Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Michigan Department of Community Health
Docket No. A-08-92
Decision No. 2225

DATE: January 30, 2009

# DECISION

The Michigan Department of Community Health (Michigan) appealed a March 28, 2008 determination by the Centers for Medicare & Medicaid Services (CMS) disallowing $89,848,860 in federal Medicaid reimbursement.

Michigan claimed this reimbursement for the costs for school-based administrative activities from January 1, 2000, through December 31, 2003. CMS calculated the amount of the disallowance pursuant to the terms of a 2002 agreement between Michigan and CMS settling 2000 and 2001 disallowances of school-based administrative costs. Michigan does not contend that the present disallowance is inconsistent with the Settlement Agreement. Rather, Michigan argues that the disallowance is temporarily barred by a congressional moratorium that prohibits CMS from imposing restrictions relating to coverage or payment of Medicaid for school-based administration if such restrictions are more restrictive than those CMS applied to school-based administration as of July 1, 2007. Alternatively, Michigan argues that, even if CMS has the authority to impose this disallowance, CMS has abused its discretion by failing to consult with Michigan officials about Michigan's present economic situation and to consider how to mitigate the impact of the disallowance. It asks the Board to overturn the disallowance or to remand the case to CMS and require it to consult with Michigan about whether the disallowance should be compromised, deferred or repaid in installments.

We reject Michigan's arguments and uphold the disallowance in full. First, the 2007 moratorium does not temporarily bar this disallowance since the disallowance is based on the 2002

Settlement Agreement and restrictions applied by CMS to school-based administrative costs long before 2007. Second, Michigan failed to demonstrate any basis for the Board to remand this disallowance to CMS with instructions "to consult with Michigan officials and to consider available options for deferral or reduction of the disallowance in light of the State's severe economic distress." App. Reply Br. at 13.

Legal Background

Medicaid, a program jointly funded by the federal and state governments, provides health care to low-income persons and families. Sections 1901, 1902 of the Social Security Act (Act).[1] Each state operates its own Medicaid program in accordance with broad federal requirements and the terms of its Medicaid state plan. Id.

A state receives federal financial participation (FFP) for a share of its Medicaid program expenditures. Section 1904 of the Act. Most Medicaid program expenditures are for "medical assistance," a term that refers to the broad categories of medical services that a state is authorized to provide under its Medicaid state plan. Section 1905(a) of the Act. States may receive Medicaid FFP for school-based medical services if, inter alia, the services are "included among those listed in the Medicaid statute . . . and included in the state's Medicaid plan or available under the Early and Periodic Screening, Diagnostic and Treatment benefit." CMS Ex. 1, at 10.

Medicaid also partially reimburses states for administrative costs "as found necessary by the Secretary for the proper and efficient administration of the State plan." Sections 1903(a)(2), (7) of the Act. CMS has determined that some school-based activities may be reimbursed as Medicaid-related administrative costs. See CMS Ex. 1, at 49-54 (Medicaid and School Health: A Technical Assistance Guide). CMS instructed states in 1997 that reimbursable administrative activities are ones that directly support the delivery of Medicaid-covered

[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.

health care (regardless of whether that care is provided by the school or some other Medicaid provider), facilitate Medicaid eligibility determinations, and inform persons who are eligible or may be eligible for Medicaid about the program and how to obtain Medicaid services. Id.

Medicaid costs are also subject to the standards in Office of Management and Budget (OMB) Circular A-87 now codified at 2 C.F.R. Part 225, App. A. 45 C.F.R. §§ 74.27(a), 92.22(b), see 68 Fed. Reg. 52,843 (Sept. 8, 2003). OMB Circular A-87 requires that, to be allowable, costs must be allocable to the grant program and necessary and reasonable for the proper and efficient administration of the grant program. OMB Circular A-87, Att. A, ¶¶ C.1.a, b.

Case Background

FFP claims for school-based administrative costs, like the ones in dispute here, are typically based on random-moment time studies that identify and measure time spent by a sample of employees on particular activities. The study participants record their time using time study codes. The results of the time study are used to allocate the costs of those activities to different programs or FFP rates. At all times relevant to this case, Michigan used time-study codes to claim school-based administrative costs. See App. Ex. 18, ¶ 4.

