well as the base year and CPI assumptions that SAO used to calculate the SFYs 2003-2005 payment pool limits. Utah Ex. 50, at DOH 162-163; Utah Ex. 59, at DOH 233-234. The State wrote that SAO had used "after-the-fact assumptions" to impose standards that the preparers of the State plan had not intended. Id. The State contended, among other things, that SFY 2001 was the first "effective year" of the GME payment pool and, consequently, it should be used as the base year for calculating allowable GME payment limits in subsequent years. Id. Further, Utah submitted that the inpatient hospital and related services CPI should be used to adjust the annual payment pool limits. Id.

By letter dated December 4, 2006, CMS issued a disallowance determination in the amount of \$3,587,146 for Utah SFYs 2003 and 2004. Utah Ex. 62. By letter dated March 21, 2007, CMS issued a disallowance determination in the amount of \$2,311,112 for Utah SFY 2005. Utah Ex. 67. CMS wrote that the disallowances were for "questioned GME expenditures identified in" the SAO audit reports for SFYs 2004 and 2005. Utah Exs. 62, 67. Relying on the findings in these reports to support the disallowance determinations, CMS wrote that the funds had not been claimed in accordance with the approved State plan methodology and, consequently, were not "medical assistance" for which the Secretary would pay under section 1903(a)(1) of the Act. Id.

On appeal, Utah argues that the relevant provisions of its amended State plan "are admittedly ambiguous," but that the State's interpretations of the language are reasonable and entitled to deference. Utah Br. at v. Utah submits that the amended plan did not preclude the State from considering legislative appropriations in determining the GME payment pools, so long as the pools did not exceed limits tied to inflation. Utah also argues that CMS improperly imposed the 2002 base year for calculating the GME pool limits, contradicting the express language of the State plan, which establishes 2001 as the base year. Utah further submits that CMS improperly imposed a CPI not required by the State plan and contrary to the CPI reasonably selected by the State. Further, Utah contends, the disallowance

⁶ The report noted that if the calculation used 2001 as the base year, the federal portion of the GME overpayment for SFY 2005 would be \$1,451,896. Utah Ex. 59, at DOH 232.

for SFY 2003 should be reversed because the actual amount of the pool approximated that estimated in the State plan and because CMS was aware of the actual payment amount for that year when it approved the revision to the State plan's GME provision. Utah also argues that half of the SFY 2005 disallowance is preempted by a pending State plan amendment. Finally, Utah contends that the disallowances should be reversed on equitable grounds and because the GME payments made are not prohibited by any federal law or policy.

Analysis

We sustain CMS's disallowances. As a preliminary matter, we conclude that the SPA 02-014 revisions to section 602 of Utah's State plan do not preclude Utah from determining its annual payment pools based on available State appropriations, so long as the annual GME pool amounts do not exceed specified limits, calculated through the use of a base year and applicable CPI. Next, we discuss the parties' conflicting interpretations of the State plan with respect to the appropriate base year and applicable CPI for calculating the annual GME payment pool limits. We conclude that CMS's interpretation of the State plan, as establishing a 2002 base year, is reasonable in light of the language of the plan and its historical context and that Utah's interpretation of the plan as establishing a 2001 base year is not reasonable. We further conclude that CMS reasonably applied the medical care services for the western region CPI to calculate the payment pool limits and properly rejected the State's choice of the hospital and related services CPI because it is not a regional index. We then discuss why we reject Utah's alternative arguments, that the disallowances for SFY 2003 and the second half of SFY 2005 in particular should be reversed. Finally, we explain why Utah's arguments that all of the disallowances should be reversed on equitable grounds are unavailing.

1. Utah SPA 02-014 does not preclude Utah's determining its annual GME payment pools based on available appropriations but differs fundamentally from SPA 01-018 by providing that annual adjustments to the pool must not exceed limits calculated pursuant to the method set out in SPA 02-014.

The State auditors found, and CMS argues, that Utah failed to follow the methodology in its revised State plan for calculating the annual GME payment pools for SFYs 2003-2005. The auditors and CMS aver that Utah determined the GME payment pools for those SFYs under the SPA 01-018 methodology, effective in SFY 2002, instead of the methodology of SPA 02-014. The original GME

provision simply "defined" the payment pool as consisting of "the appropriated state funds that will be used to draw down Federal Medical Assistance Program" and included no methodology for calculating limits to annual pool increases. Thus, Utah determined the amount of the first payment pool based on available appropriated State funds only. CMS Ex. 1, ¶ 7. CMS contends that the revisions to section 602 of the State plan under SPA 02-014 created a new payment pool determination methodology that "superseded [the] methodology of SPA 01-018." CMS Br. at 7. Specifically, CMS argues that the new methodology required Utah to "calculate its GME payment pool by using a base year and CPI in advance of the fiscal year." CMS Br. at 5.

