

**Department of Health and Human Services**  
**DEPARTMENTAL APPEALS BOARD**  
**Appellate Division**

Missouri Department of Social Services  
Docket No. A-15-93  
Decision No. 2677  
February 11, 2016

**DECISION**

The Missouri Department of Social Services (Missouri), a state Medicaid agency, has appealed a determination by the Centers for Medicare & Medicaid Services (CMS) to disallow \$2,438,638 in federal Medicaid reimbursement for FY 2014. The basis for the disallowance is CMS's finding that Missouri's Medicaid program made disproportionate share hospital (DSH) payments that exceed the limit established by section 1923(h) of the Social Security Act (Act), 42 U.S.C. § 1396r-4(h).

Using a statutory formula, section 1923(h) imposes a cap on the amount of Medicaid DSH payments that a state may make to institutions for mental diseases (IMDs) and other mental health facilities in a fiscal year. (For convenience, we refer to the annual cap as the "IMD DSH limit.") Under section 1923(h)'s formula, a state's IMD DSH limit for a given fiscal year reflects, directly or indirectly, the amount of DSH payments that the state made to IMDs and other mental health facilities in federal fiscal year (FY) 1995 (the base year), as shown on its Medicaid quarterly expenditure report.

In early 2014, CMS published a "preliminary" calculation of Missouri's IMD DSH limit for FY 2014. CMS later found that Missouri's DSH payments to IMDs and other mental health facilities in FY 2014 had exceeded that published limit. Based on that finding, CMS issued the challenged disallowance. CMS also simultaneously denied Missouri's request to revise upward the published IMD DSH limit to account for an alleged under-reporting (on its official Medicaid expenditure report) of base-year DSH payments to mental health facilities.

In this appeal, Missouri contends that its alleged under-reporting of base-year DSH payments should be corrected and that its FY 2014 IMD DSH limit should be recalculated to account for the correction of its base-year reporting error. If these actions are taken, says Missouri, then the resulting IMD DSH limit will exceed its total DSH payments to mental health facilities in FY 2014 and thus negate the factual and legal bases for the disallowance.

For the reasons explained below, we hold that CMS’s refusal to recalculate Missouri’s IMD DSH limit for FY 2014 is consistent with applicable legal authority. We further hold that section 1923(h) does not permit the Board to correct the alleged reporting errors in these circumstances. Accordingly, we sustain the disallowance in its entirety.

### **Legal Background**

The federal Medicaid statute requires state Medicaid programs to make DSH payments to hospitals that serve disproportionately high numbers of low-income patients. 42 U.S.C. §§ 1396a(a)(13)(A)(iv), 1396r-4(a)(1)(B). DSH payments supplement Medicaid’s standard payments for inpatient hospital services and serve to offset a hospital’s uncompensated costs of caring for the low-income population. *See id.* § 1396r-4(a)-(c). The federal government reimburses – that is, provides “federal financial participation” (FFP) to – a state for a share of its allowable DSH payments. *Id.* § 1396b(a); 45 C.F.R. § 95.4 (defining federal financial participation). Federal reimbursement of DSH payments is subject to an annual, state-specific cap known as the “DSH allotment.”<sup>1</sup> 42 U.S.C. § 1396r-4(f).

In general, states are prohibited from using federal Medicaid dollars to pay for services furnished to Medicaid recipients who are between 22 and 64 years old and who are inpatients of “institutions for mental diseases” (IMDs).<sup>2</sup> 42 U.S.C. § 1396d(a)(16), 1396d(a)(B); *Mo. Dept. of Social Servs.*, DAB No. 2161, at 6 n.3 (2008) (*citing* legal authorities). This prohibition is known as the IMD exclusion. The purpose of the IMD exclusion is to prevent states from using federal funds to supplant state financing of mental health hospitals, which have historically been operated and funded by states. *See* Missouri Appeal File (AF) at 31 (Letter from Donald M. Berwick, Adm’r, CMS, to State Medicaid Directors (Aug. 9, 2011)). Although the IMD exclusion prohibits states from using federal Medicaid dollars to pay directly for many IMD services, a state Medicaid program may make, and receive FFP for, DSH payments to IMDs and other mental health facilities that qualify for those payments.

During the 1990s, Congress became concerned that extensive use of the DSH payment authority could allow states to do what the IMD exclusion was intended to prevent, *i.e.*, shift the cost of operating mental health facilities from states to the federal government. *See* AF at 9, 13, 18 (U.S. Gen. Accounting Office, *Medicaid: Disproportionate Share Payments to State Psychiatric Hospitals* (No. GAO/HEHS-98-52)). Responding to that

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<sup>1</sup> DSH payments are also subject to hospital-specific limits, 42 U.S.C. § 1396r-4(g), which are not at issue in this case.

