

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Maine Department of Health and Human Services
Docket No. A-07-102
Decision No. 2168

DATE: March 31, 2008

DECISION

The State of Maine, through its Department of Health and Human Services (MDHHS) appeals a determination by the Centers for Medicare & Medicaid Services (CMS) disallowing \$255,213 in federal financial participation (FFP) that Maine claimed under the Medicaid program for the period January 1, 2005 through September 30, 2006. CMS disallowed the costs of medical assistance provided to Medicaid recipients enrolled in a State-run health insurance program for employees of small businesses and other individuals. CMS said it had determined that the employers' contributions to the State-run program on behalf of Medicaid-eligible employees and their dependents were applicable credits that should have reduced Maine's claims for FFP.

Maine challenges CMS's conclusion that the employers' contributions were applicable credits. Maine also challenges CMS's calculation of the disallowance amount. In response, CMS reduced the disallowance amount to \$233,367. CMS Br. at 1, n.1. Maine replied that the disallowance amount was still overstated because CMS disallowed Maine's entire claim for FFP in managed care capitation payments for Medicaid recipients participating in the health insurance program.

As explained below, we conclude that the employers' contributions towards the cost of providing health insurance for their employees (and their dependents) who were Medicaid recipients were receipts that were applicable to Maine's costs of providing medical assistance for those recipients. Therefore, the employer contributions should have been treated as applicable credits that reduced the amount of the Medicaid expenditures in which Maine claimed FFP. We also conclude that CMS erred in calculating the disallowance amount. CMS disallowed FFP in the total expenditures for managed care capitation payments made on behalf

of the Medicaid recipients each quarter, rather than disallowing only the difference between the amount of FFP Maine claimed and the amount of allowable FFP based on net expenditures (total expenditures reduced by the amount of the applicable credits). Accordingly, we sustain the disallowance in principle, but remand the appeal for CMS to recalculate the amount of the disallowance consistent with our decision.

Applicable law

The federal Medicaid statute, title XIX of the Social Security Act (Act), provides for joint federal and state financing of medical assistance for certain needy and disabled persons. Act §§ 1901, 1903.¹ Each state that chooses to participate administers its own Medicaid program under broad federal requirements and the terms of its own state plan, which must be approved by CMS on behalf of the Secretary of Health and Human Services. Act § 1902; 42 C.F.R. §§ 430.10-430.16. A state with an approved state plan is entitled to receive FFP in "an amount equal to the Federal medical assistance percentage ["FMAP"] . . . of the total amount expended . . . as medical assistance under the State plan." Act § 1903(a)(1). "Medical assistance" is defined as "payment of part or all of the cost" of specified services and care when provided to Medicaid-eligible individuals under the state plan. Act § 1905(a). Under certain circumstances, monthly capitation payments may be treated as amounts expended for "medical assistance" when made on behalf of Medicaid-eligible individuals. Act § 1903(m); see Minnesota Dept. of Human Services, DAB No. 2122 (2007).

The FMAP is the rate of FFP that a state receives in its expenditures for medical assistance and generally ranges from 50 percent to 83 percent of the cost of medical assistance, depending the state's per capita income and other factors. 42 C.F.R. § 433.10. Maine's FMAP was 64.89% during FFY 2005 and 62.90% during FFY 2006. CMS Ex. A (Quarterly Statements of Expenditures); CMS Br. at 2. The non-federal share that states must provide in order to receive FFP is sometimes referred to as the state share. See 42 C.F.R. § 433.51 (2006).

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, and the U.S.C.A. Popular Name Table for Acts of Congress.

Principles for determining the allowability of costs for which states claim federal funding under grant programs such as Medicaid are found in Office of Management and Budget (OMB) Circular A-87, "Cost Principles for State, Local, and Indian Tribal Government," codified at 2 C.F.R. Part 225 (70 Fed. Reg. 51,910 (Aug. 31, 2005)), and made applicable to states by 45 C.F.R. § 92.22(b). The cost principles require that the costs a state claims must be reduced by "applicable credits," or "those receipts or reduction of expenditure-type transactions that offset or reduce expense items allocable to Federal awards as direct or indirect costs." 45 C.F.R. Part 225, App. A, ¶¶ C.i, C.4.a, D.1. Examples of applicable credits include purchase discounts; rebates or allowances, recoveries or indemnities on losses; sale of publications, equipment, and scrap; income from personal or incidental services; and adjustments of overpayments or erroneous charges. Id. at ¶ C.4.a.

