Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Texas Health and Human Services Commission
DATE: July 5, 2007
Docket Nos. A-07-38 (TX-06-007-MAP)
A-07-95 (TX-07-001-MAP)
A-07-96 (TX-07-004-MAP)
Decision No. 2097

DECISION

The Texas Health and Human Services Commission (Texas) appealed disallowances issued by the Centers for Medicare & Medicaid Services (CMS). CMS disallowed Texas's Medicaid claims for costs incurred for Early Childhood Intervention developmental rehabilitative services for the period 2003 through the first quarter of federal fiscal year 2007 on the ground that the costs were not claimed in accordance with Texas's approved Medicaid state plan.

Texas argues that the costs were claimed in accordance with its approved state plan. Alternatively, Texas argues that, even if the Board upholds CMS's interpretation of the state plan, Texas is entitled to claim more reimbursement for these services than CMS allowed.

For the reasons stated below, we conclude that the rate Texas paid for the services at issue was not established in accordance with the plain terms of the approved state plan, and, therefore, we uphold the disallowances in principle. We further conclude, however, that the rate amount CMS used to calculate the disallowances was not an appropriate rate, under the state plan methodology, for the years in question. That amount (based on 1999 costs) was clearly insufficient to reimburse the costs of an efficient and economic provider during the disallowance period, and the state plan called for determining prospective rates each year by applying an inflation factor to increase the base rate or, alternatively, by re-basing the rate. While the method Texas now proposes for calculating "rebased" rates is not consistent with the state plan methodology, the disallowance calculation should, at the very least, take into account the rate amounts projected to each relevant year using the inflation factor prescribed by the state plan. Accordingly, we remand these

disallowances to CMS to recalculate the disallowance amounts, pursuant to this decision.

Law and regulations

Title XIX of the Social Security Act (Act), known as Medicaid, provides for joint federal and state financing of medical assistance for certain needy persons.[1] See also 42 C.F.R. § 430.0. States which establish a Medicaid program are required to submit a state plan for that program that meets all federal requirements. Section 1902 of the Act. To receive federal financial assistance, a state must claim the costs of medical assistance in accordance with its approved state plan. Section 1903(a) of the Act; 42 C.F.R. § 430.10. The state plan must provide methods and procedures for payment for services available under the plan as may be necessary "to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers" to assure access. Section 1902(a)(30)(A) of the Act. States may seek reimbursement only for rates determined in accordance with the state plan that is in effect. See e.g., Louisiana Dept. of Health and Hospitals, DAB No. 1542, at 2, 22 (1995); New Jersey Dept. of Human Services, DAB No. 1143, at 5 (1990).

"The State plan contains all information necessary for [CMS] to determine whether the plan can be approved to serve as the basis for Federal financial participation (FFP) in the State program." 42 C.F.R. § 430.10; see also Virginia Dept. of Medical Assistance Services, DAB No. 1838 (2002). "The plan must describe the policy and methods to be used in setting payment rates for each type of service . . . ." 42 C.F.R. § 447.201. In addition, the state plan must provide that it will be amended whenever necessary to reflect "material changes in State law, organization, or policy, or in the State's operation of the Medicaid program." 42 C.F.R. § 430.12(c)(ii).

The Board gives deference to a state's interpretation of ambiguous language in its state plan, so long as that interpretation is an official interpretation and is reasonable in light of the language of the plan as a whole and the applicable

[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.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.

federal requirements. Missouri Dept. of Social Services, DAB No. 1412 (1993); South Dakota Dept. of Social Services, DAB No. 934 (1988). In South Dakota, the Board described as follows the factors involved in determining whether a state has followed its approved state plan:

> In considering whether a state has followed its approved state plan, the Board first examines the language itself. If the provision is ambiguous, the Board will consider whether the state's proposed interpretation gives reasonable effect to the language of the plan as a whole. The Board will also consider the intent of the provision. A state's interpretation cannot prevail unless it is reasonable in light of the purpose of the provision and program requirements. Lacking any documentary, contemporaneous evidence of intent, the Board may consider consistent administrative practice as evidence of intent. The importance of administrative practice is in part determining whether the state in fact was applying an official interpretation of a plan provision or has advanced an interpretation only as an after-the-fact attempt to justify acting inconsistently with or simply ignoring its plan.