<sup>2</sup> An IMD is “a hospital, nursing facility, or other institution of more than 16 beds, that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases, including medical attention, nursing care, and related services.” 42 U.S.C. § 1396d(i).

concern, Congress in 1997 enacted section 1923(h), which establishes an annual limit on the amount of FFP-eligible DSH payments that a state may make (from its overall DSH allotment) to IMDs and other mental health facilities. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4721(b), 111 Stat. 513, *codified in* 42 U.S.C. § 1396r-4(h).

Section 1923(h) provides that a state's fiscal year IMD DSH limit is the lesser of the amounts specified in paragraphs (1)(A) and (1)(B) of that section:

(1) Payment under section 1396b(a) of this title shall not be made to a State with respect to any payment adjustments made under this section . . . to institutions for mental diseases or other mental health facilities, to the extent the aggregate of such adjustments in the fiscal year exceeds the lesser of the following:

(A) The total State DSH expenditures that are attributable to fiscal year 1995 for payments to institutions for mental diseases and other mental health facilities (based on reporting data specified by the State on HCFA Form 64 as mental health DSH, and as approved by the Secretary)

(B) The amount of such [DSH] payment adjustments which are equal to the **applicable percentage** of the Federal share of [DSH] payment adjustments made to hospitals in the State . . . that are attributable to the 1995 DSH allotment for the State for payments to institutions for mental diseases and other mental health facilities (based on reporting data specified by the State on HCFA Form 64 as mental health DSH, and as approved by the Secretary).

42 U.S.C. § 1396r-4(h)(1) (emphasis added) (paragraph headings omitted). For fiscal years after 2002, a state's "applicable percentage" (the term which appears in paragraph (1)(B)) is defined in the statute as the lesser of 33 percent or the "1995 percentage." *Id.* § 1396r-4(h)(2)(A)(ii). In addition, the "1995 percentage" is defined as:

. . . **the ratio (determined as a percentage) of –**

(i) the Federal share of [DSH] payment adjustments made to hospitals in the State . . . that are attributable to the 1995 DSH allotment for the State (as reported by the State not later than January 1, 1997, on HCFA Form 64, and as approved by the Secretary) for payments to [IMDs] and other mental health facilities, to

(ii) the State 1995 DSH spending amount.

*Id.* § 1396r-4(h)(2)(B) (emphasis added).

Following the 1997 enactment of section 1923(h), CMS began to publish its calculations of states' IMD DSH limits in the Federal Register. The first such publication appears to have occurred on October 8, 1998, when CMS published notice of states' DSH allotments and IMD DSH limits for FYs 1998 and FY 1999. *See* 63 Fed. Reg. 54,142 (Oct. 8, 1998) (AF at 23). The October 8, 1998 publication states, and subsequent Federal Register notices confirm,<sup>3</sup> that CMS "interpret[s] the aggregate limit" in section 1923(h) to be the lesser of: (1) "a State's FY 1995 total computable (State and Federal share) IMD and other mental health facility DSH expenditures applicable to the State's FFY 1995 DSH allotment (as reported to HCFA on the Form HCFA-64 as of January 1, 1997)"; or (2) "the amount equal to the product of the State's current year total computable DSH allotment and the applicable percentage." *Id.* at 54,143. The October 8, 1998 publication further notes that CMS calculates the 1995 percentage – the ratio defined in section 1923(h)(2)(B) – by "dividing the total computable amount of IMD and mental health DSH expenditures applicable to the State's FFY 1995 DSH allotment by the total computable amount of all DSH expenditures (mental health facility plus inpatient hospital) applicable to the FFY 1995 DSH allotment." *Id.*

Both paragraphs (1)(A) and (1)(B) of section 1923(h) make clear that a state's IMD DSH limit is based on DSH payment amounts that the state reported on its HCFA-64 – now called the CMS-64, or the Quarterly Medicaid Statement of Expenditures (QSE) – for FY 1995.<sup>4</sup> One of the QSE's primary schedules is the "64.9," which calls for the reporting of "medical assistance" expenditures (including DSH payments) by category of service. *See* State Medicaid Manual (CMS Pub. 45, last rev. Nov. 1991) § 2500.2(A), (D); *Ga. Dept. of Cmty. Servs.*, DAB No. 2521, at 3 (2013). Lines 1B and 2B of the 64.9 are designated for the following categories of expenditures:

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<sup>3</sup> *See, e.g.*, 79 Fed. Reg. 11,436 (Feb. 28, 2014) (AF at 35).

