Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Colorado Department of Health Care Policy and Financing
Docket Nos. A-13-88, A-13-89, A-13-108
Decision No. 2558
February 18, 2014

DECISION

The Colorado Department of Health Care Policy and Financing (Colorado) appeals three determinations by the Centers for Medicare & Medicaid Services (CMS) disallowing Colorado's claims for federal financial participation (FFP) in expenditures Colorado made for prenatal coverage for uninsured pregnant women. Colorado submitted the claims under a Children's Health Insurance Program (CHIP) demonstration project for expenditures incurred from May 1, 2010 to July 30, 2012. CMS determined that the women in question had family incomes above 200 percent of the federal poverty level (FPL) and that the approved demonstration project, as in effect prior to July 30, 2012, covered women with incomes up to 200 percent of the FPL, but not above that level. The Board consolidated Colorado's appeals of the three disallowances, which total $7,392,657 in FFP.

Colorado acknowledges that CMS did not formally approve Colorado's proposed amendment to expand coverage under its demonstration project to uninsured pregnant women with incomes up to 250 percent of the FPL until 2012, with an effective date of July 30, 2012. Colorado argues, however, that CMS's guidance on statutory changes made in 2009 altered the process for amending the demonstration project and that Colorado reasonably thought it had informal approval to claim FFP as of May 1, 2010 for women with incomes up to 250 percent of the FPL based on emails between Colorado and CMS. For the reasons stated below, we reject Colorado's arguments and uphold the disallowances.

Background

CHIP (previously referred to as SCHIP) is established by title XXI of the Social Security Act (Act) and authorizes federal grants to the states to provide child health assistance to uninsured, low-income children. States may provide health benefits coverage through a

"Medicaid expansion program," through a separate child health plan, or through a combination of the two. Act § 2101; 42 C.F.R. § 457.70.[1] The Medicaid program is established by title XIX of the Act.

States with child health plans may expand coverage of these plans to include populations not normally covered under CHIP by obtaining CMS approval for a waiver under section 1115 of the Act. Section 1115(a)(1) of the Act provides among other things that, in the case of any demonstration project which, in the judgment of the Secretary is likely to assist in promoting the objectives of the specified titles of the Act in a state or states, the Secretary "may" waive compliance with certain requirements "to the extent and for the period he finds necessary to enable such State or States to carry out such project." Section 1115(a)(2) provides that "the costs of such project," which would not otherwise be included as expenditures under other titles of the Act (and are not funded under section 1110 of the Act), "shall, to the extent and for the period prescribed by the Secretary, be regarded as expenditures under the State plan or plans approved under such title, or for the administration of such State plan or plans, as may be appropriate." Section 2107(e)(2)(A) of the Act provides that section 1115 of the Act shall apply to title XXI of the Act in the same manner as it applies to a state under title XIX of the Act (Medicaid).

Since 2002, Colorado has had an approved demonstration project to expand coverage to uninsured pregnant women under its title XXI program, which Colorado refers to as CHP. Colorado's project was entitled "Adult Prenatal Coverage in CHP+ and Premium Assistance Pilot Program." The project, as extended and approved on September 29, 2006, was subject to special terms and conditions (STCs) defining the "nature, character, and extent of anticipated Federal involvement in the project." CMS Ex. 2, at 1. STC #14 specified that changes related to eligibility and certain other matters had to be submitted to CMS as amendments to the demonstration project and also stated:

> The State must not implement changes to these elements without prior approval by CMS. Amendments to the Demonstration are not retroactive, and FFP may not be available for changes to the Demonstration that have not been approved through the amendment process set forth in STC # 15 below.

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

Id. at 9.[2] STC #15 provided, among other things, that amendment requests "must be submitted to CMS for approval no later than 120 days prior to the date of implementation and may not be implemented until approved." *Id.* As approved in 2006, the demonstration project defined "Demonstration Population 1" as follows:

> Uninsured pregnant women with family income above 133 percent of the FPL and up to and including 200 percent of the FPL, who are otherwise not eligible for Medicare, Medicaid, or SCHIP.

Id. at 7.