In 1999, CMS began reviewing Michigan's school-based administrative claims for the quarter ending September 30, 1998. CMS Ex. 5, at 3. As result of this and a subsequent review, CMS found that Michigan's time-study codes and time-study methodology had resulted in Michigan's claiming FFP for unallowable school-based administrative costs. App. Ex. 2, 5.

Based on its reviews, CMS issued disallowances on August 11, 2000 and September 7, 2001. The first disallowance was for $103,606,688 FFP and covered the quarters ending September 1998, September 1999 and December 1999. App. Ex. 2. The second disallowance was for $175,114,313 FFP, and covered the deferred claims for the quarters ending March 2000 through September 2000. App. Ex. 5.

Michigan appealed both disallowances to the Board (App. Exs. 3, 6) and they were assigned Docket Nos. A-01-01 and A-02-01 respectively (App. Ex. 4, 7). The Board stayed the cases for settlement negotiations. The negotiations produced (after approval by the Department of Justice) a settlement that

encompassed the fiscal quarters under review and other quarters that were potentially in dispute. App. Ex. 8. The Settlement Agreement, which was executed on May 24, 2002, was divided into two principal parts: retrospective (quarters prior January 2000) (id. ¶¶ 12-15) and prospective (quarters beginning January 1, 2000) (id. ¶¶ 4-11).

The disallowance at issue involves implementation of the prospective portion of the settlement.[2] For the prospective portion, Michigan agreed to "submit to CMS proposed revisions to its time study codes and its methodology for conducting time studies." App. Ex. 8, ¶ 4. The codes and methodology were to be developed and approved by November 2002, and implemented by April 2003.[3] App. Ex. 8, ¶¶ 4, 6. Pending Michigan's implementation of the new codes and methodology, CMS agreed to

[2] Under the retrospective portions of the agreement, CMS agreed not to reopen or adjust any of the reimbursement paid for school-based administrative claims for the quarters ending December 1996 through June 1998. App. Ex. 8, ¶ 12. For the quarters ending September 1998 through December 1999, CMS agreed to reimburse, and Michigan agreed to accept, 50% of the claims submitted by Michigan. Id. CMS alleges and Michigan does not dispute that "[t]his portion of the settlement strongly favored the State, as CMS effectively disallowed $97,450,947 over this period, while allowing the State $316,461,899." CMS Br. at 10, citing App. Ex. 8, ¶ 14 & Table, First Subtotal.

[3] The Settlement Agreement provided that Michigan would "immediately" submit to CMS revised time-study codes and a methodology for conducting time studies and that CMS would review them on an expedited basis. It provided further:

> If CMS cannot approve the State's revised time study codes and methodology within 6 months after execution of this Agreement, the parties agree that the Agreement will be rescinded in its entirety and that the parties shall be returned to the status quo which existed prior to the Agreement, including but not limited to, reinstatement of all disallowances, and reinstatement of any appeals by mutual agreement.

App. Ex. 8, ¶ 4. Therefore, had Michigan believed that CMS was unreasonably applying restrictions in reviewing its revised codes and methodology, it could have reinitiated its appeal of the 2000/2001 disallowances.

reimburse Michigan at an interim rate of 30% of the claim amounts submitted under the old methodology starting with the first quarter of 2000. Id. ¶ 7. The Settlement Agreement further provided that the interim payments starting in 2000 would be later adjusted under the revised time codes and time-study methodology. Specifically, the parties agreed:

> After the approved revised time codes and methodology have been in use and have produced valid results for four quarters as determined by CMS, CMS will backcast those results to adjust claims for quarters in calendar year 2000 and later that were accepted on an interim basis at thirty percent (30%) pursuant to Paragraph 7 above in order to appropriately reflect the results of the use of the approved system after four quarters of valid use. The feasibility and method of backcasting shall be determined by CMS and shall not be subject to challenge or appeal.