<sup>4</sup> The QSE is an "accounting of actual recorded expenditures" of a state's Medicaid program. 42 C.F.R. § 430.30(c)(2). A state must submit the QSE in order to claim FFP for its Medicaid program expenditures. *Id.* §§ 430.30(a)(2) (stating that the amount of a quarterly Medicaid grant is "determined on the basis of information submitted by the State [Medicaid] agency (in quarterly estimate and quarterly expenditure reports) and other pertinent documents") and 430.30(c)(1) (requiring a state to submit the CMS-64 no later than 30 days after the end of each quarter). In its State Medicaid Manual (CMS Pub. 45), CMS has provided state Medicaid agencies with detailed instructions and guidance for completing and submitting the QSE. *See Ga. Dept. of Cmty. Servs.*, DAB No. 2521, at 2 n.2 (2013) (noting that the State Medicaid Manual is a vehicle for communicating federal Medicaid policies and procedures to state Medicaid programs); State Medicaid Manual § 2500.1-.2 (setting out general guidance and line-by-line instructions for completing the QSE). (The State Medicaid Manual is available at <https://www.cms.gov/Regulations-and-Guidance/guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html> (last visited Feb. 11, 2016).)

1B Inpatient Hospital Services – DSH Adjustment Payments

2B Mental Health Facility Services – DSH Adjustment Payments<sup>5</sup>

CMS’s State Medicaid Manual (the relevant provisions of which were last revised in 1991) provides “[s]pecific definitions for FFP purposes of the types of services to report on Lines 1 through 25 of” schedule 64.9. With respect to the two lines just mentioned, the manual –

- defines “mental health facility services” with reference to Medicaid regulations<sup>6</sup> that describe Medicaid-eligible services provided in an IMD or other psychiatric facility and without distinguishing between services provided in a public mental health facility and those provided in a non-public mental health facility (SMM § 2500.1(E)(2)); and
- defines “inpatient hospital services” to mean services “[o]ther than services in an institution for mental diseases” and services that are provided in a facility that “[i]s maintained primarily for the care and treatment of patients with disorders other than mental diseases” (SMM § 2500.1(E)(1)).

The State Medicaid Manual instructs states to report revisions to previously reported expenditure amounts as “prior period adjustments” on schedules specifically designated for those adjustments. SMM §§ 2500(A)(1), 2500(C), 2500.2(A), 2500.5(A); *see also Ga. Dept. of Cmty. Servs.*, DAB No. 2521. at 3.

A submitted QSE must be supported by the certification of an appropriate state official. *See* Form CMS-64 “Summary Sheet.”<sup>7</sup> Among other things, the state official must certify that reported expenditure amounts are “based on the state’s accounting of actual recorded expenditures” and include only “allowable” Medicaid program expenditures for which state or local match funds are “available and used.” *Id.*

For FY 2014, the fiscal year for which the challenged disallowance was issued, CMS published the states’ “preliminary” IMD DSH limits in a February 28, 2014 Federal

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<sup>5</sup> According to Missouri, when the QSE was known as the HCFA-64, line 2B was titled “Mental Health Fac Service – DSH Adjustment,” and line 1B was titled “Inpatient Hospital Service – DSH Adjustments.” Mo. Br. at 3-4.

<sup>6</sup> 42 C.F.R. §§ 440.140 and 440.160.

<sup>7</sup> Form CMS-64 is available at <https://www.medicaid.gov/medicaid-chip-program-information/by-topics/financing-and-reimbursement/state-expenditure-reporting-for-medicaid-and-chip.html> (last visited Feb. 11, 2016).

Register notice. 79 Fed. Reg. 11,436 (Feb. 28, 2014) (AF at 35-44). The notice specifies each state’s IMD DSH limit in a table that also shows the figures and calculations from which CMS derived the limit. *Id.* at 11,443.