In February 2009, Congress passed the Children's Health Insurance Program Reauthorization Act (CHIPRA). Section 2112 of the Act, as added by CHIPRA, provided an option for a state to elect, through an amendment to its CHIP state plan, to provide pregnancy-related assistance to targeted low-income women. That section established certain conditions for such state plan coverage, however, including the condition that the state first establish an income eligibility level for pregnant women under Medicaid that is at least 185 percent of the FPL. Act § 2112(b). Congress specified, however, that the new state plan option did not limit the option for a state to provide "pregnancy-related services through the application of any waiver authority (as in effect on June 1, 2008)." Act § 2112(f)(1)(B). In other words, if a state's demonstration project as in effect on June 1, 2008 covered pregnancy-related assistance, the state's option to continue to provide that same assistance under that project was not limited by the conditions applying to the new state plan option.

In April 2009, Colorado's efforts to obtain authorization from its state legislature to expand prenatal coverage resulted in passage of the Colorado Health Care Affordability Act of 2009, HB 09-1293. That Act authorized the use of certain provider fees to increase the eligibility level for children and pregnant women up to 250 percent of the FPL under Colorado's CHP program. Under this legislation, expansion was contingent on the availability of federal matching funds. CO Ex. 1, at 4.

In a letter to Colorado dated September 16, 2009, CMS noted that the CHP demonstration project was scheduled to expire on September 30, 2009 and extended the project "for one-month to ensure resolution of outstanding issues." CMS Ex. 3, at 1.[3] The letter

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[2] "Prior approval" in HHS grant programs is defined by regulation as "written approval by an authorized HHS official evidencing prior consent" or "documentation evidencing consent prior to incurring specific cost." 45 C.F.R. §§ 74.2, 92.3.

[3] Colorado's brief asserts that the section 1115 waiver was "set to expire in October 2008" but Colorado provided no support for that assertion. CO Br. at 2nd page. The September 29, 2006 document extending the demonstration project refers to a "3-year extension period." CMS Ex. 2, at 6.

stated that the "current lists of waiver and expenditure authorities and special terms and conditions will continue to apply to the CHP+ Demonstration until October 31, 2009." *Id.* Thereafter, CMS further extended the existing project on a month-to-month basis. CO Br. at 2; CMS Exs. 5, 6. Colorado does not allege that there were any changes to the existing STCs as a result of these extensions.

By email dated May 3, 2010, Colorado transmitted to CMS "the documents for our SPA [State Plan Amendment] submission and waiver addendum to implement Colorado's CHIP's expansion from 200% of FPL to 250% of FPL." CO Ex. 7, at 8.

CMS did not formally approve Colorado's request to amend and renew Colorado's section 1115 demonstration project until July 30, 2012. CMS Ex. 5. In a letter of that date, CMS stated:

> As part of the amendment, Colorado has expanded the income eligibility level under the demonstration from 200 percent of the Federal poverty level (FPL) through 250 percent of the FPL for uninsured pregnant women, ... The approval for this income expansion and renewal for pregnant women is effective as of the date of this letter and will expire as specified below on January 1, 2013, when these demonstration populations are transitioned to the Medicaid and CHIP state plans.

Id. at 1.[4]

On January 2, 2013, CMS disallowed $6,928,348 in FFP that Colorado claimed for expenditures for uninsured pregnant women with incomes over 200 percent of the FPL. CMS later disallowed $422,689 in FFP, and $41,620 in FFP Colorado claimed for such expenditures. The disallowance letters identify the claims as being made on the expenditure reports for the quarters April 1, 2010 through December 31, 2012, but both parties describe the expenditures as relating to the period May 1, 2012 through July 30, 2012. Colorado first requested reconsideration by CMS of the initial disallowance, then appealed all three disallowances to the Board. The Board consolidated the three appeals of the disallowances, which total $7,392,657.

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[4] CMS's initial disallowance letters erroneously state that approval was effective on August 1, 2012. Both CMS and Colorado, however, relate the disallowed expenditures to the period May 1, 2010 to July 30, 2012, so it does not appear that this error resulted in CMS disallowing expenditures incurred on July 30 or July 31, 2012.