App. Ex. 8, ¶ 11 (emphasis added).

On May 13, 2003, the parties executed an amendment to the Settlement Agreement which extended the implementation date of the new time-study methodology for two quarters from April 2003 to October 2003. The amendment provided that the interim reimbursement rate of 30% would be reduced for these two additional quarters to 20%; otherwise, the terms of the original agreement remained in effect, with the backcasting provisions being extended to cover this additional interim period. App. Ex. 9, ¶¶ 3, 4.

On September 30, 2003, the parties executed a second amendment to the Settlement Agreement which extended the implementation date of the new time-study methodology for one additional quarter from October 2003 to January 1, 2004. This time no interim reimbursement was granted to Michigan for the additional quarter, while CMS's right to backcast remained in place as under the original Agreement. App. Ex. 10, ¶¶ 3, 4. Following this second extension, Michigan met the implementation date and began using the new CMS-approved time-study methodology as of January 1, 2004. CMS then began to reimburse Michigan for the costs identified by the revised time-study methodology for current quarters.

After Michigan had used the time-study methodology for a year and CMS had validated the results, CMS, in accordance with Paragraph 11 of the Settlement Agreement, used the results to backcast and adjust the payments made to Michigan from January

1, 2000 through December 2003.[4] As a result of the backcasting calculations, CMS determined that Michigan was required to repay $89,848,860 FFP. App. Ex. 12, at 7 and Sch. B.

Pursuant to the backcasting process, CMS issued a draft Financial Management Report on April 10, 2007 stating that Michigan should refund $89,848,860. App. Ex. 11. The draft report required Michigan to submit objections in writing. Id. at 1. In its response of June 7, 2007, Michigan did not contest the substantive findings in the CMS report. App. Ex. 12, Att.

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[4] As Michigan does not contest how the backcasting was performed, a detailed review of that process is not necessary and is in fact precluded by the terms of the agreement. See App. Ex. 8, Settlement Agreement ¶ 11 (feasibility and method of backcasting "shall not be subject to challenge or appeal"). CMS describes this process as follows:

> [T]he "quarterly time study results were matched with the appropriate quarter for each year subject to the backcasting. For example, all the March quarter costs were recalculated by applying the time study results obtained from the March 2004 time study; all the June quarter claims were recalculated based on the results from the June 2004 study, and so on. The Medicaid eligibility and indirect cost rates used in the recalculated claims were the rates in effect during the period of the original claims. A backcasting calculation was performed for each ISD [independent school district] that had cost pool data available." App. Ex. 12, Financial Management Report, at 4-5; CMS Ex. 13, ¶ 4. Because the cost pool data for some ISDs were not available, the "total recalculated claims for all ISDs that provided cost data were compared to the corresponding interim amounts paid to those ISDs to obtain an aggregate percentage of the paid claims that were allowable for each quarter." App. Ex. 12, at 5. This allowable percentage was then "applied to the amounts paid to the ISDs for which CMS was unable to obtain cost pool data to determine an allowable amount for those ISDs." Id. See App. Ex. 12, Schedule A (showing the allowable percentage as Column 4; the amounts paid to the ISDs for which cost pool data was unavailable as Column 5; and the amount allowed to such ISDs as Column 6 which is equal to (Column 4) x (Column 5) ).

CMS Br. at 12, n.8.

A; CMS Ex. 13, ¶ 5. On October 22, 2007, CMS issued the final Financial Management Report stating that Michigan should refund $89,848,860. App. Ex. 12. Subsequently, Michigan informed CMS that it would not repay the funds because disallowance of the funds was barred by the moratorium. CMS Ex. 13, ¶ 14. CMS then issued a notice of disallowance on March 28, 2008. App. Ex. 13.

Analysis

Michigan makes two arguments in opposition to the disallowance. First, Michigan argues that the disallowance violates a congressional moratorium on certain CMS actions imposing restrictions relating to coverage and reimbursement of school-based administrative expenses. App. Br. 8-12. Second, Michigan argues that, because of its fragile financial circumstances, the Board should remand the disallowance to CMS and instruct it "to consider seriously various forms of possible relief for the State's situation." Id. at 15.

