

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Pennsylvania Department of Public Welfare
Docket Nos. A-08-64, A-08-95, A-08-120, A-09-19,
A-09-43, A-09-75, A-09-105, A-10-7
Decision No. 2391
June 27, 2011

DECISION

The Pennsylvania Department of Public Welfare (Pennsylvania) appeals eight determinations by the Centers for Medicare & Medicaid Services (CMS) disallowing a total of \$92,550,325 in federal financial participation (FFP) in costs claimed under the Medicaid program at title XIX of the Social Security Act (Act), for the period July 1, 2007 through June 30, 2009. Pennsylvania claimed the costs as “residential habilitation” costs under the State’s Home and Community-Based Services Waiver for Individuals with Mental Retardation (HCBS waiver). CMS disallowed Pennsylvania’s claims on the ground that they were for room and board costs that are excluded from reimbursement as HCBS costs under section 1915(c)(1) of the Act and the 42 C.F.R. § 441.310(a)(2). For the reasons explained below, we sustain the disallowances.

Procedural background

The Board previously upheld CMS’s disallowances, on the same grounds, of Pennsylvania’s claims for residential habilitation costs under the HCBS waiver for earlier time periods. *Pennsylvania Department of Public Welfare*, DAB No. 2152 (2008). After the Board issued DAB No. 2152 on February 6, 2008, Pennsylvania appealed the instant disallowances of FFP claimed for quarters ending (QE) September 30, 2007 through June 20, 2009. In each appeal, Pennsylvania stated that the issues appeared to be the same as those that the Board decided in DAB No. 2152. At Pennsylvania’s request and without objection from CMS, the Board consolidated the appeals and stayed proceedings pending Pennsylvania’s appeal of DAB No. 2152 in federal court.

On March 31, 2010, the U.S. District Court for the Middle District of Pennsylvania affirmed the Board’s decision. *Commonwealth of Pennsylvania Dep’t of Public Welfare v. U.S. Dep’t of Health & Human Servs.*, No. 1:08-CV-791, 2010 WL 1390835 (D.Pa. Mar. 31, 2010). The Board then ordered Pennsylvania to show cause why the Board should not proceed to decision based on the analysis in DAB No. 2152. In response, Pennsylvania did not assert that there were any factual disputes for the Board to resolve, but replied that it wished to appeal the district court’s decision. Pennsylvania Resp. to Order (Apr. 22, 2010). The Board continued the stay without objection from CMS,

pending Pennsylvania's appeal of the district court's decision. On June 13, 2011, the Court of Appeals for the Third Circuit affirmed the district court's decision.

Commonwealth of Pennsylvania Dep't of Public Welfare v. U.S. Dep't of Health & Human Servs., --- F.3d ---, 2011 WL 2305972 (3rd Cir. June 13, 2011).

Since DAB No. 2152 has been upheld by the two courts and Pennsylvania identified no disputes of fact to be resolved, the Board notified the parties that it had determined to proceed to decision and to deny Pennsylvania's request for a further stay to determine whether to pursue a further appeal of the Third Circuit decision.

Based on our analysis in DAB No. 2152, which we incorporate by reference and summarize below, we sustain the additional disallowances, which total \$92,550,325.¹

Summary of analysis

Section 1915(c) of the Act² authorizes the Secretary of the Department of Health and Human Services to permit each state to apply for a waiver to provide Medicaid coverage for individuals who would otherwise need institutional care to receive care and services in home or community-based settings instead. As with other parts of the Medicaid program, Congress provided for FFP in a percentage of the state's Medicaid costs of providing coverage under what has become to be known as an "HCBS waiver." Act §§ 1915(c), 1901-03. Congress, however, specifically excluded room and board costs from Medicaid reimbursement for HCBS services. The statute thus permits a state that receives what has become known as an "HCBS waiver" to claim FFP under its approved state Medicaid plan in costs "for part or all of the cost of home or community-based services (other than room and board)" Act § 1915(c)(1) (emphasis added). Section 441.310(a)(2) of 42 C.F.R. similarly provides that FFP for HCBS "is not

¹ The amount disallowed and the time period at issue in each of the instant appeals are as follows:

<u>Docket No.</u>	<u>Amount Disallowed</u>	<u>Time period</u>
A-08-64	\$ 6,726,338	July 1 – Sept. 30, 2007 (QE Sept. 30, 2007)
A-08-95	\$10,731,259	QE Sept. 30, 2007 (\$1,534,300) QE Dec. 31, 2007 (\$9,196,959)
A-08-120	\$12,773,277	QE Dec. 31, 2007 (\$2,179,111) QE Mar. 31, 2008 (\$10,594,166)
A-09-19	\$10,320,939	QE June 30, 2008
A-09-43	\$ 9,463,973	QE Sept. 30, 2008
A-09-75	\$11,647,510	QE Dec. 31, 2008
A-09-105	\$11,052,947	QE Mar. 31, 2009
A-10-7	\$19,834,082	QE June 30, 2009

² The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm.

available in expenditures for . . . [t]he cost of room and board” with two exceptions not applicable here.