Analysis

Colorado acknowledges that CMS did not formally approve Colorado's addendum to the demonstration project to expand eligibility to cover uninsured pregnant women with family incomes up to 250 percent of the FPL until July 30, 2012. CO Br. at 6th page. Colorado argues, however, that "this administrative formality should not control the date of [Colorado's] authorization to begin covering the expanded population" because CMS issued guidance interpreting CHIPRA to permit continuation of an existing waiver and Colorado relied on that interpretation. *Id.* Colorado also contends that its understanding was that the change had been informally approved by CMS and that FFP under CHIP would be available starting May 1, 2010 in expenditures for the expanded population. According to Colorado, it reasonably thought it would get such FFP based on two documents: first, the May 2010 email transmitting the addendum to CMS, and, second, a June 1, 2011 email to Colorado from CMS. *Id.* at 6th to 9th pages.

We note at the outset that Colorado presented no documentation or testimony from any state official to show that he or she, in fact, thought that the formal approval process would not apply and that CMS had given informal approval to Colorado to claim FFP for an expanded population under the demonstration project starting May 1, 2010. Even assuming, however, that state officials did in fact think they had informal approval and that formal approval was not required, we would still reject Colorado's arguments. For the reasons stated below, we conclude that, in light of the STCs in the demonstration project as approved in 2006 and other statements by CMS, Colorado could not reasonably think that FFP would be available for the costs at issue here prior to formal, written CMS approval of the expanded demonstration project.

1. ***CMS's guidance on CHIPRA did not authorize Colorado to depart from the formal procedures for approval of any changes to its demonstration project.***

Colorado argues that the passage of CHIPRA and its impact on Colorado's section 1115 waiver "led to a departure from the normal approval process." CO Br. at 3rd page. According to Colorado, effectuating section 2112 of the Act as added by CHIPRA was not an easy process and Colorado's options moving forward were "limited by CMS, as outlined in correspondence" between CMS's Director of the Center for Medicaid, CHIP and Survey & Certification and a Colorado State Senator. *Id.* at 3rd to 4th pages. Colorado says that the State Senator had written to the Secretary of HHS "asking for clarification on how [Colorado] could move from their existing 1115 waiver after CHIPRA." *Id.* at 4th page.

Colorado describes the CMS Director's reply as stating that Colorado could continue operating any section 1115 waiver that existed on June 1, 2008 even if the requirements of section 2112 were not met. Colorado goes on to say, however, that the "letter establishes two important points about the process CMS provided for [Colorado] to move

forward from their preexisting 1115 waiver: (1) the statutory requirements regarding this process do not exclusively control, but[,] rather, (2) CMS interpretations and communications dictate the process." *Id.* According to Colorado, an examination of section 2112(f)(1)(B) of the Act demonstrates why Colorado "reasonably relied on CMS's instructions." *Id.* at 5th page. Given the "paucity of details in the provision" and the Director's letter, Colorado "could only rely on CMS communications to guide their expansion process." *Id.* Colorado also asserts that the disallowances here are simply about the timing of the expansion, because the "substance is not in dispute – ultimately, CMS approved [Colorado's] coverage of prenatals up to 250% FPL." *Id.*

These arguments have no merit. Contrary to what Colorado argues, the Act is clear on its face regarding what state options remained despite the provisions establishing conditions for expanding eligibility to pregnant women under a CHIP state plan. Specifically, the remaining option for a state relevant here is the option under section 2112(f)(1)(B) to provide "pregnancy-related services through the application of any waiver authority (as in effect on June 1, 2008)." Colorado's waiver authority as in effect on June 1, 2008, covered pregnant women only up to 200 percent of the FPL. As discussed above, this was clear on the face of the STCs for the waiver, as extended in September 2006 for three years and on a month-to-month basis thereafter.

Colorado clearly understood that it could not expand eligibility beyond that identified in the existing waiver without at the very least submitting an addendum to the project to CMS for approval since Colorado, in fact, did so in May 2010.

