DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Louisiana Department of Health and Human Resources
Docket No. 79-134-LA-HC
Decision No. 126

DATE: October 31, 1980

DECISION

This case involves an appeal by the Louisiana Department of Health and Human Resources (State) from a determination by the Director, Medicaid Bureau, Health Care Financing Administration (HCFA, Agency) disallowing Federal financial participation (FFP) in the amount of $4,314,856 claimed under Title XIX of the Social Security Act (Act). The costs in question were claimed for the period July 1, 1973 through December 31, 1974 for intermediate care facility services for the mentally retarded (ICF/MR services) provided in six facilities in Louisiana. The disallowance was taken on the ground that the State failed to comply with a regulation intended to assure that state expenditures for such services are not reduced when Federal funding becomes available. We find that the State failed to meet the applicable "maintenance of effort" requirement, and, accordingly, we sustain the disallowance.

This decision is based on the State's application for review, the Agency's response to the appeal, a submission by the State commenting on the Agency's response to the appeal, the parties' responses to an Order to Develop Record issued by the Board Chairman, and the State's response to a letter from the Board's Executive Secretary raising additional issues.

The regulation in question, 45 CFR 249.10(c)(3), limits FFP in expenditures for ICF/MR services made prior to January 1, 1975 to the amount by which the total cost of the services in an institution during the quarter for which FFP is claimed exceeds a state's average quarterly expenditures for the services in a base year. The base year is defined as the four quarters immediately preceding the quarter in which the state elected to make the services available under its Title XIX plan. The regulation provides, in pertinent part, that--

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

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

The meaning of 45 CFR 249.10(c)(3) is not disputed by the parties. The State argues, however, that it was not bound by the regulation with respect to FFP claimed for the period July 1, 1973 through March 31, 1974, half of the time covered by the disallowance, since the regulation was not published in the Federal Register until January 17, 1974 (39 FR 2220, 2222) and was by its own terms (39 FR 2235) not effective until March 18, 1974. The State takes the position that it was bound during that time only by what it finds to be the more general terms of Section 1905(d) of the Act. That section provides that a state may claim FFP for services in a public institution for the mentally retarded if, among other things--

> (3) The State or political subdivision responsible for the operation of such institution has agreed that the non-Federal expenditures in any calendar quarter prior to January 1, 1975, with respect to services furnished to patients in such institution...in the State will not, because of payments made under this title, be reduced below the average amount expended for such services in such institution in the four quarters immediately preceding the quarter in which the State in which such institution is located elected to make such services available under its plan approved under this title.

In support of its position that it is bound for most of the period in question only by the Act, which it finds less restrictive than the regulation, the State cites a March 11, 1974 letter to state agencies from the Region VI office of the Social and Rehabilitation Service, HCFA's predecessor agency. This letter stated that the regulation would be applied only with respect to services purchased during the last three quarters of calendar year 1974, and that "[o]ther reasonable methods of establishing documentation to show 'maintenance of effort' for the period prior to the effective date of the regulations will be acceptable" in the event that a state chooses not to use the methodology specified in 45 CFR 249.10(c)(3). (Dallas Regional Medical Services Letter No. 74-8, State's application for review, Exh. 5.) The State contends that it complied with Section 1905(d) of the Act since the State's outlays for the institutions in question were maintained at the same level and in fact increased during the period involved.

The Agency argues that the regulation was properly applied in determining the allowability of the State's claim for the entire period because the method provided in the regulation for determining allowable costs is required by the Act.

We conclude that the Agency's analysis is correct. The validity of its position is best shown by an example. Assume that a state with a FMAP of 50 percent spent an average of $100 per quarter for ICF/MR services in institution "X" during the base year and $150 during a quarter for which FFP is claimed. Under 45 CFR 249.10(c)(3), the state would receive 100 percent of the $50 cost increase, or $50 (which falls below the upper limit of 50 percent (FMAP) of $150), leaving $100 of costs to be paid by state funds.