Background

Effective January 1, 2005, Maine established a health insurance program, called "DirigoChoice," to provide health insurance to uninsured and underinsured employees of small businesses in Maine. Maine Ex. 1, at ¶¶ 5-7, 28 (declaration of Karynlee Harrington, Executive Director of the Dirigo Health Agency). DirigoChoice "attempts to pool the resources of the State and its many small business and sole proprietorships, to create affordable health insurance coverage options for owners employees, and their dependents." Id. at ¶ 10.

DirigoChoice is administered by the Dirigo Health Agency (DHA), an independent State agency that provides a "comprehensive benefit package of health care services to DirigoChoice enrollees." Id. at ¶ 11. DirigoChoice is open to all Maine businesses with 50 or fewer employees, and offers coverage to employees of eligible businesses, self-employed individuals, unemployed Maine residents, and individuals employed in eligible businesses that do not offer health insurance. Id. at ¶ 10; CMS Ex. B, at 2 (group health insurance agreement).

Eligible employers and sole proprietorships that elect to participate in DirigoChoice pay a monthly membership fee and make monthly contributions for each participating employee. Maine Ex. 1, at ¶ 11. Some of the individuals enrolled in DirigoChoice also pay monthly contributions, in amounts that vary depending on their income. For that purpose, Maine has divided the DirigoChoice membership into ascending income-based groups, A through F, and provides sliding-scale subsidies towards the members' monthly contributions. Group A enrollees meet the

eligibility criteria for participation in Maine's federally-funded Medicaid program (MaineCare); they receive 100% subsidies for their DirigoChoice contribution and pay no out-of-pocket costs to participate in DirigoChoice. *Id.* at ¶¶ 12-14. Groups B through E enrollees receive increasingly smaller State subsidies while Group F enrollees receive no subsidies and pay their full costs to participate in Dirigo Choice. *Id.* The employer contribution is set at a minimum of 60% of the cost of covering each employee, who pays the remaining percent, less whatever income-based subsidy the employee receives from the State. Maine Reply Br. at 7; Maine Reply Ex. 1 (Harrington Supp. Decl.) at ¶ 9; CMS Ex. C, at unnumbered 15th page (reprint from dirigohealth.maine.gov). The employers' contributions cover the costs of insuring only the employee, and, while employers are required to offer family coverage, they are required to pay only the 60% minimum of the cost of covering each employee, although "a handful" of the DirigoChoice employers voluntarily elect to make contributions on behalf of employees' families. Maine Reply Ex. 1, at ¶ 9.

Maine contracts with Anthem Blue Cross/Blue Shield of Maine (Anthem) to deliver medical services to DirigoChoice enrollees. Maine Ex. 1, at ¶¶ 11, 17; Maine Ex. 2, at ¶¶ 7, 8 (declaration of Kirsten Figueroa, Deputy Commissioner of Finance, MDHHS). Anthem has two contracts with Maine. The contract between Anthem and DHA covers members of Groups B through F (enrollees not eligible for Medicaid) through a group health insurance plan. Another contract, between Anthem and MDHHS, Maine's State Medicaid agency (Maine Ex. 2, at ¶ 3), covers Group A members (those eligible for Medicaid) under a managed care contract.² *Id.* The purpose of this "dual arrangement," Maine reports, is to

² Maine's submissions do not refer to DirigoChoice Group A enrollees as Medicaid recipients, but describe them as "eligible for MaineCare," as "Medicaid-eligible participants in . . . DirigoChoice" and as "meet[ing] the financial eligibility criteria for participation in the State's Medicaid program, MaineCare." Maine Br. at 7; Maine Ex. 7; Maine Ex. 1, at ¶ 14. Maine nowhere denied that it claimed FFP under the Medicaid program for the costs of providing them with DirigoChoice coverage and services, and reports that Group A enrollees also receive prescription drugs and "wrap around" coverage, in addition to the services they receive under the managed care contract with Anthem, "to ensure that they have access to the full panoply of benefits available under the state Medicaid plan." Maine Ex. 2, at ¶ 10. We refer to Group A enrollees as Medicaid recipients.

