DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Utah Department of Social Services
Docket No. 79-48-UT-HC
Decision No. 194

DATE: June 30, 1981

DECISION

This case involves an appeal by the Utah Department of Social Services (State) from a determination dated February 12, 1979, by the Director, Medicaid Bureau, Health Care Financing Administration (Agency), disallowi Federal financial participation (FFP) in the amount of $247,660 claimed under Title XIX of the Social Security Act (Act). The costs in question were incurred for inpatient psychiatric services for individuals under age 21 provided at the Utah State Hospital during the periods January 1, 1973 through June 30, 1974, and July 1, 1975 through December 31, 1976. The disallowance was taken on the ground that the State failed to comply with a requirement in Section 1905(h)(2) of the Act and the implementing regulations at 45 CFR 249.10(c)(5) which was designed to assure that states do not use Federal funds merely to replace state funds already being used for treatment of the mentally ill. 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' response to the appeal, the parties' responses to an Order to Show Cause issued by the Board Chair, and the parties' oral and written responses to inquiries made in two telephone conferences held by the Board.

Applicable Law

As indicated above, the disputed costs were claimed for periods beginning in 1973. The statutory provision on which the disallowance was based was part of a 1972 amendment to the Act, (Section 299B of Pub. L. 92-603), which permitted states, at their option, to include inpatient psychiatric hospital services for individuals under age 21 in their Medicaid state plans. The maintenance of effort provision, added as Section 1905(h)(2) of the Act, excludes from the definition of such services--

> services provided during any calendar quarter under the State plan of any State if the total amount of the funds expended, during such quarter, by the State ... from non-Federal funds

> for inpatient services ..., and for active psychiatric care and treatment provided on an outpatient basis for eligible mentally ill children, is less than the average quarterly amount of the funds expended, during the 4-quarter period ending December 31, 1971, by the State ... from non-Federal funds for such services.

A regulation implementing Section 1905(h)(2) was published on January 14, 1976 as 45 CFR 249.10(c)(5) and provided in pertinent part that—

> Federal financial participation will be at 100 percent of such increase in expenditures [between the base year and the quarter in question] but may not exceed the Federal medical assistance percentage times the expenditures for inpatient psychiatric hospital services for individuals under the age of 21.

The regulation specifically provides that the amount of the cost increase is determined by subtracting from total expenditures for the current quarter, the average quarterly per capita non-Federal expenditure for the base year times the total number of eligible individuals receiving services in the current quarter. The Federal medical assistance percentage (FMAP) which under the regulation determines the ceiling on FFP is defined in Section 1905(b) of the Act as 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 FMAP 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.

Parties' Arguments

The State claimed FFP for inpatient psychiatric services for individuals under age 21 by multiplying its FMAP (approximately 70 percent) times the total amount expended by it for such services each quarter, in accordance with Section 1903(a)(1) of the Act. The State does not dispute that this yielded an amount greater than the increase in current over base year expenditures (per capita average times total eligible individuals for the current quarter), whereas under 45 CFR 249.10(c)(5) a state is entitled only to the lesser of (a) the increase in current over base year expenditures (per capita average times total eligible individuals for the current quarter) or (b) FMAP times total expenditures. The State contends, however, that it has separately shown that it met the maintenance of effort requirement in Section 1905(h)(2) of the Act, and that it is not bound by the regulation, which it asserts imposes requirements not in the Act, is invalid as inconsistent with the Act, and in any event was improperly applied to periods prior to its issuance. (State's response to Order, dated 11/10/80, p. 2.)

In support of this argument, the State notes that Section 1905(h)(2) speaks in terms of total state expenditures, concluding that the regulation's use of per capita expenditures to determine the base year level of effort has no basis in the statute. (State's response to Order, dated 11/10/80, pp. 4-5.) The State further asserts that by multiplying the average quarterly per capita expenditures for the base year by the number of eligible individuals receiving services in the current quarter, pursuant to the regulation, "the Agency is creating a fictitious first year total expenditure which prevents a true subsequent year total expenditure comparison." It also argues that this method "inflate[s] the base year total expenditure," thus reducing the amount subject to Federal reimbursement. (State's response to Order, dated 11/10/80, p. 4.) Finally, the State contends that its method of determining compliance with Section 1905(h)(2) was consistent with oral advice subsequently given to it by Agency personnel. The State furnishes in support of this contention an affidavit of the former Financial Manager of the Department of Social Services which alleges that he was informed early in 1977 by a member of the Management Services staff of the regional office of the Social and Rehabilitation Service (the predecessor agency of the Health Care Financing Administration) that the statute required that "total state expenditures must be at least equal to or greater than the state expenditures in the base period...." (Affidavit dated 3/27/81, Exhibit F to State's supplemental response to Order, dated 3/27/81.)