As discussed, under CMS’s reading of section 1923(h), the IMD DSH limit is the lesser of: (1) a state’s total computable FY 1995 DSH payments to IMDs and other mental health facilities, as reported on the QSE (for the moment, we ignore CMS’s reading of the statute as requiring that those payments be reported as of January 1, 1997); or (2) the “applicable percentage of the state’s current-year DSH allotment, According to the FY 2014 payment-limit table in CMS’s February 28, 2014 Federal Register notice, Missouri’s total computable FY 1995 DSH payments to IMDs and other mental health facilities (*i.e.*, the amount under paragraph (1)(A) of section 1923(h)) were \$207,234,618. 79 Fed. Reg. at 11,443 (Column C). That figure, says Missouri, is the amount that it reported on line 2B of its QSE for FY 1995. Mo. Br. at 4. The FY 2014 payment-limit table also indicates that Missouri’s “1995 percentage” (the ratio defined in section 1923(h)(2)(B)) is 28.42 percent, which CMS calculated by dividing total mental-health-facility DSH payments for FY 1995 (\$207,234,618) by total DSH payments to all facilities in that year (\$729,181,142). 63 Fed. Reg. at 11,443 (column E). Because 28.42 percent is less than 33 percent, 28.42 percent is (by CMS’s reckoning) Missouri’s “applicable percentage” for purposes of determining the amount under paragraph (1)(B) of section 1923(h). *Id.*; 42 U.S.C. § 1396r-4(h)(2)(A)(ii). Comparing the amounts that it calculated under paragraphs (1)(A) and (1)(B), CMS determined that Missouri’s total computable IMD DSH limit for FY 2014 is \$207,234,618 and that the federal share of that limit is \$128,547,634. 63 Fed. Reg. at 11,443(columns J & K). The following information summarizes the figures used and calculations made by CMS to determine Missouri’s FY 2014 IMD DSH limit (as published in the February 28, 2014 Federal Register):

(1)	FY 1995 DSH payments to IMDs and other mental health facilities:	\$207,234,618
(2)	Total FY1995 DSH payments:	\$729,181,142
(3)	1995 percentage (line 1 divided by line 2):	28.42 percent
(4)	Applicable percentage:	28.42 percent
(5)	Current-year (FY 2014) DSH allotment:	\$814,509,721

(6)	Applicable percentage multiplied by current-year DSH allotment (line 4 multiplied by line 5):	\$231,485,157 <sup>8</sup>
(7)	Total computable IMD DSH limit (lesser of lines 1 or 6, per section 1923(h)(1)):	\$207,234,218
(8)	Federal share of IMD DSH limit (line 7 multiplied by Missouri's Federal Medical Assistance Percentage of 62.03 percent):	\$128,547,634

### **Case Background**

CMS's review of submitted QSEs revealed that Missouri had claimed \$130,986,272 in FFP for DSH payments to IMDs and other mental health facilities for FY 2014. AF at 46, 49. That claimed FFP, both parties agree, reflects: (1) DSH payments by Missouri to *state-owned* IMDs, which Missouri reported on line 2B of the QSE ("Mental Health Facility Services – DSH Adjustment Payments"); and (2) DSH payments to *non-public* IMDs, which Missouri reported, in error, on line 1B of the QSE ("Inpatient Hospital Services – DSH Adjustment"). See AF at 49. The total federal share claimed by Missouri for mental-health-facility DSH payments in FY 2014 (\$130,986,272) exceeds by \$2,438,638 the federal share of Missouri's "preliminary" IMD DSH limit for that year, as published in the February 28, 2014 Federal Register. *Id.*

Citing Missouri's apparent breach of the IMD DSH limit, CMS deferred its approval of \$2,438,637 in FFP for Missouri's Medicaid program. AF at 49. In its written response to the deferral, Missouri argued that CMS should revise upward its IMD DSH limit for FY 2014 in order to account for an error in the reporting of its FY 1995 DSH payments.<sup>9</sup> AF at 54. As noted, for FY 1995 (the base year for calculating the IMD DSH limit), Missouri reported \$207,234,618 (total computable) in mental-health-facility DSH payments on line 2B of the QSE. Mo. Br. at 4. Missouri advised CMS (in its response to the deferral) that this figure included only DSH payments to publicly owned IMDs. AF at 53. Missouri further advised CMS that it had reported \$9,902,046 in FY 1995 DSH

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<sup>8</sup> By our calculation, the applicable percentage (28.42 percent) of Missouri's FY 2014 DSH allotment of \$814,509,721 is \$231,483,663 (and not \$231,485,157, as stated in column I of the payment-limit table in the February 28, 2014 Federal Register notice). The apparent computation error is immaterial to our decision.