Utah does not dispute that after the plan was amended by SPA 02-014, it continued to determine the annual pool amounts based only on available appropriated funds, as it had done under SPA 01-018. Utah asserts, however, that the revisions to section 602 made by SPA 02-014 "did not preclude consideration of appropriations, so long as the payment pool did not exceed the specified guideposts tied to inflation." Utah Br. at 41; Utah Reply Br. at 3. Thus, Utah argues that the revisions "provid[ed] some indication as to how Utah ensured the adequacy and appropriateness of payment increases from year to year, without fundamentally altering their basic process." Utah Br. at 12, (citing Ex. 87, ¶ 10 (Decl. of Eggers); Ex. 88, ¶¶ 11,12 (Decl. of Roner)); see also Utah Reply Br. at 1; Transcript of Oral Argument (Tr.) at 10-11.

To evaluate whether a state has reasonably interpreted and followed its approved state plan, the Board first examines the language of the plan itself. South Dakota Dept. of Social Services, DAB No. 934, at 4 (1988); see also Colorado Dept. of Health Care and Policy Financing, DAB No. 2057, at 2 (2006); Louisiana Dept. of Health and Hospitals, DAB No. 1542, at 2-3 (1995); Missouri Dept. of Social Services, DAB No. 1412, at 5 (1993). If the wording is clear, then the plain language of the provision will control. If, however, the provision is ambiguous, the Board will consider whether the state's interpretation gives reasonable effect to the language of the plan as a whole and whether "it is reasonable in light of the purpose of the provision and program requirements." South Dakota at 4. Further, while a state has considerable flexibility in choosing standards, methods and payment rates for each type of service included under its state plan, the state is "not free to implement ad hoc changes or ignore the methodology set out in [its] approved state plan." Louisiana at 2 (citing Missouri at 2-3; South Dakota at 5). The state "must use the methodology in the state plan[], once adopted and approved." Louisiana at 2.

Applying this standard, we conclude that Utah's interpretation of SPA 02-014 is reasonable to the extent that it permits the State to base its annual GME payment pools on available appropriations, provided that the pools do not exceed annual pool limits required by the amended provision. While the first sentence of section 602 states that the annual GME payment pools must be determined before the beginning of each State fiscal year ("The annual payment pool will be determined prior to the beginning of each year on July 1st"), it does not set forth a specific methodology for determining the amounts of the pools. Utah Ex. 75. However, we do not agree with Utah that the amendment did not fundamentally alter its basic process because SPA 02-014, unlike SPA 01-018, does provide a formula for limiting annual increases in the pool funding. Section 602 states that "[t]he amount in the payment pool will be adjusted annually by an amount *not to exceed* the consumer price index for the western region." Utah Ex. 75 (emphasis added). This language creates a limit on the annual pool adjustments, calculated using a CPI and a base year, referenced in the second sentence of section 602. Thus, while SPA 02-014 does not prohibit the State from taking legislative appropriations into consideration or using available appropriations to set the pool amounts, the amendment fundamentally differs from its predecessor by requiring that annual increases be limited and providing the formula for calculating those limits.

2. CMS reasonably interprets the State plan to require calculating the GME payment pool limits for SFYs 2003-2005 using SFY 2002 as the base year and applying the CPI for medical care services for the western region.

While SPA 02-014's changes to section 602 of the State plan do not prohibit Utah from continuing to set its annual GME payment pools based on available appropriations, the State may no longer rely on the appropriations process alone to claim FFP for GME, as it could under SPA 01-018. Rather, as discussed above, the amendment requires the State to ensure that the payment pools not exceed annual limits, calculated pursuant to the methodology in SPA 02-014. Under this methodology, the pool limit each fiscal year is established on the basis of two variables: the prior year's pool amount, and a CPI, described in the third sentence of the provision. Thus, the methodology requires one to identify at the outset a first, or base year, pool amount to which the CPI is applied.

CMS relied on SAO's interpretations of the State plan language to determine the annual limits and disallowance amounts for SFYs 2003-2005, using a base year of 2002 and the medical care

services index for the western region. Utah argues that CMS's disallowances are based on flawed interpretations of the State plan and insists that its own interpretation of the GME payment pool limit provision, using a base year of 2001 and the hospital and related services index, is reasonable and entitled to deference. Accordingly, we next address each of the GME payment pool limit variables in turn.