help ensure that DirigoChoice participants do not experience "gaps" in health insurance coverage as they "move in-and-out of MaineCare eligibility." Maine Ex. 2, at ¶ 7. In return, DHA and MDHHS each pay monthly capitation payments to Anthem on behalf of DirigoChoice enrollees served under the group health insurance plan (for Groups B-F) and the managed care contract (for Group A), respectively. *Id.* at ¶ 8; Maine Ex. 1, at ¶¶ 19, 20.

An employer eligible to participate in DirigoChoice is not required to participate. Once an employer becomes a member, however, the employer must contribute a minimum of 60% of the monthly premium for each employee. Maine Reply Ex. 1, at ¶ 9; CMS Ex. C, at unnumbered 15th page. The parties disagree over minor details of the processing of the employers' contributions. CMS, citing language in the group health insurance agreement between DHA and Anthem, asserts that Anthem bills the employers, collects their monthly contributions, and places them in "a DHA lock box." CMS Br. at 3, citing CMS Ex. B, Sch. F. Maine reports that the lock box is owned and controlled by DHA and administered by a third party "servicer," that the lock box funds are deposited in the State of Maine account, and that Anthem merely "generates invoices for DirigoChoice employers," who then send payments to the lock box. Maine Reply Br. at 3; Maine Reply Ex. 1, at ¶ 5. Maine also refers to employer contributions as being paid to DHA. Maine Br. at 14. Schedule F to the agreement between Anthem and DHA says that the charges to the employers will be "sent to the DHA lock box, through Anthem's agent." CMS Ex. B, Sch. F. For the purposes of this decision, what is important is that the employer contributions are ultimately received by DHA and deposited into a State of Maine account.

Maine reports that each month DHA transfers funds to MDHHS to reimburse MDHHS for the state share of the cost of providing medical assistance to DirigoChoice Group A enrollees who were eligible for Medicaid as a result of a May 2005 increase in Maine's Medicaid financial eligibility ceiling. Maine Br. at 7. Apparently, however, the amounts transferred do not include all of the employer contributions on behalf of Medicaid recipients enrolled in DirigoChoice. Maine asserts that "[t]he amounts transferred are not based on the employer payments DHA has collected on behalf of DirigoChoice enrollees, and are small in comparison to the costs DHHS incurs providing medical assistance to Group A enrollees eligible for MaineCare." Maine Br. at 7-8, citing Maine Ex. 2, at ¶ 15-17.

Funding for DirigoChoice consists of an initial, one-time appropriation of "seed money" from State General Funds, employer and employee contributions, and, after its first year of

operation, "savings offset payments," which are assessments levied on "health insurers doing business in Maine" intended to represent their savings resulting from the establishment of DirigoChoice and other provisions of the Dirigo Health Reform Act. See Maine Br. at 7; Maine Ex. 1, at ¶¶ 23-26. Maine reported that during the disallowance period, DHA received \$53,000,000 in General Funds (seed money), \$28,697,801.04 in contributions from employers and employees, and \$9,087,152 in savings offset payments. Maine Ex. 1, at ¶ 27 (chart).

At issue are Maine's claims for FFP in the costs of medical assistance provided to members of Group A - DirigoChoice enrollees who are Medicaid recipients. CMS's disallowance letter states that the employers' contributions toward DirigoChoice represent applicable credits and that Maine's failure to reduce its costs claimed for federal reimbursement by the amount of the contributions meant that Maine received an overpayment of federal funding. Maine Ex. 3 (disallowance letter).

Analysis

- I. The employers' contributions to Maine for DirigoChoice coverage for their employees (or their dependents) who were Medicaid recipients were applicable credits that reduced Maine's cost of providing Medicaid services to those employees.