<sup>9</sup> Missouri also argued that CMS should count only payments to publicly-owned IMDs or mental health facilities in determining whether it had exceeded its FY 2014 IMD DSH limit. AF at 53. Missouri does not press that argument in this appeal.

payments to *non-public* IMDs on line 1B. *Id.* (stating that approximately \$9.9 million “were not counted as payments to IMDs, but instead were counted as regular [inpatient] hospital DSH payments” on line 1B).<sup>10</sup> Missouri then showed CMS that if the calculations and comparisons called for by section 1923(h) are performed using *total* base-year DSH payments (\$207,234,618 in payments to public IMDs reported on line 2B *plus* the \$9.9 million in payments to non-public IMDs reported in error on line 1B), then its total computable IMD DSH limit for FY 2014 would be \$217,136,664, the federal share of which is \$134,689,873.<sup>11</sup> AF at 54; *see also* Mo. Br. (Appendix). Because \$134,689,873 – the revised IMD DSH limit – exceeds the amount of FFP that Missouri claimed for its FY 2014 DSH payments to mental health facilities (\$130,986,272), Missouri urged CMS not to issue a disallowance. AF at 54.

CMS rejected that proposition and disallowed \$2,438,638 in FFP. AF at 59. In its June 4, 2015 disallowance letter, CMS justified its decision as follows:

. . . During our review [of Missouri’s FY 2014 QSE], we found that DSH payments to private IMDs were not reported correctly on the [QSE]. When the DSH payments to private IMDs were combined with the DSH payments to public IMDs, the amount of DSH payments Missouri made to IMDs for FY 2014 totaled \$130,986,272 FFP, which exceeded Missouri’s FY 2014 IMD limit by \$2,438,638 FFP.

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. . . You . . . asserted that if CMS counts [FY 1995] DSH payments to private IMDs toward the IMD DSH limit, then Missouri’s limit should be recalculated because CMS did not count DSH payments to private psychiatric hospitals in FY 1995 as payments to IMDs.

We . . . disagree . . . that a disallowance is not warranted. Missouri was required to properly report IMD DSH payments for FY 1995. Section 4721 of the BBA [Balanced Budget Act of] 1997 [section 1923(h) of the Act] specified that DSH allotments and IMD limits were to be **based on 1995 DSH spending amounts “as reported by the state not later than**

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<sup>10</sup> Missouri provided CMS with a spreadsheet which purports to show that “only payments to public psychiatric hospitals were counted” on line 2B of its QSE for FY 1995 and which also identifies (by payment amount and institution) Missouri’s FY 1995 DSH payments to non-public IMDs. AF at 53 n.1, 56-57.

<sup>11</sup> If the figure for Missouri’s FY 1995 DSH payments to all mental health facilities (public and non-public) were \$217,136,664, then the applicable percentage for FY 2014 would be 29.78 percent, instead of 28.42 percent (as CMS indicated in its February 28, 2014 Federal Register notice). *See* Mo. Br., Appendix (column E). Given Missouri’s FY 2014 DSH allotment, an applicable percentage of 29.42 percent would yield a total computable IMD DSH limit greater than \$217,136,664, and so, pursuant to section 1923(h)(1)(A), \$217,136,664 would be Missouri’s total computable IMD DSH limit for FY 2014 under Missouri’s proposed recalculation.



**January 1, 1997.” Because of that explicit language in the BBA 1997 and section 1923(h) of the Act, there is no basis or authority for CMS to recalculate the IMD limit.** CMS published the proposed and final DSH allotments and IMD limits in the Federal Register to permit states the opportunity to submit comments and to correct errors. This action was taken to ensure that the DSH allotments and IMD limits were based on accurate and reliable amounts from FY 1995.

**Because you reported the DSH payments to the private IMDs as DSH payments to regular hospitals, you did not comply with regulations in 42 C.F.R. 447.299(b).** This regulation requires states to report DSH payments on a quarterly basis in accordance with procedures established by CMS. Section 2500.2E of the State Medicaid Manual (SMM) provides definitions for the types of services that states are to report on various lines of the Form CMS-64. The Medicaid Budget and Expenditure System provides the same instructions and definitions. There was no basis for Missouri to characterize the DSH payments to private IMDs as DSH payments to regular hospitals.

AF at 60 (emphasis added).<sup>12</sup>

Missouri then filed this appeal, asserting that its IMD DSH limit for FY 2014, as published in the February 28, 2014 Federal Register, is “incorrect and should be revised” and that the disallowance should be reversed because its FY 2014 DSH payments to mental health facilities do not exceed the “corrected” IMD DSH limit. Mo. Br. at 9, 14.