DAB No. 934, at 4. The Board has also held that states must follow the methods and standards set out in their state plans, and may not change their plans unilaterally. New Hampshire Dept. of Health and Human Services, DAB No. 1862 (2003); California Dept. of Health Services, DAB No. 1474 (1994); California Dept. of Health Services, DAB No. 1007 (1989).

Case Background

In 2001, CMS approved Texas State Plan Amendment (SPA) 00-18 adding Early Periodic Screening Diagnosis and Treatment developmental rehabilitative services to the Texas Medicaid program. Developmental rehabilitative services are described in SPA-00-18 as medical and/or remedial services that integrate therapeutic intervention strategies into the daily routines of a child and family in order to restore or maintain function and/or reduce dysfunction resulting from a mental or physical disability or developmental delay.[2]

[2] Texas represents that these rehabilitative services are performed by or under the supervision of a licensed physician or other health care professional acting within the scope of their

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SPA-00-18 sets forth a methodology for calculating hourly reimbursement rates for the developmental rehabilitative services. Texas Ex. A. Pursuant to that methodology, Texas used 1999 fiscal year cost data to calculate an initial rate, beginning October 1, 2000, of $73.57 per hour for these services. Texas Br. at 4, citing Texas Ex. B. SPA-00-18 provides that this rate could be adjusted in subsequent years by applying an inflation factor or by using prior year reported costs to "re-base," i.e. recalculate, the rate. The rate remained $73.57 until 2003.

Texas changed the rate in 2003 as a result of a mandate from the Texas Legislature to the Texas Interagency Council on Early Childhood Intervention (ECI Council) to review the services and funding system used by the ECI Council for programs under its purview. Texas Br. at 5. House Bill 1503, 76th Legislature, Regular Session, 1999, required the ECI Council to review its services and funding system. In response to this mandate, the Council hired the company Maximus as a consultant to evaluate the costs of delivering all ECI services, including developmental rehabilitative services, and to evaluate potential fee-for-service rates. Texas Ex. C.

Maximus conducted a random moment time study of developmental rehabilitation services providers during April 2002, and also obtained cost information during the period January 30 through July 12, 2002.[3] Texas Br. at 5. Maximus concluded that the cost

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[2](...continued)
practice. They include developmentally appropriate individualized skills training and support to foster, promote and enhance child engagement in daily activities, functional independence, and social interaction; assistance to caregivers in the identification and utilization of opportunities to incorporate therapeutic intervention strategies into daily life activities that are natural and normal for the child and family; and continuous monitoring of child progress in the acquisition and mastery of functional skills to reduce or overcome limitations resulting from disabilities or developmental delays. Texas Ex. A, at A-3.

[3] A random moment time study (time study) intercepts workers at random moments and records the activity in which they are engaged at that moment. Such studies are used in situations where the workers at issue perform different types of activities and/or work for different programs. Here the results were used,

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of delivering developmental rehabilitation services in 2003 was $119.69 per hour, rather than the original rate of $73.57. Texas Ex. D. A new rate of $119.69 per hour was proposed based on the Maximus study and, following a public rate hearing on April 4, 2003, the new rate was adopted. Texas Br. at 6.

In 2003 and again in February 2005, CMS Regional Office staff inquired about Texas's increased claims for developmental rehabilitative services. In 2003, Texas informed CMS about the Maximus time and cost study and asserted that the rate increase was due to increased costs of health services and "the participation of additional provider types in the delivery of these services, which made the costs included in the Maximus study more comprehensive and complete." Texas Br. at 6, citing Texas Ex. E, at E-1. After the 2005 inquiry, CMS notified Texas that it considered Texas's use of the Maximus methodology to be a significant change in its rate calculation methodology that required an amendment to Texas's state plan. Texas Br. at 7, citing Texas Ex. F. In response on June 29, 2005, Texas submitted a proposed state plan amendment (SPA-05-002), with a proposed effective date of April 1, 2005.[4] SPA-05-002 is based on the methodology used by Maximus to establish the $119.69 per hour rate. Texas Br. at 7. SPA-05-002 was still under review by CMS as of May 11, 2007, when CMS submitted its brief. CMS Br. at 3, n.1.