We reject both of these arguments.

**1. The disallowance does not violate Congress's moratorium.**

Michigan's principal argument is that a congressional moratorium bars CMS from imposing this disallowance. App. Br. 8-12. The moratorium was enacted in 2007 after CMS published a proposed regulation that would make Medicaid reimbursement unavailable for, among other things, school-based administrative activities performed by school employees or contractors. 72 Fed. Reg. 51,397 (Sept. 7, 2007). The moratorium was adopted as part of the Medicare, Medicaid and SCHIP Extension Act of 2007 and provides in relevant part:

> [T]he Secretary of Health and Human Services shall not, prior to June 30, 2008, take any action (through promulgation of regulation, issuance of regulatory guidance, use of Federal payment audit procedures, or other administrative action, policy, or practice, including a Medical Assistance Manual transmittal or letter to State Medicaid directors) to impose any restriction relating to coverage or payment under [Medicaid] for . . . school-based administration . . . if such restrictions are more restrictive in any aspect than those applied to such areas as of July 1, 2007.

Pub. L. No. 110-173, § 206, 121 Stat. 2492, 2514 (2007).

Congress extended the moratorium to April 1, 2009 in the Military Construction, Veterans' Affairs, and Related Agencies Appropriations Bill, Pub. L. No. 110-252, § 7001(a)(2), 122 Stat. 2323, 2388 (2008).[5]

We conclude that the disallowance does not violate this moratorium. The moratorium temporarily bars CMS's imposition of restrictions that are "more restrictive in any aspect than those applied to [school-based administration costs] as of July 1, 2007." In calculating this disallowance, CMS imposed no such restrictions. Instead, CMS simply implemented standards that the parties adopted in their 2002 Settlement Agreement and repeatedly applied, prior to July 1, 2007, in determining coverage of and payment for Michigan's school-based administrative services. Thus, the restrictions on which CMS relies for this disallowance predate July 1, 2007 and do not fall within the moratorium.

Moreover, the restrictions underlying the Settlement Agreement (and applied by CMS in approving the Michigan's revised time-study codes) predate even 2002. In the 2000/2001 disallowance, CMS determined that Michigan's school-based administrative claiming methodology resulted in claims for unallowable costs. CMS based this determination on standards in the Act, regulations, OMB Circular A-87, and CMS guidance to states that CMS used then (and continues to use) in determining whether school-based administrative costs are allocable to Medicaid and necessary for the proper and efficient administration of the Medicaid state plan. App. Exs. 2, 5. For example, CMS's 1997 "Medicaid and School Health: A Technical Assistance Guide" instructed states that "[e]xpenses cannot be claimed as administration if they are an integral part or extension of a

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[5] In this extension, the only changes in wording to section 206 of the SCHIP Extension Act were to amend the statute:

> (A) by striking "June 30, 2008" and inserting "April 1, 2009";
> (B) by inserting ", including the proposed regulation published on August 13, 2007 (72 Federal Register 45201)," after "rehabilitation services"; and
> (C) by inserting ", including the final regulation published on December 28, 2007 (72 Federal Register 73635)," after "school-based transportation".

Pub. L. No. 110-252, § 7001(a)(2), 122 Stat. 2323, 2388 (2008).

direct medical or remedial service." CMS Ex. 1, at 51. In the 2000/2001 disallowances, CMS found that Michigan's activity codes D, E and J categorized activities as administrative that inappropriately included "[medical] services, or integral parts of [medical] services." App. Exs. 2, at 3; 5, at 3 (see these disallowance letters for CMS's explanation and authority for its remaining 2000/2001 disallowance error findings). Thus, the restrictions underlying this disallowance are found in the provisions in the Act, regulations, OMB cost principles, and CMS guidance that predate the 2002 Settlement Agreement.