The CMS Director's letter on which Colorado says it relied is dated September 13, 2011, more than a year after Colorado had submitted the addendum. CO Ex. 4. That letter describes the State Senator's letter as seeking clarification from CMS "on the position that the State must transition coverage of lower income pregnant women from the Demonstration project to the Medicaid State plan **in order to obtain Federal approval for Colorado's amendment and renewal request** to expand coverage under the Demonstration" to 250 percent of the FPL. *Id.* at 1 (emphasis added). The letter discusses the provisions of section 2112 and then states:

> The CMS interprets section 2112(f)(1)(B) to permit continuation of existing demonstration authorities in effect as of June 1, 2008, even if the requirements of section 2112 are not met. However, when a State seeks expansion of such authorities, the exemption from the requirements of section 2112 is not applicable. Because Colorado is seeking to expand its existing section 1115 Demonstration to higher income levels, CMS has indicated that Colorado must meet the requirement to first cover pregnant women in Medicaid to at least 185 percent of the FPL before expanding eligibility in CHIP.

Id. The letter went on to say that CMS was considering whether there could be a structure for the section 1115 waiver project under which pregnant women transitioned to the Medicaid State Plan from the demonstration could still be eligible under CHIP so that the state could receive the higher rate of FFP available under CHIP. The letter explained:

> This would involve waivers of 2112(b)(2) and 2105(c)(6)(B) of the Act. **If these waivers were approved**, Colorado would receive enhanced [funding] for all pregnant women above 133 percent through 250 percent of the FPL . . . and our intent is to ensure that Colorado maintains its existing enhanced [funding] rate for low income pregnant women, as well as receives the enhanced [funding] for its expansion population **upon approval of the Demonstration**.

Id. at 2 (emphasis added).[5] Given these statements, we do not see how Colorado could have reasonably thought that it did not need to obtain federal approval for its addendum expanding the waiver population before it would be authorized to claim FFP under CHIP for the expanded population (or that it already had such approval).

Moreover, it is implicit in the letter that CMS had already communicated to Colorado that CHIPRA raised substantive issues that prevented CMS from simply approving the expansion under the demonstration project as proposed, without considering whether Colorado first needed to expand coverage under Medicaid and what rate of FFP would be available for populations covered under the Medicaid expansion. CMS ultimately approved the amendment to the definition of "Demonstration Population 1" that Colorado had proposed but only after the parties had agreed to additional changes to the project STCs to address the issues raised by CHIPRA. CMS Ex. 1. The new STCs required Colorado to transition part of the demonstration population to Medicaid by a date certain. *Id.* Thus, we disagree with Colorado that the fact that the expansion was ultimately approved indicates that timing is the only issue here.

In any event, Colorado's view that somehow the CMS Director's letter changed the **process** for approval of an amendment to a demonstration project and allowed Colorado to claim FFP before it had formal approval from CMS to expand the demonstration project population is unreasonable. Nothing in this letter changed the STCs for the existing demonstration project. Those STCs clearly made implementation of any change to the project and the availability of FFP contingent on CMS's "prior approval" of the change.

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[5] Section 2105(c)(6)(B) of the Act provides that, with certain exceptions, no payment will be made under CHIP for expenditures to the extent payment could reasonably be expected to be made promptly under any other federally operated or financed health care insurance program.

Colorado also points out that, on May 27, 2011, the Governor of Colorado signed into law a bill "expanding coverage of prenatals to 185% of FPL under the Medicaid state plan," arguing that, once this occurred, Colorado "had an even greater belief that it could continue to cover the expanded population." CO Br. at 7th to 8th pages. A change in Colorado law to authorize state funding for such a change is not tantamount to approval of a state plan provision providing for such coverage, however, and state law certainly does not constitute CMS prior approval of a change to a demonstration project. Indeed, the CMS Director's letter dated of September 2011 noted the statutory change, but nonetheless referred to approval of the expansion as a contingency that had not yet occurred and that might require waivers of statutory provisions in addition to those waived under the existing project.

2. Colorado could not reasonably consider CMS's failure to object to a statement in an email from Colorado as authorizing FFP for the expanded population.