### **Discussion**

Under 45 C.F.R. Part 16, the Board is authorized to review specified “final written decisions,” including Medicaid “disallowances.” 45 C.F.R. Part 16, App. A, ¶¶ A, B(a)(1); *see also* 42 U.S.C. § 1316(e)(2)(A). The Board must sustain a disallowance “if it is supported by the evidence submitted and is consistent with the applicable statutes and regulations.” *W. Va. Dept. of Health & Human Resources*, DAB No. 2185, at 20 (2008) (*citing* 45 C.F.R. §§ 16.14, 16.21).

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<sup>12</sup> CMS issued 42 C.F.R. § 447.299 in 1992, five years prior to the enactment of section 1923(h). 57 Fed. Reg. 55,118, 55,145 (Nov. 24, 1992). Of relevance here, paragraphs (a) and (b) of section 447.299 require a state to “present a complete, accurate, and full disclosure of all of their DSH programs and expenditures” and to do so “in accordance with procedures established by CMS.” 42 C.F.R. § 447.299(a), (b). Paragraph (e) states that “[i]f a State fails to comply with the reporting requirements contained in this section, future grant awards will be reduced by the amount of FFP CMS estimates is attributable to the expenditures made to the disproportionate share hospitals as to which the State has not reported properly, until such time as the State complies with the reporting requirements.” *Id.* § 447.299(e).

In this case, the basis for the challenged disallowance is CMS’s finding that for FY 2014, Missouri claimed FFP for DSH payments that, in the aggregate, exceeded its IMD DSH limit for that year, as calculated by CMS and published in the February 28, 2014 Federal Register. AF at 59-60. Missouri does not dispute that its FY 2014 DSH payments to IMDs and other mental health facilities exceed the published payment limit. Nor does Missouri dispute that \$2,438,638 in FFP claimed for FY 2014 is subject to disallowance if the published IMD DSH limit is enforced. Instead, Missouri argues (as it did in response to the deferral) that the payment limit should be recalculated to account for \$9.9 million in base-year (FY 1995) DSH payments to non-public IMDs that were reported in error (on line 1B of the QSE) as DSH payments to inpatient hospitals. If this recalculation is performed, says Missouri, the resulting payment limit will exceed its total mental-health-facility DSH payments for FY 2014, removing the factual and legal predicates for the disallowance. Because CMS refused to perform or approve the proposed recalculation, the issue before us (in light of the Board’s review standard) is whether that refusal is consistent with applicable law.

CMS stated in the disallowance letter that “there is no basis or authority to recalculate” Missouri’s IMD DSH limit because section 1923(h) required Missouri to report its FY 1995 mental-health-facility DSH payments “not later than January 1, 1997.” AF at 60 (*quoting* 42 U.S.C. § 1396r-4(h)(2)(B)). In response, Missouri argues that the statutory language upon which CMS’s statement relied – “as reported by the state not later than January 1, 1997” – is inapplicable because it does not appear in section 1923(h)(1)(A), the provision which supplies its IMD DSH limit for FY 2014, and that the Board should reject any contrary “interpretation” of the statute as unreasonable. *See* Mo. Br. at 6-8; Reply Br. at 2-8. However, in this appeal, CMS does not rely on the just-quoted statutory language. Instead, as it is permitted to do, CMS has advanced an alternative ground in defense of the disallowance – namely, Missouri’s failure to report the additional \$9.9 million in IMD DSH payments “as mental health DSH” on its Medicaid expenditure report for FY 1995.<sup>13</sup> *See* Response Br. at 5-6 (emphasizing Missouri’s failure to report base-year DSH payments on line 2B of the QSE, the line designated for mental-health-facility DSH payments). We conclude that this alternative ground is a sufficient basis for upholding the disallowance. Regardless of whether section 1923(h)(1)(A) requires the IMD DSH limit to be based only on Medicaid expenditure reports (or revised expenditure reports) filed prior January 1, 1997, the statute plainly requires CMS to rely only upon

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<sup>13</sup> CMS’s shift in position does not invalidate the disallowance. The Board has held that the federal government party may revise the basis for a disallowance on appeal as long as the opposing (non-federal) party is given an adequate opportunity to respond to the change in position. *Or. Dept. of Human Servs.*, DAB No. 2208, at 12-13 (2008). Missouri does not contend that it lacked an adequate opportunity to respond to the grounds for disallowance advanced by CMS in this appeal, and we conclude that Missouri had an adequate opportunity. We note, in this regard, that Missouri’s comprehensive briefing reflects an understanding of CMS’s arguments on appeal.

expenditures that are identified as mental-health-facility DSH payments on a QSE submitted by the state.