A. The base year

As discussed above, to determine whether a state has reasonably interpreted and followed its approved state plan, the Board first looks to the language of the plan itself. South Dakota at 4. If the language is clear, it will control. If, however, the provision is ambiguous, the Board will consider whether the state's interpretation gives reasonable effect to the language of the plan as a whole and whether it is reasonable in light of the purpose of the provision and program requirements. Id. The Board also will consider the intent of the provision, as alleged by the state. Id. Absent contemporaneous documentation evidencing intent, the Board may look to consistent administrative practice as evidence of intent. Id. Whether a state has consistently administered a plan provision over time may be an indication of whether the state in fact was applying an intended, official interpretation or has merely advanced an interpretation as an after-the-fact attempt to justify acting inconsistently with or simply ignoring its plan. Id.

Accordingly, to evaluate whether Utah reasonably interprets its State plan as establishing a payment pool limit base year of 2001, we look first to the language of the provision itself. The pertinent provision that Utah relies on as determining the base year reads:

Fiscal year 2001 was the first effective year of the "payment pool" and resulted in the payment of \$19,719,568 being allocated to the teaching providers.

Utah Ex. 75. Utah argues that the plain language of this sentence, which CMS reviewed and approved, compels the conclusion that SFY 2001 is the starting point, or base year, for calculating the subsequent year pool limits because it explicitly uses the term "[f]iscal year 2001" associated with a "\$19.7 million" payment pool. Utah further argues that "[e]ven if there were ambiguity as to the base year . . . the intent, history, and administrative practice in implementing this provision support the Department's use of SFY 2001 as the base year." Utah Br. at 30. In particular, Utah argues, SFY 2001 was the first

"effective year" of the plan because the State's "original intention was to make GME payments in SFY 2001, and [Utah] had identified State funds for a payment pool . . . for SFY 2001." Id. Further, although it did not actually make GME pool payments in 2001, the State argues, "there's no requirement that a base year has to tie to an actual historical figure. It is merely a device for building up future payment increases." Tr. at 7.

We disagree with the State's conclusion that the language of the sentence on which it relies plainly establishes a 2001 base year and base year pool amount of \$19.7 million. While incorporating the term "fiscal year 2001," the plan does not precisely state that fiscal year 2001 is the "base year" or "starting year" for purposes of determining the limits of subsequent annual payment pools. It merely states that fiscal year 2001 "was the first effective year of the 'payment pool' and resulted in the payment of \$19,719,568 being allocated to the teaching providers." Utah interprets this language as meaning that fiscal year 2001 is the "base year," but the plan does not plainly state this.

Rather, as SAO observed, the sentence on which Utah relies is ambiguous and, when read together with the rest of the plan and in light of the history of the amendment, provides "conflicting information" as to "whether 2001 or 2002 should be considered the base year." Utah Ex. 50, at DOH 161; Utah Ex. 59 at DOH 232. That is, while the sentence specifically includes the term "[f]iscal year 2001," it does so by characterizing that year as the year in which the payment pool was "first effective" and which "resulted in the payment of \$19,719,568 being allocated to the teaching providers." The year in which the payment pool actually went into operation and the resulting payment was made, however, was not SFY 2001, but SFY 2002. That is, as established under SPA 01-018 and reflected in the history of that amendment, SFY 2002 was "the first year of the plan" and the first year in which a GME pool, totaling \$19.7 million, was distributed among and paid to participating providers by UMEC for costs incurred during that year. Utah Ex. 21 at DOH 54; Utah Exs. 22, 24. As the year in which the pool went into operation and payments first resulted, it logically follows that SFY 2002 was the starting point, or base year, for purposes of applying the CPI to derive the subsequent year payment pool limits.

Utah argues that even if one found the provision ambiguous, the State reasonably interprets the plan as establishing an "effective" SFY 2001 base year - one not "tie[d] to an actual historical figure" - wherein "effective" means something other than "actual." Utah argues that it does not matter that the GME pool was not actually paid until fiscal year 2002. "Utah used

SFY 2001 as an 'effective' base year, rather than an actual base year," the State submits, "because that was the first year for which the [State] had sought to establish a GME pool, and it was the year in which the legislature appropriated the funds" Utah Br. at 13, 31-32.