Although not necessary to our holding, we also conclude that the legislative history of the moratorium is consistent with our rationale. Congress demonstrably intended to suspend CMS's ability to impose new and more restrictive standards on a variety of Medicaid costs, not to preclude CMS's enforcement of existing standards or preexisting settlement agreements reflecting those standards.[6] We reach this conclusion based on the following events and elements of the legislative history:

- In August 2007, CMS published proposed rules that limited Medicaid reimbursement for "rehabilitative services" (72 Fed. Reg. 45,201 (Aug. 13, 2007)) and "administrative activities performed by school employees or contractors, [and] transportation for school-aged children between school and home" (72 Fed. Reg. 51,397 (Sept. 7, 2007)). For school-based administrative services, the proposed rule limited reimbursement to those administrative activities performed by employees of the State or local Medicaid agency.[7] Under existing policy (which is also the policy

[6] Michigan mischaracterizes CMS's argument when it asserts that CMS "insist[s] that the moratorium extends only to particular [CMS] regulations." App. R. Br. at 2. Rather, CMS argued that the moratorium was directed at the regulations and "was not meant to stay a particular Settlement Agreement entered into by CMS and Michigan." CMS Br. at 19.

[7] CMS gave the following reasons, inter alia, for concluding that administrative activities performed by school employees or contractors should no longer be considered necessary for the proper and efficient administration of the state plan: "the activities or services support the educational program and do not specifically benefit the Medicaid program"; "the activities . . . are performed by the school system to further their educational mission and/or to meet requirements under the IDEA

(contuined . . .)

applied under the Settlement Agreement) reimbursement was available for activities performed by school employees and contractors. On December 28, 2007, CMS published a final rule, with an effective date of February 26, 2008, adopting the proposed rule. 72 Fed. Reg. 73,635 (Dec. 28, 2007).

- Congress enacted a moratorium, effective December 29, 2007, as to "rehabilitation services or school-based administration and school-based transportation." Statements made by members when discussing the moratorium refer to "a moratorium on cuts to school-based Medicaid services that the Administration proposed" (CMS Ex. 8 (153 Cong. Rec. H16742-02 (Dec. 19, 2007), 2007 W.L. 440440)) and to "delay[ing] implementation of recently released regulations on school based services and rehabilitation services in Medicaid" (CMS Ex. 9 (153 Cong. Rec. S15834-01 (Dec. 18, 2007), 2007 W.L. 4410539)). While these comments do not mean the moratorium impacts only the cited rules, they certainly make clear that the intended target was these new rules cutting back on the pre-existing availability of funding for these services and school-based administrative costs.

- That the moratorium is directed at the type of restrictions proposed by CMS in 2007 is also evident from the language and legislative history of the 2008 bill extending the moratorium to April 2009. This amended version of the moratorium cites CMS's publication in the Federal Register of the final rule adopting the proposed restrictions on school-based administrative services. Pub. L. No. 110-252, § 7001(a)(2), 122 Stat. 2323, 2388 (2008). The discussion of the extension in the congressional record contains repeated references to Medicaid regulations that would cut services, including school-based administrative services. See CMS Ex. 11 (154 Cong. Rec. H5622-02 (Thursday, June 19, 2008), 2008 W.L. 2467203); CMS Ex. 12 (154 Cong. Rec. S6234-01 (Thursday, June 26, 2008), 2008 W.L. 2548256).

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(. . . contuined)
[Individual With Disabilities Education Act], even in the absence of any Medicaid payment"; and "section 1903(c) of the Act provides specific authority . . . only for reimbursement of medical assistance for specified covered services in schools; it contains no provisions authorizing claiming for the costs of school-based administration." 72 Fed. Reg. at 51,400.

Thus, CMS is correct that there is no sign that Congress was seeking to suspend CMS's ability to enforce preexisting restrictions, much less undo existing settlement agreements, through this moratorium. CMS Br. at 19-25.