As noted earlier, paragraph (1)(A) of section 1923(h) supplies the FY 2014 IMD DSH limit that CMS calculated for Missouri and published in the February 28, 2014 Federal Register. *See* 79 Fed. Reg. at 11,443 (Columns C, E, I, and J) (identifying an IMD DSH limit of \$207,234,618 for Missouri, equal to total computable FY 1995 DSH payments to mental health facilities, an amount less than the applicable percentage of its current-year DSH allotment). Paragraph (1)(A) also supplies the payment-limit amount under Missouri’s proposed recalculation. *See* Mo. Br., Appendix (Columns C, E, I, and J) (identifying a payment limit of \$217,136,664 for FY 2014 based on total computable base-year DSH payments to mental health facilities). We therefore focus on what that paragraph requires or permits, although both paragraphs (1)(A) and (1)(B) contain identical language (highlighted in the first sentence of the next paragraph) about the “reporting data” to be used in calculating an IMD DSH limit.

Paragraph (1)(A) states that the IMD DSH limit is based on “total State DSH expenditures that are attributable to fiscal year 1995 for payments to institutions for mental diseases and other mental health facilities (*based on reporting data specified by the State on HCFA Form 64 as mental health DSH, and as approved by the Secretary*).” 42 U.S.C. § 1396r-4(h)(1)(A) (italics added). Because paragraph (1)(A) expressly refers to “HCFA Form 64,” and because that form requires a state to report its expenditures by service category – one of which is “mental health facility services”<sup>14</sup> – paragraph (1)(A) is properly read to require (or at least permit) CMS to calculate the IMD DSH limit using only the amount of “mental health DSH” payments actually reported on line 2B of the QSE, the line expressly designated for those payments.

To this date, as Missouri concedes, Mo. Br. at 10-11, the \$9.9 million in base-year DSH payments to non-public IMDs that Missouri says should be counted in determining its annual IMD DSH limit have not been reported on the QSE “as mental health DSH” on line 2B, as called for by the statute. CMS therefore lawfully refused to consider those payments in calculating Missouri’s FY 2014 IMD DSH limit under section 1923(h)(1)(A).

Missouri suggests that the Board should direct CMS to “permit” appropriate “retroactive adjustments” to the QSE to account for the \$9.9 million in DSH payments allegedly made to nonpublic IMDs in FY 1995. *See* Mo. Br. at 12 (stating that “CMS should permit” the retroactive adjustments). We see three interrelated problems with that request. First, on this record, we have no assurance – apart from a spreadsheet whose content has not been

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<sup>14</sup> *See* State Medicaid Manual § 2500.2(A), (E) (instructing states to use the QSE to report “current period” medical assistance expenditures by “type of service,” including expenditures for “mental health facility services”).

vouched for by any state official (AF at 55-57) – that Missouri in fact claimed \$9.9 million in IMD DSH payments on line 1B of its QSE for FY 1995 and that those payments are allowable and otherwise eligible to be reported as FY 1995 expenditures on line 2B.

Second, Missouri has not attempted to amend its FY 1995 Medicaid expenditure report to account for any additional IMD DSH payments. Medicaid regulations, and the long-established program instructions that implement those regulations, require states to report Medicaid program expenditures and retroactive adjustments *on the QSE* (as opposed to merely documenting them in a Board proceeding) and to certify that report as reflecting actual (rather than estimated) and allowable costs.<sup>15</sup> As Missouri is well aware, *see* Mo. Br. at 9, the mechanism for retroactively adjusting a previously reported expenditure amount is a “prior period adjustment,” entered on the appropriate schedule of the QSE. While Missouri acknowledges that “the default rule in Medicaid is that reporting errors should be corrected through a prior period adjustment” to the QSE, Reply Br. at 7-8, and while it further submits that there is no time limit or other legal obstacle to making prior period adjustments to move \$9.9 million in DSH payments from line 1B to line 2B of the QSE, *see* Mo. Br. at 9, Missouri does not allege that it has tried to revise its official reporting of those payments. Nor has Missouri pointed to any law, regulation, or agency policy permitting the Board to adjust a Medicaid expenditure report for which a disallowance (or other appealable final written decision) has not been issued. We are unaware of any circumstance in which the Board has approved, or directed CMS to approve, an adjustment to a state’s QSE without the state’s first having attempted to secure CMS’s approval for the adjustment through the normal expenditure reporting process.