We do not find Utah's interpretation reasonable. While the State argues that "there's no requirement that a base year has to be tied to an actual historical figure," the sentence on which the State relies itself uses language purporting to describe actual, historical events ("was the first effective year . . . resulted in the payment" Utah Ex. 75 (emphasis added)). Further, Utah itself, in its attempt to establish SFY 2001 as the base year, ties the "actual historical figure" of \$19.7 million to SFY 2001 by way of its assertion that the State identified that amount in SFY 2001. Moreover, Utah's reading of the word "effective" to mean something other than "actual" is not reasonable considering the history of the amendment. The mere fact that the State sought in SFY 2001 to establish a GME pool or "identified" funds (approximately \$19.7 million) that could be used to make that pool operational in SFY 2002 does not transform SFY 2001 into the first "effective year" of the payment pool under the common meaning of "effective," which is "being in actual operation."⁷ Merriam Webster's Intermediate Dictionary (2004).⁸ Further, while the Utah Legislature does meet between January and the Spring of each year to determine appropriations, those appropriations are for the following fiscal year. Thus,

⁷ A fundamental principle of statutory construction, equally applicable in evaluating a State plan, recognizes that in considering a statute as a whole, "even apparently plain words, divorced from the context in which they arise and in which their creators intended them to function, may not accurately convey the meaning the creators intended to impart." 2A Norman J. Singer, Sutherland Statutes and Statutory Construction § 46.05 (6th ed. 2002) (quoting Leach v. FDIC, 860 F.2d 1266 (5th Cir. 1988), cert. denied, 491 U.S. 905 (1989)).

⁸ Black's law dictionary defines "effective date" as "the date on which a statute, contract, insurance policy or other such instrument becomes enforceable or otherwise takes effect" Black's Law Dictionary 533 (7th ed. 1999). We note that the description of the history of SPA 01-018 in Utah's opening brief itself uses the term "effective" to mean in operation, or in force: "Utah did not have authority to begin making actual GME payments to the hospitals until October 1, 2001, however, when SPA 01-18 became effective." Utah Br. at 9.

the roughly \$19.7 million that came from funds appropriated in SFY 2001 could not have been for use prior to SFY 2002. Accordingly, contrary to the State's contention, it is altogether material when the resulting payments from the first pool were actually made because these payments establish when the first pool went into effect, in this case, SFY 2002.

Even assuming, however, that the parties did intend through the use of the term "effective year" in section 602 to convey that SFY 2001 was the first year in which events occurred that ultimately led to GME pool payments in later years, it does not follow that the plan establishes SFY 2001 as the base year for determining the GME payment pool limits. Rather, when read together with the rest of section 602, the sentence on which Utah relies establishes that the base year for determining subsequent payment pool limits could be none other than the first year in which the pool payments were actually made. As noted above, the wording in the sentence on which Utah itself relies, "was the first effective year . . . and resulted in the payment . . . being allocated," describes an actual history in which the resulting payment of \$19.7 million was made to participating providers in SFY 2002. It is not couched in language establishing a hypothetical first or base year and hypothetical payment amount for purposes of calculating payment pool limits for subsequent years, as Utah's argument ultimately suggests. Further, the chart of estimated pool amounts in section 602 "illustrat[ing] how the CPI would be applied to the previous year's GME payments to calculate a pool amount for the following fiscal year" begins with SFY 2003. Utah Br. at 16. Because the payment pool limit formula applies a CPI to the prior year pool amount, it therefore follows that the starting point, or base year, contemplated by the provision must be the year immediately preceding SFY 2003, which is SFY 2002.

We also are not persuaded that Utah's interpretation is supported by either contemporaneous documentation of the State's intent or consistent administrative practice. The State submits that its intent to establish SFY 2001 as the base year is evidenced by its decision to retain the reference to SFY 2001 in the SPA 02-014 revision to section 602. Utah Br. at 31. However, as noted by SAO, SPA 01-018 (the provision revised by SPA 02-014) explicitly provided that "'the first year of this plan will begin 10-1-01' which is State fiscal year 2002," not SFY 2001. Utah Ex. 50, at DOH 161; Utah Ex. 59 at 232 (quoting Utah Ex. 21 at DOH 54). Since there was no State plan provision in effect for a GME payment pool prior to SFY 2002, retaining the reference to SFY 2001 in SPA 02-014 could not establish SFY 2001 as the base year

and, thus, could not have the significance now attributed to that alleged decision.