Colorado says that its understanding was that it had informal approval from CMS to expand the population under the demonstration project because it notified CMS, in a May 3, 2010 email sent to CMS by a Colorado Program Analyst, of the effective date of the expansion, and CMS did not object until its disallowance letter of January 2, 2013. The May 3 email stated in relevant part:

> Attached are the documents for our [State Plan Amendment] submission and waiver addendum to implement Colorado's CHIP expansion from 200% of FPL to 250% of FPL. This expansion was effective as of May 1, 2010.

CO Ex. 2, at 1. According to Colorado, it reasonably believed that its "process to provide coverage to the expanded population was conditionally approved" because CMS did not object to the statement that the expansion was effective as of May 1, 2010 and because Colorado was "operating under the impression that the normal rules did not apply" and that "the terms of prior waiver agreements, pending waiver agreements, and general statutory provisions did not control" but that it would be "CMS who would communicate whether [Colorado's] process was valid." CO Br. at 6th to 7th pages.

We have already discussed above why Colorado could not reasonably rely on the CMS Director's letter (which, in any event, was issued well after May 2010) as altering the usual process for amending a demonstration project. We further conclude that Colorado could not reasonably think under the circumstances as a whole that CMS's failure to object to the Program Analyst's email statement regarding an effective date somehow constituted a commitment by CMS to provide FFP under the demonstration project for the expanded population as of that date. Circumstances that we consider relevant include the following.

First, the Waiver Renewal Addendum document (which indicates it was updated May 3, 2010) contains at the top the part of the STCs providing that a change "may not be implemented until approved." CO Ex. 7, at 21. Also, this document refers to the addendum as a "proposed amendment," and to the expansions of coverage as "proposed expansions." *Id.* at 21-22.

In addition, a letter from Colorado's Policy Analyst to CMS, also dated May 3, 2010, contains language similar to that in the Policy Analyst's email. The letter describes the Colorado Health Care Affordability Act passed in April 2009 as mandating the expansion of CHP and states that the "change was effective May 1, 2010." CO Ex. 7, at 25. Thus, in context, the reference in the email to an effective date for the expansion did not unambiguously refer to implementation of the expansion under the waiver. Rather, it appears to be referring to the effective date of the state law.

As noted above, moreover, STC # 15 required Colorado to submit any change to the demonstration project to CMS for approval no later than 120 days prior to the date of implementation and cautioned that such an amendment may not be implemented until approved.

In sum, given the context, Colorado could not reasonably have considered CMS's failure to object to the reference to an effective date in the email as somehow constituting CMS's approval for Colorado to have implemented its proposed amendment as of May 1, 2010.

3. Colorado could not reasonably consider an email from CMS's Associate Regional Administrator as indicating that CMS had conditionally approved the expansion of the demonstration project population.

Colorado also argues that "communications from CMS demonstrate that it had conditionally approved the expansion – that is, while CHIPRA mandated further action on behalf of [Colorado], payment for claims on the expanded population was authorized as of their implementation date in May 2010." CO Br. at 8th page. Colorado, however, identifies only one communication from CMS as demonstrating conditional approval – a June 1, 2011 email from CMS's Associate Regional Administrator. Specifically, Colorado says it relied on his statements in the email that "Colorado will continue to provide pregnant women above 185 through 250 percent of the FPL with the same benefit package that they are currently receiving under the demonstration" and that meeting the additional requirements set out in the email would allow Colorado to "continue to receive title XXI funds for this population." *Id.* at 8th to 9th pages.

Colorado takes these statements out of context. When considered alone, the statement about "continuing to provide the same benefit package" could possibly be read as indicating that pregnant women with incomes through 250 percent of the FPL were at

that time receiving a benefit package under the demonstration. The focus of that statement, however, was on the nature of the benefit package that Colorado would provide once it transferred coverage of pregnant women from 133 through 185 percent of the FPL from the title XXI demonstration to the Medicaid state plan, not on whether title XXI funds were currently available for the entire population to which the statement referred. The statement appears after a sentence stating that "[a]s part of the proposed Special Terms and Conditions, Colorado has submitted a Medicaid State plan amendment to transfer coverage of pregnant women from 133 through 185 percent of the FPL from the title XXI demonstration to the Medicaid State plan and **to provide these women with the Medicaid benefit package."** CO Ex. 7, at 7 (emphasis added).