Applicable credits, as noted above, are "those receipts or reduction of expenditure-type transactions that offset or reduce expense items allocable to Federal awards as direct or indirect costs." 45 C.F.R. Part 225 (OMB A-87), App. A, ¶¶ C.i, C.4.a, D.1. The Board has repeatedly stated that a common theme in cases where states have had to account for applicable credits is "the receipt of monies (or reductions of expenditures) by a state related to its federally funded program which, if unaccounted for in the program, would result in a savings or gain to the state alone." Michigan Dept. of Management and Budget, DAB No. 1994, at 9 (2005); Colorado Dept. of Personnel & Administration, DAB No. 1872, at 10 (2003); Oregon Dept. of Human Resources, DAB No. 1298, at 10 (1992). Not all funds a state receives are applicable credits. The Board has, however, found a credit to be applicable to a program expenditure where there is a direct relationship or nexus between the questioned receipt and the federally-funded program. Michigan at 8; Colorado at 10; California Dept. of Finance, DAB No. 1592, at 6 (1996), aff'd, Brown v. HHS, No. S-96-1712 FCD/GGH (E.D. Cal. June 16, 1999).

Here, the employers' contributions for DirigoChoice health insurance for their employees (or their dependents) who were Medicaid recipients were clearly applicable credits because they were "receipts or reduction of expenditure-type transactions." Each employer made monthly contributions on behalf of individual employees enrolled in DirigoChoice, with the total amount of the payment related to the number of employees so enrolled and the cost of the premiums for those employees. Maine Reply Ex. 1, at ¶ 9 (employers pay 60% of the cost of covering each employee); Maine Reply Br. at 3 ("employers make payments on behalf of their employees"); Maine Reply Br. at 5 (employers "pay contributions on behalf of employees" towards "the costs of providing state-subsidized healthcare to interested employees"). DHA, a State agency, received the employers' contributions, including contributions on behalf of Medicaid recipients.³ Although the corresponding monthly capitation payments to Anthem to cover the Group A enrollees were made by MDHHS, rather than by DHA, this does not matter. The employers' monthly contributions nonetheless reduced the State's costs of providing Medicaid services to DirigoChoice enrollees. In the absence of the employer contributions, Maine would have had to pay 100% of the cost of covering each Medicaid recipient employee, instead of only the employee's share. Maine Reply Ex. 1, at ¶ 9. The contributions therefore "offset or reduce[d] expense items allocable" to Maine's federal Medicaid award. There was a definite nexus or direct relationship between the employers' contributions on behalf of Medicaid recipients and Maine's federally-funded Medicaid program, as the employers were contributing toward the cost of health care services for their employees and their dependents. For Medicaid recipients, this meant the insurance premiums in the form of managed care capitation payments that MDHHS made to Anthem. The status of an individual employee as a Medicaid recipient affected the amount of the monthly employer contribution, since each Medicaid

³ Consideration of the receipts by any State agency reflects the well-established principle, which Maine acknowledges, that a state as a whole must be viewed as a single entity responsible for the administration of Medicaid funds. Maine Br. at 14. This principle derives from the definition of "grantee" (now at 45 C.F.R. § 92.3) and from use of the word "State" in section 1903(a) of the Act. See, e.g., California at 11-12; Oregon at 14 (citing definition of "grantee" then at 45 C.F.R. § 74.3). Based on this principle, the character of funds as applicable credits is assessed at the point at which funds are initially received by the state. See Colorado at 14, citing Oregon at 11.

recipient was part of Group A under the DirigoChoice plan, and this affected what services were covered under the plan and the amount of the capitation payment that MDHHS made to Anthem.⁴

Maine argues that the employers' contributions are not applicable credits because they do not arise "directly out of (rather than incidental to) the operation of" Maine's federal Medicaid award or out of a grant-related expenditure. Maine Br. at 17, citing Michigan, Colorado, California and Pennsylvania Office of the Budget, DAB No. 1234 (1991), aff'd, 996 F.2d 1505 (3rd Cir. 1993), cert. denied, 510 U.S. 1010 (1993). Maine likens this case to Oregon and Hawaii Dept. of Social Services and Housing, DAB No. 779 (1986). In those cases, the Board found that the states did not have adequate notice that funds derived from taxes imposed on the gross receipts of all businesses in the state, including Medicaid providers (Hawaii), or from a flat fee the State imposed on each driver's license it issued or renewed (Oregon), constituted applicable credits. Maine argues that the employer contributions, like the receipts in those cases, "did not result from the receipt of federal funds by the State," or "arise out of the operation of the Medicaid program" (Oregon at 11-12) or "out of the transaction of the State paying the [Medicaid] providers" (Hawaii at 7). Maine Br. at 18-19. Maine argues that the employers' contributions, like the taxes and fees in Oregon and Hawaii, are not applicable credits because of what the Board described as the "remoteness of the relationship with federal Medicaid funds." Oregon at 12-13, n.8. Maine argues that the DirigoChoice program, like Oregon's fund for accident victims financed with drivers license fees, is "separate and apart from Medicaid," noting that fewer than 2% of the individuals who participated in DirigoChoice during the period of the disallowance were enrolled in Medicaid. Maine Br. at 20; Maine Ex. 1, at ¶ 21.