Utah also relies on the post-audit declaration of Vance Eggers of the Utah Department of Health, which states that in preparing the draft of SPA 02-014, Mr. Eggers "intended SFY 2001 to be the base year." Utah Ex. 87, ¶ 11. While we have carefully considered Mr. Eggers' declaration, we do not find it persuasive, in part because Mr. Eggers did not point to any evidence going to his intent that existed contemporaneously with the drafting of SPA 02-014. Instead, as support for his declaration of intent, Mr. Eggers cites historical facts that we have already concluded do not support finding SFY 2001 the base year: that SFY 2001 was the first full year for which the Department had sought approval to make GME payments; that the Department began considering an approximate payment pool of \$19.7 million (combining the state and federal share) during SFY 2001; and, that legislative appropriations had been made in SFY 2001 that would support a payment pool in that amount. Id.

We also find no consistent administrative practice to support the State's claimed intent to use SFY 2001 as the base year. Utah strenuously argues that it "faithfully attempted to follow the amended State plan" and "implemented [the plan's] imprecise language according to the State's reasonable understanding." Utah Br. at 1, 28. However, Utah has failed to show that it in fact implemented the payment pool limit provision by calculating the annual pool ceilings during the years at issue using any base year. In addition, the declaration of the SAO audit supervisor, Nathan D. Harrison, states that in the course of conducting the SFY 2004 and 2005 audits, Utah officials and employees responsible for administering the Medicaid program first indicated that 2002 was intended to be the base year for the GME calculation. CMS Ex. 1, ¶ 5. See also Utah Ex. 60, ¶ 2. Only after SAO's calculations of the payment pool limits using SFY 2002 as the base year showed that Utah had paid for GME in excess of the limits for SFYs 2003-2005, Mr. Harrison declares, did the State Medicaid program employees "assert that 2001 was the intended base year." Id.⁹

If anything, the administrative history of the provision supports use of SFY 2002, not SFY 2001, as the first effective year of the pool and the appropriate base year for calculating subsequent year ceilings. UMEC's April 24, 2002 letter implementing the

⁹ Mr. Harrison's statements also undercut Mr. Eggers' declaration as to Utah's intent.

allocation of pool funds among participating hospitals and distributing the first GME pool payments states that the "total amount to be paid" to the participating hospitals for "fiscal year 2002" is \$19,719,568, the same amount referenced in the State plan amendment's description of the base year. Utah Ex. 22. That SFY 2002 was the first effective year of the pool, and therefore the appropriate base year for calculating the annual payment pool limits, is also supported by the June 7, 2002 letter from UMEC to the Chief Executive Officer of the University of Utah Hospital, stating that the first supplemental payments for GME represent "current fiscal year funding for July 1, 2001 through June 30, 2002," or SFY 2002. Utah Ex. 24.

In sum, we conclude that Utah's reading of Section 602 of its State plan, as amended by SPA 02-014, as establishing a payment pool limit base year of SFY 2001 is unreasonable. The State plan provision does not plainly establish that SFY 2001 is the starting point, or base year, for determining subsequent annual pool limits. Rather, the language of the plan is ambiguous. Further, we conclude that the State's interpretation of the plan as establishing a 2001 fiscal year base and \$19.7 million base year amount is unreasonable in light of the language of the provision, read as a whole, and the history of the amendment. We further conclude that the absence of contemporaneous evidence showing the State implemented the annual GME pool limit provision using a SFY 2001 base year suggests that the alleged intent to use SFY 2001 as the base year was not an "official interpretation" but an after-the-fact attempt to justify the State's claims for FFP associated with payment pools that were set without regard to the pool limit provision.

Utah alternatively argues that if one uses SFY 2002 as the base year, the base year amount should be increased because "[t]he \$19.7 million in GME payments were only made for the final three quarters of SFY 2002," as SPA 01-018 was not effective until October 2001. Utah Br. at 33; Utah Ex. 87, ¶ 19; Utah Ex. 88, ¶ 14. Thus, Utah submits, because the SFY 2002 payment amounts were for less than the full year, CMS would "need to determine a full year, four quarter payment pool that could then be adjusted annually." Utah Br. at 34. The annualized base year amount, according to Utah's calculations, should be \$26,292,757. Utah Br. at 34.