The statement about Colorado continuing to receive title XXI funds appears in the following context:

> This email confirms that as long as the State establishes a CMS/State agreed upon date (in the Special Terms and Conditions of the demonstration) for transitioning pregnant women from 133 percent through 185 percent of the FPL from the demonstration to the Medicaid State Plan, the State will be able to continue to receive title XXI funds for this population.

CO Ex. 7, at 7. In context, the term "this population" is clearly referring to pregnant women from 133 percent through 185 percent of the FPL, a population that was covered under the demonstration project as it existed on June 1, 2008. The statement does not indicate that Colorado was receiving funds for the expanded population at issue here.

Finally, Colorado ignores the fact that the email starts with the following statement:

> Colorado has a **pending** Section 1115 amendment/renewal request to expand coverage of uninsured women under the demonstration from the **currently approved coverage level of above 133 through 200 percent** of the FPL to above 133 percent through 250 percent of the FPL.

Id. (emphasis added). Given this unambiguous statement about the population for which coverage under the demonstration was currently approved, Colorado could not reasonably consider the other statements as evidencing approval of use of title XXI funds for the expanded population retroactive to May 1, 2010.

We also note that only a few months later, in September 2011, the CMS Director's letter continued to refer to steps that Colorado had to take in order to obtain federal approval for its request to amend and renew the demonstration project. CO Ex. 4. Furthermore, the need for Colorado to obtain prior approval before FFP would be available for the expanded population was reinforced by the letter CMS sent to Colorado dated June 29, 2012. That letter stated:

> [CMS] is aware that the State is currently claiming Federal financial participation (FFP) for a requested amendment to its demonstration to increase the income eligibility from 200 to 250 percent of the Federal poverty level (FPL) for CHIP coverage for pregnant women . . . that has not been approved by CMS. Pursuant to the approved Special Terms and Conditions (STCs), specifically STC #14, the State may not implement changes to the demonstration without prior approval by CMS[,] and FFP is not available for changes to the demonstration that have not been approved. Additional guidance on this issue was recently shared with the State by the CMS Regional Office.

CMS Ex. 6, at 1.

Thus, we reject Colorado's argument that CMS's communications demonstrate that CMS had conditionally approved the demonstration project prior to the formal approval on July 30, 2012.

Colorado further argues, however, that even if CMS's communications do not "explicitly" support Colorado's position, "they create at the very least an ambiguity in how the expansion process was supposed to work." CO Br. at 9th page. According to Colorado, in light of that ambiguity, the Board should resolve the issues in favor of covering the payments for the expanded population because it "would be contrary to the spirit of CHIPRA and health care reform overall to punish [Colorado] for its willingness to expand eligibility pursuant to an 1115 waiver that was ultimately approved by CMS." *Id.* at 10th page. "CHIPRA encourages expansion," Colorado contends, "allowing states an additional vehicle for providing coverage of the prenatal population via the CHIP state plan." *Id.* Colorado asserts that it has been a leader in health care reform and "worked seemingly cooperatively with CMS in the prenatal population expansion" and throughout the expansion process, "reasonably relied on its federal partner's communications." *Id.*

As we discussed above, however, CHIPRA conditioned expansion on a state taking certain steps. CHIPRA exempted demonstration projects from those conditions only "as in effect on June 1, 2008." Colorado chose not to expand coverage under the CHIP state plan, instead seeking to expand coverage under the demonstration project. The STCs applicable to that project clearly required Colorado to obtain prior approval from CMS before implementing any amendment to the project and before FFP would be available under the project for the expanded population. Colorado could not reasonably think that it had such approval prior to July 30, 2012, when CMS communicated that approval together with specific conditions intended to address the issues raised by CHIPRA.

Conclusion

For the reasons stated above, we affirm the disallowances.

/s/
Stephen M. Godek

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member