On November 30, 2006, after several deferrals, CMS notified Texas that it was disallowing $19,415,940 in federal financial participation for claims submitted in federal fiscal years (FFYs)

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[3](...continued)
at a minimum, to allocate what Texas terms "ECI overhead" and "host agency administration costs" (Texas Ex. A, at A-6) to the cost of delivering of developmental rehabilitative services. Both the $73.57 rate and the $119.69 rate described later were based on time studies. Texas submitted a draft request for proposals (for the consultant ECI hired to implement the state legislative mandate to study rates) indicating that the time study to be delivered must be statistically sound and meet other criteria. Texas Ex. C, at 9. Texas did not, however, submit a detailed explanation of either time study methodology actually used (although there is some information in the record about the methodology for the time study used to establish the $73.57 rate.

[4] Texas states that, while it submitted SPA-05-002 at CMS's direction, it "did not agree that a state plan amendment should be necessary . . . ." Texas Br. at 7.

2003, 2004, 2005 and Quarters I, II, and III of FFY 2006 for costs incurred for developmental rehabilitative services. These costs are the subject of Board Docket No. A-07-38. Subsequently, CMS disallowed $1,763,912 for Quarter IV of FFY 2006 (Board Docket No. A-07-95) and $1,134,189 for Quarter I of FFY 2007 (Board Docket No. A-07-96).

Discussion

1. The costs at issue were not claimed in accordance with SPA-00-18, Texas's approved state plan.

SPA-00-18 sets forth the following methodology for establishing uniform prospective reimbursement rates for developmental rehabilitative services:

> The [Texas Health and Human Services] Commission determines a prospective uniform reimbursement rate for the Texas Early Childhood Intervention Program (ECI) Medicaid programs. ECI reimburses Early Childhood Intervention program providers according to the reimbursement methodology. The Commission determines the rate based on costs contained in the ECI providers' Time and Financial Information (TAFI) reports, which are reported on a quarterly basis. The recommended rate is determined in the following manner:
>
> (1) Salaries and benefits for staff delivering developmental rehabilitation services are added to allocated costs for Early Childhood Intervention (ECI) overhead and host agency administration costs. Allocations are made using time study information from the time and financial information (TAFI) reports.
>
> (2) These total costs for developmental rehabilitation services are divided by the total direct service hours to calculate a cost per hour.
>
> (3) The resulting total cost per hour for developmental rehabilitation services is projected from the historical reporting period to the prospective rate period using the Personal Consumption Expenditures (PCE) Chain-Type Index.
>
> (4) The projected total cost per hour for developmental rehabilitation services is the proposed reimbursement rate. The reimbursement rate will be paid on an hourly basis, and will be pro-rated for 15-minute intervals.

> (5) The providers' reported costs will be examined annually to determine if it is necessary to re-base the rate.

Texas Ex. A, at A-6 (emphasis added).

Texas does not represent that Maximus used data from the TAFI reports to establish the 2003 rate, and, therefore, CMS found that Maximus used some cost data from other sources. Texas states that "Maximus conducted a random moment time study of developmental rehabilitation services providers during April, 2002, and also obtained cost information during the period of its study which lasted from January 30 through July 12, 2002." Texas Br. at 5.

Texas's admitted switch from the TAFI-based calculation methodology to a methodology based on a new time study and different cost data, on its face, creates a presumption that use of the Maximus methodology constitutes a material change in the state reimbursement policy.[5] The fact that the rates also increased by 62.7% further supports the presumption that the change was material.[6] A material change in a state's operation of its Medicaid program must be implemented by a state plan amendment. 42 C.F.R. § 430.12(c)(ii); see also Colorado Dept. of Health Care Policy and Financing, DAB No. 2057 (2006) and cases cited therein.

Relying on our prior cases on deference to a state's official interpretation of its state plan, Texas takes the position that its use of the Maximus methodology was not a material change for the following reasons. Texas argues that the plain language of SPA-00-18 does not require the rate to be based on data from TAFI reports. Texas Br. at 9. Texas states, "The state plan nowhere defines 'TAFI reports' nor, more importantly, describes what information from a 'TAFI report' is used nor specifically how it

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[5] Because Texas provided limited documentation as to the TAFI process and no documentation as to the Maximus process, we make cannot make an informed comparison between the two methodologies. For example, Texas did not document how Maximus determined providers' costs generally, how it conducted the time study, or how it calculated the rate. Texas provided only the rate summary by service prepared by Maximus. Texas Ex. D.