We disagree. SPA 01-018, according to its own terms and as approved by CMS, did not become effective until the second quarter of SFY 2002. The record shows, however, that the first payment pool of approximately \$19.7 million was in fact intended to compensate the participating providers for GME costs for the

full fiscal year. That is, UMEC and the State did not adjust the first annual GME pool allocations by reducing the funds so that the participating providers would receive supplemental payments for only the final three quarters of the 2002 fiscal year. Specifically, the April 24, 2002 letter from UMEC refers to the aggregated pool amount of approximately \$19.7 million as "the total amount to be paid each hospital for fiscal year 2002." Utah Ex. 22. The June 7, 2002 letter states that between the date of the letter and the end of the fiscal year, the University of Utah hospital would receive its GME allocation, described as "current fiscal year funding for July 1, 2001 through June 30, 2002." Utah Ex. 24. The letter adds that the University Hospital's "allotment will come in three separate installments of approximately equal amounts." *Id.* Thus, contrary to the State's argument before us, the GME participating providers actually received a windfall of supplemental payments for the first quarter of SFY 2002, and the aggregated base year pool amount of \$19.7 million does not require further adjustment.

Accordingly, we sustain CMS's use of SFY 2002 as the base year and \$19,719,568 as the base year pool amount for calculating the annual GME payment pool limits and corresponding disallowances for SFYs 2003-2005.

B. The Consumer Price Index

The GME payment pool methodology in Utah's approved State plan takes inflation into account by requiring that--

The amount in the payment pool will be adjusted annually by an amount not to exceed the consumer price index for the western region published by the U.S. [D]epartment of Labor.

The Department of Labor, Bureau of Labor Statistics' Consumer Price Indexes program publishes monthly data on inflation showing changes in prices paid by consumers for representative baskets of goods and services. The program publishes numerous indexes. Some CPIs apply to the entire United States; others are regional indexes, tailored to prices in the four census regions. Yet other CPIs are published by city size. Further, indexes are available for major groups of consumer expenditures (including food and beverages, housing, transportation, and medical care), for items within each group, and for special categories, such as services. Utah Ex. 10.

SAO's SFYs 2004 and 2005 audit reports, on which CMS relies to support the disallowances for SFYs 2003-2005, calculate the GME

overpayments using the CPI for medical care services for the western region. Utah Ex. 50, at DOH 162; Utah Ex. 59, at 232-233. The audit reports explicitly reject use of the CPI for hospital and related services, which the State argues should have been used, because the State plan calls for use of a western region index and "the U.S. Department of Labor has not published a CPI for hospital and related services for the western region." Id.

Utah acknowledges that more than a single index produced by the Department of Labor meets the description of the CPI in section 602 of the State plan. Utah Br. at 14. The State also concedes that State "officials involved in negotiating the SPA did not have a specific index in mind" when they drafted the provision and that there is no evidence that the State was "committed to using one index in particular during the approval process." Utah Br. at 14, 35. Nevertheless, Utah argues that during the audit process it "viewed the hospital and related services index as the most appropriate index for use" in applying the State plan provision because that CPI "is specific to hospital services, has been used by CMS [to update Medicare inpatient hospital prospective payment rates], and applies to all regions, including the western region." Utah Br. at 16, 36. Utah also writes that the "June calculation of the medical care services index" for the western region "would be permissible if Utah had chosen to use it," despite Utah's later assertion that that index has a "significant shortcoming" in that it is not published until after the fiscal year begins. Utah Br. at 35-36. The State asserts, however, that it is entitled to deference in its choice of the hospital and related services index to make the retrospective calculations here. Id.

We conclude that CMS's use of the medical care services index for the western region reasonably interprets the methodology in Utah's State plan for purposes of calculating the GME overpayments for SFYs 2003-2005 and that Utah's proposed use of the hospital and related services CPI does not. As noted above, the language of State plan section 602 calls for use of a CPI that: 1) is published by the Department of Labor; and 2) is a western regional index. The medical care services index for the western region not only meets both requirements, but also reasonably relates to the specific type of costs at issue, GME expenses, as it includes "professional services, hospital services, and medical insurance." Utah Ex. 72 at 26.

In contrast to the medical care services CPI, the hospital and related services index advanced by the State fails to meet the second criterion of the CPI described in the GME payment pool

provision, that the index be "for the western region." Thus, use of that index would be unreasonable because it would fail to give effect to the language of the plan as a whole. Utah argues that even though the hospital and related services index is not published by region, the nationwide CPI should be used because it is the most "accurate indicator of the inflationary costs confronting hospitals."¹⁰ Utah Br. at 36. Yet such an interpretation of the State plan would render the language "for the western region" superfluous. As is true in construing statutes, state plans should be read such that "every word . . . must be presumed to have been used for a purpose," and that no part will be rendered inoperative or superfluous. Sutherland § 46.06. Thus, the State plan's inclusion of the term "western region" in describing the CPI to be used to calculate the pool limits plainly requires use of an index specific to the western region.