In support of its position that the moratorium nevertheless bars the disallowance, Michigan reasons that (1) "[a] disallowance is an 'administrative action' within the meaning of [the moratorium]"; (2) [t]he disallowance constituted a 'restriction[] relating to . . . payment . . . for school based administration'; and (3) "[t]he disallowance is an action 'more restrictive' than restrictions CMS had applied as of July 1, 2007 because, "as of that date CMS had not taken a disallowance covering the backcasting amount or taken any other action to collect these funds from the State." App. Br. at 9-10. In its reply brief, Michigan further argues that earliest date that the terms of the Settlement Agreement should be considered to have been "applied" was October 22, 2007, when CMS issued the financial management report finalizing the amount due from Michigan pursuant to the backcasting calculation. App. Reply Br. at 5-8.

Michigan's logic is flawed for the following reasons.

- The moratorium addresses "restrictions relating to coverage or payment." Michigan characterizes the disallowance, imposed in March 2008, as the "restriction" at issue. This is incorrect. A disallowance is not, itself, a restriction. Rather, a disallowance is a means by which CMS enforces a restriction. Here, the disallowance merely enforced restrictions on coverage and payment to which Michigan and CMS had agreed in the 2002 Settlement Agreement and had repeatedly "applied." For example, CMS applied these restrictions in issuing the 2000/2001 disallowances, Michigan applied them in redesigning and implementing its revised activity codes and time-study, and CMS applied them in approving the revised activity codes and time-study, paying Michigan's claims pursuant to the revised codes and time-study methodology (payment that Michigan accepted), and calculating retrospective payments through the backcasting process based on the revised codes and time-study.

- As discussed above, there is no reason to conclude that Congress intended the moratorium to hold states temporarily harmless from CMS's enforcement of restrictions, standards, or policies that CMS was using prior to July 1, 2007.

> Indeed, Michigan's construction of the moratorium would effectively suspend CMS's enforcement of any restriction (such as OMB cost principles) on the entire categories of costs listed in the moratorium. Michigan denies this consequence, asserting that this disallowance is based "not on a regulation, but rather on a one-time calculation made pursuant to the terms of a settlement agreement" and that "[v]ery few other disallowances (if any) will arise out a backcasting calculation for a subject referenced in the moratorium . . . ." App. Reply Br. at 7. However, Michigan identifies no reason why the source of the restriction enforced by the disallowance, whether it is a regulation, a cost principle, or a settlement agreement, is relevant to Michigan's position that a restriction is not "applied" until CMS issues the disallowance or a demand for payment of a specific sum.

For the preceding reasons, we conclude that the moratorium does not bar this disallowance.

**2. Michigan failed to demonstrate any basis for the Board to remand the disallowance to CMS to further consider Michigan's concerns.**

Alternatively, Michigan asserts that the "Board should at least remand [the disallowance] to CMS with instructions to negotiate with the State. The remand should require CMS to consider seriously the various forms of possible relief for the State's situation."[8] App. Br. at 15. As for the "State's situation,"

[8] In its initial brief, Michigan also argued that the Board should "set aside" the disallowance on the ground that CMS's demand for immediate repayment in the context of Michigan's fragile financial situation was arbitrary, capricious, and an abuse of discretion. App. Br. at 12. In its reply brief, Michigan abandoned this argument, stating that --

> Michigan argues only that CMS's failure to consult with State officials and to consider the State's financial crisis constitutes an abuse of discretion and that remand is appropriate, not that the Board should order CMS to reach a particular result . . . . [T]he case should be remanded to CMS with instructions to consult with Michigan and consider the concerns the State has raised.

App. R. Br. at 1.

Michigan describes the profound financial distress that it is currently experiencing and the dire consequences it anticipates if required to immediately repay the full disallowance. Id. at 15-19; App. Reply Br. at 10-11; see also App. Exs. 18-24. As for "forms of possible relief," Michigan proposes a compromise of the amount of the disallowance, a deferral of payment, or repayment in installments. Id. at 18-19.