The State argues that it would be entitled under Section 1905(d) of the Act to receive its FMAP times the full $150 expended during the quarter in question, or $75. The receipt of $75 in Federal funds, however, would free up $75 in state funds which would otherwise have to be devoted to ICF/MR costs incurred by institution "X". Thus, the state's share of the ICF/MR costs for the quarter in question would actually be only $75 ($150 - $75). Since that falls below the state's base year average expenditure of $100, the state fails to comply with the requirement in Section 1905(d) of the Act that non-Federal expenditures not be reduced. In order to maintain its base year level of effort, the state could receive at most $50 in Federal funds. As indicated above, that is the amount it would receive under 45 CFR 249.10(c)(3).

We do not find persuasive the State's argument that the Act is unclear regarding how compliance with the maintenance of effort provision must be determined. The Act provides specifically that non-Federal expenditures will not, because of Federal payments, be reduced below a base level. This clearly requires that total expenditures less Federal funds received be equal to or greater than the base level. The State has claimed only that its total expenditures for ICF/MR services in each quarter increased over its average quarterly base year expenditures. This is not responsive to the Act's express concern with non-Federal expenditures.

The regulation in question, therefore, does not impose any restrictions on the receipt of FFP for ICF/MR services which are not already present in the Act. It merely provides a means for assuring compliance with the Act's maintenance of effort requirement by adjusting the amount of FFP allowable for ICF/MR services. Thus, we conclude that, although the regulation itself was not retroactive, the interpretation of the Act in 45 CFR 249.10 (c)(3) was properly applied in determining the allowability of the State's claim for the period prior to as well as after the regulation's stated effective date.

The State argues, however, that the Federal funding received by it did not in this particular case free up an equivalent amount of state funds which would otherwise have been devoted to ICF/MR costs. According to the State, the Federal funding was specifically applied to the costs of construction and renovation of the State's ICF/MR facilities, which are not allowable costs under Title XIX of the Act.

The State is correct that the construction and renovation costs are not properly considered ICF/MR costs. The State loses sight, however, of the fact that money is fungible, and that, although it claims to be able to trace the Federal funds received to construction and renovation expenditures, an equivalent amount still became available to support ICF/MR services.

The State also argues that it complied with the maintenance of effort requirement even if its ICF/MR expenditures for some facilities in some quarters decreased from the base year level, contending that the decrease was due "to the vagaries of the budget/expenditure process," such as "the way in which payrolls fall, the manner of purchasing supplies and the random dates by which other obligations become due," rather than attributable to the availability of Federal funding. The State calls attention to the language in Section 1905(d) of the Act prohibiting the reduction of non-Federal expenditures "because of payments made under this title."

Although the State was given an opportunity to specifically document any instances in which "vagaries of the budget/expenditure process" were responsible for a decrease in its ICF/MR costs, no evidence was offered on that point. We note, moreover, that under both Section 1905(d) of the Act and 45 CFR 249.10(c)(3), the determination whether a state has complied with the maintenance of effort requirement in a particular quarter for which FFP is claimed is made by comparing the ICF/MR costs in that quarter to the average of its ICF/MR costs in the four quarters of the base year. We find that, in the absence of a specific showing that the State's expenditures were reduced because of factors other than the availability of Federal funding, the use of the average quarterly ICF/MR costs for the base year adequately accounted for any payments not made on a regular basis.

This decision does not discount entirely the March 11, 1974 letter from SRS, relied on by the State, which stated that reasonable methods of showing maintenance of effort other than those specified in 45 CFR 249.10(c)(3) would be acceptable for periods prior to the publication of the regulation. We believe, however, that the letter refers to

provisions of the regulation other than the central provision in question here. One such provision might be the requirement that a state use a per capita (rather than per diem) method to calculate the costs for each institution during the base year and in each quarter for which FFP is claimed. In the instant case, consistent with the SRS letter, HCFA has accepted the State's computations made on a per diem basis. (Agency response to appeal, dated 11/27/79, p. 6, fr. 2.)

Conclusion

We find that the State failed to comply with the "maintenance of effort" requirement in Section 1905(d) of the Act. The disallowance taken by the Agency is therefore upheld.

/s/ Clarence M. Coster

/s/ Donald G. Przybylinski

/s/ Norval D. (John) Settle, Panel Chair