The employers' contributions at issue here are readily distinguishable from the taxes and fees in Hawaii and Oregon, which were levied on all entities in the state without regard to their involvement with the state-funded health program for which

⁴ Maine disputes CMS's use of the word "premiums" to describe the employers' contributions, on the ground that the employer monthly contributions "do not reflect the full cost of an employee's participation." Maine Reply Br. at 3. Clearly, however, the employers were contributing amounts intended to cover a percentage of the premium cost each month (which for Medicaid recipients was the capitation payment amount set under the agreement between MDHHS and Anthem).

the state claimed FFP. The employers' contributions, by contrast, were not received from all employers in Maine, but from only those participating in DirigoChoice, and the amounts contributed included amounts identifiable to specific individual Medicaid recipients, determined as a percentage of the amount paid by MDHHS to Anthem on behalf of each recipient each month.⁵ Unlike Hawaii, where the Board found that the taxes imposed on all businesses were neither "a quid pro quo" nor "paid in exchange for the Medicaid reimbursement," the employers here made their contributions to DirigoChoice specifically in exchange for health insurance coverage for their employees, which was funded partially by the State and, in the case of employees who were Medicaid recipients, by CMS. Hawaii at 14. And unlike Oregon's fund for persons injured in motor vehicle accidents, the DirigoChoice program is not separate and apart from Medicaid, but rather is, in fact, a significant part of Maine's Medicaid program with respect to Medicaid recipients who are DirigoChoice enrollees.

Maine argues that the employers' contributions here did not "arise out" of the Medicaid program as in cases Maine cites where a state "either received a rebate based on federal expenditures or earned interest using federal funds." Maine Br. at 18, 20. That the employer contributions at issue here arose from the DirigoChoice program does not mean that they were not applicable credits or that there was no nexus between the receipts and Maine's federally-funded Medicaid program. In California, the Board found that interest earnings on *employee* contributions to a retirement fund for State employees were applicable credits, where the State used those interest earnings to defray its own employer contributions to the fund, for which the State claimed FFP. The interest earnings the State acquired were applicable credits even though the interest was not earned on federal monies and the State arguably would have operated the retirement fund for State employees in the absence of the federal programs under which the State claimed FFP in its contributions. Key to the Board's decision was the savings the State realized in operating the federal programs that had contributed to the retirement fund. "[B]y using the funds [interest earned on employee contributions] to cover amounts that otherwise would have been paid as employer

⁵ Maine argues that instead of receiving payments from employers participating in DirigoChoice, it could have "imposed a tax on all small businesses, deposited the receipts in its General Funds, and then appropriated funds to finance DirigoChoice." Maine Br. at 21. That is not the situation before us, and we do not address that hypothetical arrangement.

contributions, [the State] in effect received a discount on its [retirement program] expenses." California at 7. The Board concluded that there was a nexus between the interest earnings and California's retirement system for its employees to which the federal government contributed, because the interest earnings "arose directly out of the operation" of the retirement system. Id. Here, the employers' contributions on behalf of their employees or dependents who were Medicaid recipients reduced the amount that Maine was required to pay to provide Medicaid services to those employees. There was also, as we discussed above, a nexus between those contributions and the MDHHS payments to Anthem in which Maine claimed federal Medicaid funds.