We further reject Utah's assertions that CMS "has unilaterally chosen a CPI for the State" and that the State was entitled to greater deference in the choice of CPI used to calculate the overpayments. Utah Br. at 34. As explained above, Utah's interpretation of the State plan amendment for purposes of choosing an appropriate CPI to calculate the GME pool limits is not entitled to deference because it does not give reasonable

¹⁰ Arguing that the hospital and related services index should be used because it more accurately reflects changes in GME costs evades the issue presented - whether the State plan language permits use of such a national index, which it does not. Further, Utah's reliance on CMS's use of the hospital and related services index to calculate Medicare prospective payments system (PPS) rates to support the contention that that index is the most appropriate in this case is misplaced. Under PPS, the projected capital standard federal rate is determined and updated based on "an analytical framework that takes into account changes in a capital input price index (CIPI) and several other policy adjustment factors," including case mix constant intensity. 72 Fed. Reg. 24,841-42 (2007). CMS defines case mix constant intensity as the change in total charges per admission, adjusted for price level changes and changes in real case-mix. Id. CMS uses the hospital and related services CPI only in this context, to account for price level changes. Id. GME costs, however, are addressed separately from the other costs of providing inpatient hospital services. Direct GME is specifically excluded from the basic inpatient PPS rates, and indirect GME is separately identified as a payment adjustment. 72 Fed. Reg. 28930, 28932 (2007). Id.

effect to the language of the plan as a whole and is not supported by historically consistent administrative practice. Moreover, the declaration of audit supervisor Nathan Harrison indicates that even after the SFY 2004 audit process had begun, the State had not yet made its ultimate choice as to which CPI it preferred to use. Mr. Harrison states that during the SFY 2004 audit process, SAO initially calculated the payment pool limits using the all items, western region CPI. CMS Ex. 1, ¶ 6. "However," Mr. Harrison declares "in response to our discussion with Kent Roner [of the State], SAO next applied the 'Medical Care' Western Region CPI . . . because Kent indicated that a medical CPI would be more appropriate than using the CPI for all items." Id. Later still, Mr. Harrison declares, after the State received advice from its counsel, the State asked SAO to "apply the 'Medical Care Services' Western Region CPI" to calculate the aggregate pool limits. Id. See also Utah Ex. 60, ¶ 3; Utah Ex. 84 at DOH 478. It was that CPI which the auditors employed to calculate the overpayments in its final reports. Id. Thus, the auditors (and CMS) did not unilaterally choose a CPI to maximize the disallowances in this case, but took into account the State's arguments, albeit post hoc, about the appropriate CPI to use to calculate the GME overpayments for SFYs 2003 - 2005.

In sum, we sustain CMS's use of the medical care services, western region CPI in calculating the GME disallowances for SFYs 2003-2005.

3. The State Plan's estimated 2003 GME payment pool amount

Utah argues for the reversal of the SFY 2003 GME disallowance "in particular" because: 1) the State plan provision includes an estimate of the GME payment pool amount of \$22,250,000 for SFY 2003 that is "consistent with" a payment pool limit for that year of \$22.4 million, which would be derived by using the State's preferred base year and CPI; 2) the State "made actual payments for SFY 2003 [based on the annual appropriations process] in almost exactly the \$22.25 million amount estimated in the chart"; and 3) CMS was already aware of the actual SFY 2003 payment pool amount, "derived from the annual appropriations process," and raised no objection to it in the course of the SPA 02-014 approval process. Utah Br. at 39-40.

We conclude that none of these arguments support reversal of the SFY 2003 GME disallowance. Section 602's table of payment pool amounts for SFYs 2003-2007 is explicitly labeled "estimated." Thus, as Utah itself has acknowledged, the amounts listed in the table were not determinative. Utah Ex. 84, at DOH 461, 465.

Rather, the dollar amounts in the table represent mere approximations of future payment pool amounts and do not justify ignoring the base year and CPI methodology required by the plan. Indeed, the estimated pool amounts cannot even be derived using the methodology required by the state plan by applying the State plan's assumed 3.8% inflation factor to either a 2001 base year of \$19.7 million or a 2002 base year of \$19.7 million. In sum, CMS is not bound by the SFY 2003 payment pool estimate in the State plan.