[6] We calculated the 62.7% increase as follows: $119.69 minus $73.57 equals $46.12; $46.12 divided by $73.57 equals 62.69%.

is used." Id. Rather, Texas asserts that, when it developed the initial rate, it "did not consider the reimbursement methodology to be limited to this source [i.e., the TAFI report] of cost information" (Texas Reply Br. at 3; see also Texas Br. at 5) and that SPA-00-18 allows the State to establish a rate by using "recent cost information" and any "statistically valid time study" (Texas Br. at 9, 10). Texas also asserts that the increase in the rate is the result of other factors, such as increased costs. Texas Br. at 6. Finally, Texas argues it did not actually change its methodology since both hourly rates were calculated with the same formula:

$$\frac{\text{Salaries + Benefits + Overhead and Administrative Costs}}{\text{Total Direct Service Hours.}}$$

Texas Reply Br. at 1.

We reject Texas's arguments.

First, while Texas asserts that "the state plan nowhere defines 'TAFI reports'," the introductory paragraph quoted above identifies "TAFI" as an acronym for "Time and Financial Information" reports. Moreover, as Texas explains elsewhere in its brief, TAFI reports are part of Texas's larger and comprehensive system for claiming Medicaid federal reimbursement both for direct services, such as these, and for administrative costs. Texas Br. at 9; Texas Reply Br. at 2-3. As Texas explained to CMS in 2000, the TAFI reports contain the quarterly expenses of "contracted providers of ECI services" that are "submitted electronically twice a year." CMS Ex. K, at 5.

Second, the plain language of SPA-00-18 expressly states that developmental rehabilitative services rates will be based on TAFI data.[7] The introductory paragraph to the five steps for calculating and adjusting the rate provides that the Commission

[7] Texas asserts that SPA-00-18's reliance on "TAFI reports" created an ambiguity in the plan because "the organizations providing these services are also able to claim federal matching funds for Medicaid administrative activities on the basis of information contained in TAFI reports." Texas Br. at 9. We see no reason why the fact that TAFI reports are used for multiple purposes creates ambiguity. Rather, as explained below, the fact that TAFI reports are used to calculate Medicaid administrative claims was arguably a factor in approval of the SPA-00-18 since use of different allocation methods for the same joint costs could result in duplicate claims.

"determines the rate based on costs contained in the ECI providers' Time and Financial Information (TAFI) reports." Texas Ex. A, at A-6. Texas is not correct that SPA-00-18 does not describe "what information from a 'TAFI report' is used nor specifically how it is used. " Texas Br. at 9. The plan refers to specific categories of costs to be used in calculating the rate and provides that allocation of overhead and host agency administration costs will be made using TAFI time study information. Texas provided a worksheet, dated August 2001, setting forth the mathematical process it applied to the TAFI data to calculate the original rate of $73.57. Texas Br. at 4, citing Texas Ex. B. This process tracks the state plan methodology for how developmental rehabilitation services rates should be calculated using the TAFI data under SPA-00-18. Contrary to what Texas argues, that methodology consists not only of the formula that Texas expresses as a fraction, but also of the allocation percentages determined from the TAFI time study and used to determine the amounts included in that formula.

Third, in response to CMS's questions at the time Texas proposed SPA-00-18, Texas affirmed that the rate is based on TAFI data, stating that "this cost based rate [for developmental rehabilitative services] is derived from the [TAFI] reports used for the Medicaid Administrative Claims." CMS Ex. K, at 4. Texas made no showing here that, in proposing SPA-00-18, it also informed CMS that it construed SPA-00-18 to allow it to re-base rates on other cost data or on any statistically valid time study it chose to conduct in the future. Further, Texas cannot reasonably rely on the reference to "providers' reported costs" in paragraph 5 of SPA-00-18 as creating such latitude. See Texas Br. at 10. Paragraph 5 states: "The providers' reported costs will be examined annually to determine if it is necessary to re-base the rate." In context, the only reasonable reading of this reference to "the providers' reported costs" is as a reference to the providers' costs reported on the TAFI report, since the prior provisions specifically identify the TAFI report as the source for the cost information to be used in setting the rates.[8]