Pennsylvania nonetheless submitted claims “for ‘occupancy’ costs (such as rent, utilities, facility maintenance and repairs, and furnishings) incurred by community residential facilities” in which Pennsylvania provided residential habilitation services. DAB No. 2152, at 1. Pennsylvania conceded that the costs at issue were, “in general, joint costs that benefit the objective of providing room and board to the residents, as well as the objective of providing habilitation services.” *Id.* at 1-2. Pennsylvania calculated its claims based on a consultant’s estimate that residents of the community facilities were engaged in “habilitative activities or other waiver activities” for 13 hours on average in a typical 24-hour period. Based on this estimate, Pennsylvania allocated 54.1667% (or 13/24) to “waiver services” or “habilitation services.” *Id.* at 6-7. The Board determined that:

- The claimed costs were “room” costs that were part of room and board costs that are excluded from FFP under the statute and regulations. *Id.* at 9-10.
- The cost principles of Office of Management and Budget (OMB) Circular A-87, codified at 2 C.F.R. Part 225, do not permit the allocation to federal cost objectives for reimbursement purposes of otherwise allocable costs that are not allowable under federal law. OMB Circular A-87, Appendix (App.) A, ¶ C.1.d (to be allowable, costs charged to federal grants must, among other requirements, be allocable to federal awards and also “[c]onform to any limitations or exclusions set forth in these principles, Federal laws, terms, and conditions of the Federal award, or other governing regulations as to types or amounts of cost items.”). The record in DAB No. 2152 indicated that all of the costs were allocable to the cost objective of room and board. They were therefore unallowable, notwithstanding Pennsylvania’s contention that they were also allocable to habilitation services provided under its waiver. *Id.* at 10-12.
- Pennsylvania did not provide any evidence to show that any of the “occupancy” costs were incurred only in order to provide habilitation services and not in order to provide room and board such that the costs did not benefit the cost objective of providing room and board for the residents. Pennsylvania’s allocation method was “unacceptable because it results in claims for Medicaid FFP in room and board costs, under any reasonable definition of those costs.” *Id.* at 12-14.
- Pennsylvania’s allocation method had not been approved by CMS as part of Pennsylvania’s waiver program, contrary to CMS’s instructions in its State Medicaid Manual (SMM) that states proposing “to provide care in a residential setting” under a waiver show “a clear differentiation between waiver services and nonwaiver services (e.g., room and board)” and provide “a detailed cost allocation

strategy . . . as part of the waiver request to explain how the cost of waiver services in the residential setting will be determined and segregated from ineligible waiver costs.” *Id.* at 14, quoting SMM, § 4442.3.B.8 (emphasis in SMM). Even if Pennsylvania’s adoption of the methodology was not a significant change to its waiver program (under which it had previously not claimed its occupancy costs), as Pennsylvania contended, it was “still unacceptable because it resulted in Pennsylvania claiming Medicaid funds for ‘room and board’ costs that Congress excluded from reimbursement.” *Id.* at 16.

In affirming the Board’s decision, the district court found that the occupancy costs Pennsylvania claimed fit within the statutory exclusion barring federal reimbursement for “room and board” costs in community residential facilities and that Pennsylvania had not shown that the Board’s decision was arbitrary or capricious. The Third Circuit affirmed the district court.

In sum, since the issues in each of these appeals are the same as those that the Board decided in DAB No. 2152 (2008), we sustain the disallowances on the same ground, as affirmed on appeal.

Conclusion

For the reasons stated above or incorporated by reference, we sustain CMS’s determinations to disallow Pennsylvania’s claims for federal Medicaid financial participation in 54.1667% of its HCBS facility costs for the period July 1, 2007 through June 30, 2009, totaling \$92,550,325.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Judith A. Ballard
Presiding Board Member