CMS objects that, while the Board has the authority to review the legal basis for a disallowance, it does not have the authority to review CMS's processes for deciding whether to impose or settle a disallowance. CMS Br. at 37. CMS cites a line of cases in which courts have held that an agency's decision to bring an enforcement action or to compromise an enforcement action is not generally subject to review under the Administrative Procedure Act (APA). CMS Br. at 28-30, citing 5 U.S.C. § 701(a)(2) (APA provision barring judicial review of "agency action [which] is committed to agency discretion by law"); Heckler v. Chaney, 470 U.S. 821, 828 (1985); Madison-Hughes v. Shalala, 80 F.3d 1121, 1124 (6th Cir 1996); Rasmussen v. United States, 421 F.2d 776, 779 (8th Cir. 1970); Baltimore Gas & Electric Co. v. FERC, 252 F.3d 456, 459 (D.C. Cir. 2001); and Fort Sumter Tours, Inc. v. Babbitt, 202 F.3d 349, at 353, 357 (D.C. Cir. 2000).

In its reply brief, Michigan responds that CMS has mischaracterized its position in that Michigan is "not challenging CMS's refusal to settle or agree to certain terms; rather it challenges the agency's failure to consult with Michigan officials regarding their concerns about Michigan's financial condition and to consider whether there are ways CMS could address those concerns."[9] App. Reply at 12-13. Michigan argues that "CMS's failure to even consider Michigan's concerns is properly characterized as an abuse of discretion under the

[9] Michigan alleges that "CMS refus[ed] to honor Michigan's request for consultation." App. Reply Br. at 10; see also App. Br. at 10, 13. The fact that we do not reach this issue does not mean that we accept that the record shows such a refusal by CMS. We note that the statement cited by Michigan in support of this allegation in a June 2007 letter from Michigan's Medical Services Administrator to the CMS Acting Associate Regional Administrator merely asserts that "it will be incumbent upon us to take this issue up with the appropriate officials in your agency." App. Ex. 12, at Att. A.

[APA], 5 U.S.C. § 706." App. Reply Br. at 13. Section 706 provides that "the reviewing court shall . . . hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion . . . ."

Michigan's reliance on the APA is misplaced. The APA "both authorizes and limits judicial scrutiny of the action of administrative agencies." Baltimore Gas, 252 F.3d at 458. However, while the Board may rely on APA standards in reviewing cases, the Board's authority or scope of review, unlike a federal court's, is not based on the APA. In particular, the Board's authority to review Medicaid disallowances is based on section 1116(e) of the Act and Appendix A of 45 C.F.R. Part 16.[10] Appendix A, ¶ B(a)(1) provides that the Board reviews "final written decisions in disputes arising under . . . disallowance under Titles . . . XIX [Medicaid]." As CMS asserts, the scope of this review encompasses CMS's legal bases for imposing the disallowance, not matters such as CMS's internal deliberations or processes in deciding to impose a particular disallowance. See, e.g., Maryland Dept. of Human Resources, DAB No. 1875, at 10 (2003). Remanding to CMS with instructions to "seriously" consider Michigan's assertions would amount to an intrusion into CMS's decisional processes.

Michigan also cites Gonzalez v. INS, 996 F. 2d 804 (6th Cir 1993) and N.A.A.C.P. v. Secretary of Housing & Urban Development, 817 F.2d 149, 160 (1st Cir. 1987) for the proposition that "agencies should exercise their discretion when necessary to adapt to unforeseen circumstances, such as those Michigan has faced here." App. Reply Br. at 14. This is an overbroad description of the holdings in these cases, holdings that have no relevance here.

In Gonzalez, the court ruled that the INS's *de facto* policy of treating a serious drug conviction as precluding its exercise of discretion to grant waivers of deportation orders was an abuse of its discretion. Here, CMS does not argue that it lacks discretion to compromise or adjust its demand for payment. Rather, CMS describes its longstanding cooperative work with Michigan about this claiming problem and the circumstances leading to its disallowance. See CMS Ex. 13; CMS Br. at 26-30.

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10 Prior to July 15, 2008, the Board's authority to review Medicaid disallowances derived from Secretarial delegation under section 1116(d) of the Act.

Thus, the problem for Michigan here is not that CMS did not exercise discretion or refused to engage Michigan at all, but that, after consultation, CMS exercised it in a way that Michigan does not like.