The Agency argues that the regulation merely interprets the statute and that the disallowance, based on a clear violation of the regulation, should be upheld. (Agency response to appeal, dated 6/15/79, p. 8.)

Discussion

We do not accept the State's argument that the regulation is inconsistent with the statute. By multiplying average quarterly per capita costs for the base year by the number of eligibles in a current quarter, the regulation adjusts base year costs to reflect any increase or decrease in the number of eligibles from the base year to the current quarter. Thus, under the regulation, Federal funds must be used for increased services to each inpatient rather than to cover an increase in costs attributable to a larger number of inpatients. That Congress intended Federal funds to be used in this manner is apparent from the report of the Senate Finance Committee on H.R. 1 which stated with respect to the statutory provision in question here that "[a]n appropriate 'maintenance of effort' provision is included to assure that the new Federal dollars are utilized to improve and expand treatment of mentally-ill children." (Emphasis added.) S. REP.

NO. 92-1230, 92d Cong., 2d Sess. 281 (1972). This statement clearly contemplates the furnishing of additional psychiatric services to each patient, not the institutionalization of additional children. It should also be noted that the regulation assures that a state is not penalized, by a loss of FFP, for any decrease in total costs resulting from a decrease in the number of patients. Thus, the State's characterization of Section 1905(h)(2) as requiring that total expenditures be equal to or greater than state expenditures in the base period in order for a state to be eligible for FFP is not correct. As noted by the Agency, the State could not have relied on oral advice from an Agency official supporting this interpretation since it was given after the period involved in the disallowance. (Agency's letter dated 4/13/81.)

Even if maintenance of effort was properly determined by a comparison of total expenditures, we find that the State has failed to show that it maintained its effort on that basis. In support of its position, the State submitted a chart showing, for each of the four fiscal years beginning in FY 73, that the amount expended from State funds (exclusive of FFP) for inpatient psychiatric services in the facility in question exceeded the amount expended from non-Federal funds during the base year 1971. (Grantee's Exhibit B to supplemental response to Order, dated 3/27/81.) This evidence is defective, however, in that the State expenditures in each fiscal year, as well as in the base year, include expenditures for persons not eligible for services under Title XIX as well as for Title XIX eligibles. Since the purpose of the statute is to prevent the substitution of Title XIX funds for State funds, the State cannot demonstrate compliance unless it separately identifies expenditures for Title XIX eligibles. The State argues that expenditures for non-eligibles are properly included since it cannot separately identify those persons receiving services in the base year who would have been eligible for services under Title XIX. (Confirmation of Telephone Conferences, dated June 23, 1981, p. 2.) This would be an additional justification for the requirement that base year costs be calculated by multiplying average quarterly per capita costs in the base year times the number of Title XIX eligibles in the current quarter, however. It is not sufficient to justify a comparison of figures bearing no relation to the purpose of the statute.

The State argues that the regulation was in any event improperly applied to periods prior to its issuance. Since the State has not shown that it maintained its effort using a reasonable method other than that specified by the regulation, however, we need not reach the question whether its retroactive application was improper. (Cf. Idaho Department of Health and Welfare, (Board Chair) Decision No. 156, March 19, 1981.)

The State also notes that 45 CFR 249.10(c)(5) treats outpatient costs differently than inpatient costs in that it compares current outpatient costs to total non-Federal outpatient costs for the base year (quarterly average). The State argues that this comports with the statute whereas the required comparison of current inpatient costs to base year per capita inpatient costs (quarterly average) times the current number of eligible inpatients does not. (State's response to Order, dated 11/10/80, p. 5.) The apparent reason for the different treatment of outpatient costs is that FFP was available for such costs during the base year, and hence there was no necessity to utilize a per capita measure to prevent the replacement of state funds by Federal funds. As indicated above, however, the State has not shown that it would have met the maintenance of effort requirement had current inpatient costs been compared to total non-Federal inpatient costs for the base year. Accordingly, it is not necessary to pursue the matter.

Finally, we note that, although some question was raised by the Board in the first telephone conference regarding whether inpatient costs for the base year were computed on a per diem rather than a per capita basis (Confirmation of Telephone Conference, dated 2/3/81, p. 2), both parties are now in agreement that the disallowance was computed in accordance with the regulation. (Grantee's supplemental response to Order, dated 3/27/81, p. 7; Agency's letter dated 3/27/81, p. 3.)

Conclusion

For the reasons discussed above, we find that the State failed to comply with the "maintenance of effort" requirement in Section 1905(h)(2) of the Act. The disallowance taken by the Agency is therefore upheld. The tentative conclusions reached in the Order, which would have granted the appeal in part, were based on the Board Chair's understanding of the record as it stood at the time and are not adopted by the Panel after full consideration of the complete record.

/s/ Cecilia Sparks Ford

/s/ Alexander G. Teitz

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