Further, that the payment pool limit for SFY 2003 that one would derive using a 2001 SFY base year and the hospital and related services CPI exceeds the estimated pool amount for SFY 2003 by only about \$150,000 is irrelevant because, as detailed above, use of that base year and CPI is unreasonable in light of the language of the plan as a whole and its historical context. Finally, even if CMS knew the dollar amount of Utah's proposed GME payment pool for SFY 2003, there is no contemporaneous evidence that CMS was aware that Utah had failed to follow the methodology in the State plan for calculating that year's payment pool limit, nor does it excuse Utah from claiming FFP in excess of that limit.

Accordingly, we reject the State's argument that the SFY 2003 disallowance of \$1,035,882 should be reversed.

4. SFY 2005 and Utah's Proposed SPA 05-004

Utah also submits that the second half of the SFY 2005 disallowance was preempted by the submission of SPA 05-004 because the State has pending an amendment proposing to revise the GME payment pool provision in the State plan, effective January 1, 2005. Thus, Utah argues that a disallowance for the second half of SFY 2005 was "not yet ripe for consideration" and that it should either "be overturned or held in abeyance pending the outcome of the State Plan Amendment process." Utah Br. at 43.

However, even before Utah submitted its brief taking this position, CMS had notified Utah of its "inability to continue processing . . . SPA 05-004 [d]ue to inadequate funds available to accommodate Utah's request to increase the funding pool for direct graduate medical education (GME) reimbursement." CMS Ex. 5. CMS recommended that Utah withdraw the amendment. Id. In a subsequent e-mail (after the date of Utah's opening brief), CMS stated that if Utah did not withdraw the amendment, CMS would "proceed with the official disapproval process on SPA 05-004." Id. Thus, it appears that while Utah has not officially

withdrawn SPA 05-004, it is not "pending" in any meaningful sense of that term. But even assuming the demise of SPA 05-004 remains uncertain, Utah has cited no authority for reversing a disallowance based on mere speculation that a new plan amendment might be approved and be effective for part of the disallowance period.

5. Equity

In its final argument, Utah contends that the disallowances should be reversed because the State attempted to administer the State plan GME provisions in good faith and because "there is no federal law or policy that the State's payments violated." Utah Br. at 44. CMS, the State avers, "waited for several years, and is now using technical arguments about how Utah implemented that ambiguous language [in the State plan] as a cudgel against the State to support a multi-million dollar disallowance." Id. Citing the Board's decision in Hawaii Dept. of Human Services, DAB No. 1981 (2005), Utah submits that the disallowances should be reversed on equitable grounds.

As the foregoing analysis details, CMS properly took disallowances in this case because Utah's GME payments for SFYs 2003-2005 violated Medicaid laws and regulations establishing that states must pay providers at rates determined under the methods and standards established in their approved state plans. Furthermore, the Board has noted in earlier decisions that it cannot provide equitable relief, but is bound by all applicable laws and regulations. 45 C.F.R. § 16.14; See, e.g., Juanita County Child Care and Development Services, Inc., DAB No. 2089 (2007). While Utah cites the Board's decision in Hawaii to support its argument about equitable considerations, the State's reliance on that decision is misplaced. In Hawaii, the Board reversed Medicaid disallowances relating to state taxes on health care items and services because the Board found CMS's position inconsistent with the governing statute and regulations. DAB No. 1981, at 2. The Board explicitly stated in Hawaii that it did not reach the States' equity-related arguments because it was reversing on other grounds.¹¹ Id. at 2, 17-18.

¹¹ In Hawaii, CMS contended that the States should have known from the face of the statute that their tax programs were impermissible. The equity-related arguments alleged, among other things, that the States had been prejudiced by CMS's delay in taking the disallowances and that the States reasonably thought that CMS had ultimately agreed that their tax programs were

(continued...)

Finally, even if equitable considerations could be taken into account, we would question Utah's characterizations of its prior actions in this case as warranting the invocation of equitable principles. Despite its strenuous objections to the contrary, Utah has made no showing that it even attempted to implement the payment pool limit provisions in its State plan during the years in question to ensure that its annual GME payment pools not exceed those limits. We fail to see how this qualifies as good faith.

Conclusion

For the reasons discussed above, we uphold the disallowances of \$5,898,258 in federal Medicaid funding for Utah graduate medical education payments made for State fiscal years 2003-2005.

/s/

Leslie A. Sussan

/s/

Constance B. Tobias

/s/

Sheila Ann Hegy
Presiding Board Member

¹¹(...continued)
permissible, in light of CMS's failure over many years either to issue any clear policy interpretation or to formally reduce their Medicaid funding. DAB No. 1981, at 2, 17-18.