Moreover, CMS represents, and Michigan acknowledges, that CMS worked for years with Michigan in correcting a claiming methodology that resulted in tens of millions of dollars of federal overpayments to Michigan and that CMS made substantial concessions in the initial stages of this settlement process that enabled Michigan to address this problem in a constructive manner and that benefited Michigan financially. App. Br. at 9. CMS also represents, and Michigan does not dispute, that CMS informed Michigan of its projected liability at the exit conference 17 months prior to issuing a disallowance; that CMS officials believed Michigan had agreed with the overpayment figure resulting from the backcasting calculation when Michigan made a decreasing adjustment of $89,848,860 FFP on its September 30, 2007 CMS-64 expenditure report; and that they had to inquire as to the reason Michigan then removed the adjustment in an amended CMS-64 submitted November 8, 2007 and were then told that Michigan had been advised by legal counsel that CMS was legally barred from imposing any disallowance under the moratorium. See CMS Ex. 13; CMS Br. at 27. Only after Michigan took the position that CMS could not collect the FFP that both parties agreed was owed under the Settlement Agreement, did CMS issue a disallowance so that it could recover the funds. Moreover, CMS set forth reasons why it considered the imposition of a disallowance at this time appropriate. These reasons included the history of the settlement process, Michigan's long awareness that this obligation would be due, Michigan's position that the obligation did not have to be paid as long as the moratorium was in effect, and CMS's reservations about some of the assertions Michigan now makes. CMS Ex. 13, CMS Br. at 28, n.18.

In N.A.A.C.P., the N.A.A.C.P. sought court review of whether the Secretary of Housing and Urban Development (HUD) had failed to administer programs in Boston in furtherance of basic policies of Title VIII of the Fair Housing Act. The court ruled that section 701(a) of the APA did not preclude such review because, inter alia, the plaintiff sought review of HUD's pattern of behavior over time, not of an individual instance of conduct, and this meant that the court could "find adequate standards against which to judge the lawfulness of HUD's conduct." 817 F.2d at 158. In contrast, as discussed above, Michigan asks the Board here to interfere with CMS's enforcement decision as to

particular costs for one state. As CMS asserts, granting such relief would change litigation before the Board. CMS Br. at 29. Michigan's belief that its circumstances are unique and more compelling than those of other grantees would not deter other grantees from seeking similar relief.

Michigan also objects to the statement in the disallowance letter that Michigan was not eligible under 42 C.F.R. § 430.48 to repay by installment. App. Ex. 12, at 2; see also App. Ex. 13, ¶ 12; App. Br. at 28, n.18. Michigan argues that section 430.48 "does not preclude an installment arrangement; it merely gives the State a right to repay federal funds by installments if certain conditions are satisfied." App. Br. at 19 (citing 45 C.F.R. § 30.22(b)). Michigan asserts that "CMS may agree to installment arrangements outside the terms of 42 C.F.R. § 430.48." Id. CMS does not deny Michigan's assertion. Rather it responds that, while the regulations at 42 C.F.R. Part 30 subpart C authorize it to compromise claims or allow installment payments (subject to approval by the Department of Justice), the wording of the regulations (i.e., "the Secretary may compromise a debt") makes decisions to do so "committed to agency discretion." CMS Br. at 29. CMS correctly points out that the Board has held that the Secretary's decisions under 45 C.F.R. Part 30 are not subject to Board review. United Maine Families, DAB No. 1707, at 5 (1999) (holding that "once the Board concludes that there is a valid debt, the Federal Claims Collection Act regulations at 45 C.F.R. Part 30 provide a separate process for the Secretary . . . to determine how the debt should be repaid").

For the preceding reasons, we reject Michigan's request that we "remand [this disallowance] to CMS with an instruction to consult with Michigan officials and to consider available options for deferral or reduction of the disallowance in light of the State's severe economic distress." App. Reply Br. at 13.

Conclusion

We uphold the disallowance in full. Our decision does not preclude CMS from engaging in any further consultation with Michigan that CMS may consider appropriate.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member