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[8] Texas argues, "Since the approved rate methodology indicated that 'provider's reported costs will be examined annually to determine if it is necessary to re-base the rate,' both ECI (now DARS) and HHSC staff interpreted the state plan as allowing the adoption of a new rate based on this more current and comprehensive cost information." Texas Br. at 5. As evidence of this interpretation, Texas relies on a 2003 email explaining to CMS that "in accordance with the reimbursement

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Moreover, while the provision in paragraph 5 clearly permits Texas to use a different base year to calculate a new rate, nothing in that provision suggests that the data or formula used to calculate the "re-based" rate could be different from the data and formula specified in the prior provisions.

Fourth, Texas has failed to support its assertion that the 62.7% increase in the rate in 2003 was the result of such factors as increased costs, rather than a result of a material change to the methodology previously used under SPA-00-18.

- Texas cites increases in ECI employee salaries and benefits, relying on a "Salary Summary for ECI Program Employees, FY 2007." Texas Reply Br. at 4, citing Texas Ex. N. It points to the data for a "fully qualified early intervention specialist - professional" that indicates that the 2007 average salary for this worker represents a 49% increase over the average salary in 1999. Id. We reject this argument because the data on which Texas relies (the salary increase between 1999 and 2007) does not document the salary increase

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[8](...continued)
methodology approved by CMS that allows for annual examination of provider's costs to determine an appropriate rate, a time and cost study was conducted" and a new rate was adopted. Texas Ex. E, at E-4. Texas asserts that this statement shows that its official and contemporaneous interpretation of SPA-00-18 was that it "authorized the use of time and financial information collected by Maximus in calculating the rate." Texas Br. at 10; see Texas Reply Br. at 4-5. Citing South Dakota, Texas asserts that the Board should defer to this official interpretation.

We reject this argument. As we said in South Dakota, we defer to a state's interpretation only if the language of the plan is ambiguous and the interpretation relied upon is an official interpretation that is reasonable in light of the language and purpose of the plan and federal requirements. Above, we explain why Texas's position here is not reasonable in light of the language of SPA-00-18 as a whole. Also, the 2003 email was neither contemporaneous with the approval or implementation of SPA-00-18 in 2000 nor an official justification used by Texas when it approved the rate based on the Maximus calculations. Instead, the statement in the email is merely an after-the-fact explanation by an ECI employee to CMS, after CMS had questioned the rate increase. Texas Ex. E, at E-4. Indeed, the statement does not purport to be interpreting any specific language in the plan.

between 1999 and 2002 or how the 1999-2002 increase relates to the 62.7% rate increase in 2003 that resulted from applying the Maximus methodology.

- Texas points to the increase in the proportion of services provided by higher paid ECI workers. Texas Reply Br. at 4, citing Texas Ex. 0. Again, Texas relies on 2006 data; the relevant data would be the increase in services by higher paid ECI workers in 2002.

- Finally, Texas asserts that the rate increased because "the more recent data was thought to reflect the participation of additional provider types in the delivery of these services, which made the cost included in the Maximus study more comprehensive and complete." Texas Br. at 6, citing Texas Ex. E, at E-1. However, the record does not quantify the impact of adding such provider types or address whether they were properly added under the SPA-00-18 methodology.

Therefore, we conclude that Texas failed to show that the 2003 rate increase was due solely to increases in ECI costs and personnel, rather than to a material change in methodology in calculating the rate.

Moreover, Texas's position here, that SPA-00-18 allows it to re-base rates using any "time and financial information reported by providers in a statistically valid time study" (Texas Br. at 10), is unreasonable because it undermines a central purpose of Medicaid state plans. Medicaid state plans establish how costs are determined - that is why plans must "describe the policy and methods to be used in setting payment rates for each type of service . . . ." 42 C.F.R. § 447.201. CMS approves such plan provisions after determining that the methods result in payments that are "consistent with efficiency, economy, and quality of care" as required by section 1902(a)(30)(A) of the Act. If states can unilaterally change such methods, by, for example, changing time study methods, altering the source of data prescribed by the plan, and substantially modifying the mathematical process for calculating the components of a rate, without review by CMS, a plan provision would have limited utility in ensuring efficiency and economy of Medicaid rates.