Third, in the absence of an attempted prior-period adjustment to Missouri’s FY 1995 expenditure report, any payment-limit recalculation that we might approve, or direct CMS to make, would circumvent the statutory requirement that an IMD DSH limit founded on section 1923(h)(1)(A) be based on amounts reported on the QSE “as mental health DSH.” Being bound by statute and regulation, the Board cannot issue a decision inconsistent with that reporting requirement. Expenditure reporting on the QSE, it is important to note, is no mere formality; indeed, the QSE is a critical tool for ensuring that a state’s expenditure of federal Medicaid funds complies with federal law. Hence, the onus is on a state to ensure that its reporting on the QSE complies with all applicable federal requirements, including the requirement in 42 C.F.R. § 447.299(b) that it report

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<sup>15</sup> *See* 42 C.F.R. § 430.30(a)(2), (c) (requiring submission of a QSE as the condition for providing a Medicaid grant award); State Medicaid Manual § 2500 *et seq.* (setting forth procedures for completing and submitting the QSE); Form CMS-64 Summary Sheet (requiring a state official to certify, among other things, that the reported expenditure amounts on the QSE are “based on the state’s accounting of actual recorded expenditures” and include only “allowable” Medicaid program expenditures for which state or local match funds are “available and used”).

DSH payments “in accordance with procedures established by CMS.” *Cf. Ga. Dept. of Cmty. Servs.*, DAB No. 2521, at 23-24 (stating that “[u]nder the grant award process established by the Medicaid statute, regulations, and program instructions, the onus is on a state to have cost accounting and other financial systems in place to ensure that it makes a complete, supportable, and accurate claim for a current or prior quarter”).

Missouri suggests that section 1923(h) “does not prohibit” CMS from informally correcting a DSH-payment reporting error (that is, without the need for the state to report a prior period adjustment) for purposes of calculating an accurate IMD DSH limit. Reply Br. at 5. We question that suggestion given paragraph (1)(A)’s description of the required “reporting data” as being “specified by the State on HCFA Form 64.” However, we need not decide whether CMS has the discretionary authority envisioned by Missouri because, even if CMS has such authority, Missouri has not alleged or shown that CMS abused its discretion by not correcting the alleged base-year reporting errors.

Missouri asserts that “[a] disallowance cannot be taken purely as a penalty for noncompliance with a CMS reporting requirements” and that “a disallowance can only be taken when CMS identifies ‘a claim or portion of claim is not allowable.’” Reply Br. at 10 (*quoting* 42 C.F.R. § 430.42(a)). “If the 1995 reporting is corrected,” says Missouri, “the \$2,438,638 that CMS seeks to disallow falls under the State’s 2014 IMD DSH cap and is allowable.” *Id.* We disagree with Missouri’s suggestion that it was “penalized” by CMS’s refusal to revise the IMD DSH limit. CMS merely followed statutory language that calls on the Secretary of Health & Human Services to rely on a state’s official expenditure reports to calculate the IMD DSH limit.

Title 42 C.F.R. § 447.299(e) states that “[i]f a State fails to comply with the reporting requirements,” then “[d]eferrals and/or disallowances . . . may be imposed with respect to quarters for which the State has failed to report [its DSH expenditures] properly” but that “FFP for those expenditures will be released *when the State complies with all reporting requirements*” (*italics added*). Missouri asserts that this regulatory language recognizes that states that incorrectly report DSH expenditures will have an opportunity “to comply with reporting requirements.” Mo. Br. at 11. Here, the applicable “reporting requirements” obligated Missouri to correct its reporting errors for FY 1995 by submitting prior period adjustments to its QSE for FY 1995, something it has not yet done.

In short, CMS’s refusal to recalculate Missouri’s IMD DSH limit to reflect \$9.9 million in base-year DSH payments to non-public IMDs is consistent with the Medicaid statute and regulations because Missouri failed to report the payments as “mental health DSH” on line 2B of the QSE. Because that reporting failure justifies CMS’s refusal to recalculate Missouri’s IMD DSH limit, we need not consider Missouri’s objection to CMS’s statement in the disallowance letter that only FY 1995 DSH payments (or payment adjustments) “reported by the State not later than January 1, 1997” may be

considered in calculating a state's IMD DSH limit. In addition, we express no view about the allowability of any increasing (prior-period) adjustment to line 2B of the QSE in order to account for base-year DSH payments that may have been incorrectly reported on another line of the QSE.

**Conclusion**

For the reasons stated above, we sustain CMS's June 5, 2015 determination to disallow \$2,438,638 in FFP for Missouri's Medicaid program.

/s/

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Leslie A. Sussan

/s/

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Constance B. Tobias

/s/

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Sheila Ann Hegy  
Presiding Board Member