Additionally, Texas' position that it has wide latitude to interpret SPA-00-18 exposes Medicaid to the risk of overstated claims. CMS approves parts of state plans in relation to other parts of a state's Medicaid claiming processes. For example, the TAFI reporting system is related to the Medicaid Administrative Claim (MAC) program and the time study was part of the cost

allocation plan for claiming Medicaid administrative costs, approved by the Division of Cost Allocation. Texas Br. at 3. Texas explains the TAFI report's relationship to the MAC program as follows.

> In accordance with 45 C.F.R. Part 95 the public assistance cost allocation plan must describe the methods for making administrative claims in the Medicaid program. When the Medicaid agency claims these costs pursuant to agreement with other public entities, such as schools, the MAC program must be supported by a system that has the capability to isolate the costs directly related to the administration of the Medicaid program from all other costs incurred by the public entity, <u>including the costs of directly providing Medicaid services</u> if the public entity is also a Medicaid provider. Therefore, the TAFI reports were created as a necessary and essential part of the MAC program to isolate the costs directly related to the administration of the Medicaid program.

Texas Reply Br. at 3 (emphasis added).

Thus, the fact that the TAFI data and codes were used to calculate both the direct service rate for these services and these providers' Medicaid administrative costs gave CMS an assurance that costs allocated to program administration would not also (and improperly) be included in calculating the direct service rates. Using one time study for allocating joint costs of a provider to direct service rates and another time study to determine program administrative costs could result in duplicate claims.

Finally, Texas tries to distinguish the circumstances here from those in other cases by pointing out that the Maximus process was "not used to make retroactive claims or adjustments to previous claims." Texas Br. 10, citing <u>Colorado</u>, DAB No. 2057 and <u>New Hampshire</u>, DAB No. 1862. In both those cases the Board ruled that a state may not unilaterally modify its state plan methodology for calculating rates. The same principle applies regardless of whether a state is filing a new claim or adjusting a prior claim.

2. CMS could not reasonably use the $73.57 rate to calculate the disallowance amounts, but Texas did not show that the higher rate it paid did not exceed the rates permissible under the approved state plan.

In Docket No. A-07-88, CMS stated that "the disallowance of $19,415,940 [Federal Financial Participation] reflects the difference between $73.57 (the approved reimbursement methodology) and $119.69 (the unauthorized reimbursement methodology)." CMS disallowance letter of November 30, 2006. The subsequent disallowances are also based on this difference, multiplied by the relevant units of service.

Texas asserts that the disallowance amount is overstated and inconsistent with the approved state plan because "CMS did not utilize the most recent TAFI reports to calculate what the rate should have been and from that information determine what the State's claim should have been." Texas Br. at 1. Texas argues that CMS's calculations should have reflected the amount Texas could have claimed under the SPA-00-18 methodology if it had used the TAFI data to re-base the rates for the years at issue. Texas Br. at 11-12. Texas presented a set of calculations that it alleges were based on 2006 TAFI data and show that a re-based rate for 2006 would be $136.93. Texas then applied the PCE inflation factor for each year of the disallowance period to reduce this amount retrospectively, yielding the following rates: $126.21 for 2003, $129.12 for 2004, and $132.85 for 2005. Texas Ex. P. Since these amounts exceed the $119.69 rate that Texas paid and used for its Medicaid claims, Texas asserts that the disallowances should be reversed. In other words, Texas asserts that, even if CMS is correct that the Maximus method was inconsistent with the approved state plan, this did not result in any claims in excess of the amount to which Texas was entitled under its state plan.

We agree with Texas that the $73.57 does not represent an appropriate rate under the "approved reimbursement methodology," contrary to what the disallowance letters suggest. As Texas points out, the "approved reimbursement methodology is not a specific dollar amount but a method and process for calculating a dollar amount." Texas Br. at 11. In response, CMS provides no justification for use of the $73.57 amount to calculate the disallowances, merely asserting that the argument Texas makes about how CMS calculated the disallowance is "not relevant to this proceeding." CMS Br. at 10. CMS's calculation of a disallowance is relevant, however, since it is part of the determination being reviewed and is based on an interpretation of the state plan just as is the original claim. The plain language of the approved state plan contemplates that an inflation adjustment will be applied each year to project the total cost per hour from the historical reporting period to the prospective rate period to determine a proposed rate and, alternatively, permits Texas to re-base the rate if necessary after examining

reported costs.[9] CMS cannot reasonably state that Texas must follow the approved methodology and then ignore that methodology and its purpose. The $73.57 was based on 1999 costs projected to 2000 and does not take into account any inflation factor for subsequent years. Thus, CMS could not reasonably rely on that rate amount as sufficient to meet the requirements of section 1902(a)(30)(A) during the period 2003 through 2006. The data on rising salary costs provided by Texas supports this conclusion (even if it does not support the conclusion for which Texas presented it).

While we agree with Texas that it is entitled to federal funding for the disallowance period so long as the claims do not exceed the proper amounts calculated in accordance with SPA-00-18, the method Texas proposes for calculating the rates for the years 2003-2006 is not in accordance with SPA-00-18. In the documents it submitted to us, Texas used 2006 TAFI data and "projected" back to earlier years. SPA-00-18, however, provides that the rate "is projected from the historical reporting period to the prospective rate period using the Personal Consumption Expenditures (PCE) Chair-Type Index." Texas Ex. A, at A-6. As Texas explained to CMS in 2000, "When the rates are rebased, they will be set for the one-year period immediately following the original rate period." CMS Ex. K, at 6. Therefore, to re-base the rate for 2003 consistent with SPA-00-18, Texas would have had to use cost data from 2002, not 2006.[10] Since the calculations Texas presents here do not use 2002 data, Texas has failed to prove, pursuant to SPA-00-18, either the amount of a re-based rate for 2003 or the amount for any subsequent year.

At a minimum, however, the disallowances should be reduced by the amount determined by multiplying the units of service by the difference between the $73.57 rate CMS used and the rates

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[9] We note that the approved state plan permits Texas to decline to adopt a proposed, projected reimbursement rate based on considerations such as budget constraints. Texas Ex. A, at 6. Texas approved the $119.69 rate in April 2003 after a hearing, however, so there is no reason to believe it would not have approved a lower rate calculated using the approved methodology.

[10] Texas tries to justify use of the 2006 data by referring to it as the most current data. We suspect, however, that there may be other reasons, such as that the 2002 data is no longer available. Clearly, had Texas followed its approved state plan in 2003, it could not have based the rate on data from 2006.

calculated by applying the appropriate PCE inflation factors (starting with the factor for the year after the year Texas used to calculate the $73.57) to project the 1999 total costs forward to determine an appropriate rate for each relevant year, pursuant to SPA-00-18. While Texas applied some PCE factors to the 2006 TAFI data, neither party has identified the correct factors for all of the years in question. Thus, we do not have sufficient information to calculate the minimum amount by which the disallowances should be reduced.

We are also remanding these disallowances to CMS for other reasons. First, if Texas has the data from the TAFI reports for the appropriate historical period and presents it to CMS, within a reasonable time period set by CMS, this might also provide a basis for further reducing the disallowance amount. Second, if the plan amendment Texas proposed (SPA-05-00) were approved with an effective date during the disallowance period, this might also require withdrawal of part of the disallowances. The Board previously stayed Docket Number A-07-38 while the parties discussed this proposed amendment. The current status of the proposal is somewhat unclear, however. The parties stated in their briefs that they were still discussing the proposal, but it is unclear from the record whether or not the time period in which the amendment would automatically be considered approved (which is extended if CMS requests additional information, as it did here) has now expired. See 42 C.F.R. §§ 430.16, 447.256.

Conclusion

Based on the foregoing analysis, we uphold the disallowances in principle but remand to CMS to recalculate the disallowance amounts consistent with the guidance provided above. If the parties do not reach a mutually acceptable solution to how to recalculate the disallowances, Texas may return to the Board within 30 days of receiving a CMS determination of the amount.

/s/
Leslie A. Sussan

/s/
Donald F. Garrett

/s/
Judith A. Ballard
Presiding Board Member