Finally, as Maine recognizes, the examples of applicable credits provided in the regulatory definition (which include purchase discounts and rebates) are not an exhaustive or all-inclusive list, and the fact that employer contributions to insurance costs might not be one of the examples in the regulatory definition or may not have been specifically addressed in prior Board decisions does not mean that they are not applicable credits, nor that Maine could not have known they would be treated as such. 45 C.F.R. Part 225, App. A, ¶ C.4.a; Maine Br. at 16, citing Pennsylvania.

Accordingly, we conclude that the employers' contributions on behalf of Medicaid recipients were applicable credits that reduced Maine's cost of providing medical assistance to individuals who were employees of participants in the DirigoChoice program (and their dependents) and which should have been deducted from Maine's claims for FFP.

II. The employers' contributions were not protected from disallowance by the state share regulation.

Maine also argues that the rule on applicable credits does not support the disallowance because Maine funded its state share of Medicaid expenditures on behalf of DirigoChoice enrollees from permissible sources as specified at 42 C.F.R. § 433.51(b). That regulation permits states to use "public funds" as the state share of Medicaid expenditures if the funds "are appropriated directly to the State or local Medicaid agency, or transferred from other public agencies (including Indian tribes) to the State or local agency and under its administrative control, or certified by the contributing public agency as representing expenditures eligible for FFP under this section." 42 C.F.R. § 433.51(b) (2006). Maine asserts that the state share of Medicaid expenditures on behalf of DirigoChoice enrollees permissibly derived "primarily from state appropriations, as well

as occasional transfers of funds to MDHHS from DHA, a public agency," and argues that CMS has identified no aspect of DirigoChoice or its funding that is inconsistent with the regulation. Maine Br. at 11. Maine cites the statement of CMS's predecessor in Texas Dept. of Human Resources, DAB No. 381 (1986), with which the Board agreed, that "if the funds here qualify as the matching share [of Medicaid expenditures in which a state claims FFP], they would not be subject to the applicable credit requirements." Texas at 4; see also Minnesota Dept. of Human Services, DAB No. 2122, at 16 and n.8 (2007), and citations therein.

Maine's reliance on the state share regulation and on prior Board decisions addressing intergovernmental transfers or donated funds is misplaced. CMS did not find that the funds transferred from DHA to MDHHS were applicable credits. The disallowance letter makes no findings regarding Maine's appropriation or transfer of funds among its State agencies. Instead, the disallowance is premised on the State's receipt of employers' contributions made to cover health insurance for Medicaid recipient employees or dependents that reduced the overall costs, to the State as a whole, of its Medicaid program. Maine Ex. 3, at 1 (disallowance letter). Maine realized those savings irrespective of whether or not DHA ultimately transferred some funds that may have been derived from the employers' contributions to MDHHS to fund the state share of Medicaid expenditures.

Maine also argues that parts of the Medicaid statute and regulations that do address a state's receipt of funds from outside of state government permit Maine to receive the employers' contributions without consequence. Those provisions require that a state's claim for FFP in expenditures for medical assistance be reduced by the amount of certain donations the state receives from health care providers, which the statute refers to as "provider-related donations." Act § 1903(w)(1)(A); 42 C.F.R. Part 433, Subpart B (§§ 433.50-433.74). Maine argues that there is no similar rule against Maine collecting "voluntary contributions from private employers" and notes that employer participation in DirigoChoice is voluntary. Maine Br. at 14-15. Maine cites Texas, in which the Board reversed a disallowance attributable to funds the state received from hospitals to pay a portion of the salaries of state Medicaid eligibility workers stationed in the hospitals. Maine argues that the Board held there that the absence, at that time, of any regulations addressing the use of donations as the state share, other than regulations permitting donations to fund Medicaid training expenses, meant that there was a "policy vacuum" in which the state, under the circumstances in that case, could reasonably

expect to use the funds from the hospitals as part of its share of Medicaid expenditures. Maine Br. at 15, citing Texas at 5-6.⁶

This argument ignores key aspects of the employers' contributions noted above. The employers made their contributions as a condition of their participation in DirigoChoice and as consideration for DirigoChoice coverage of their employees. While employer participation was voluntary, employers that elected to participate were required to contribute specific amounts for coverage for each of their individual employees. These were not funds the employers intended to donate to the State Medicaid program. We thus do not accept Maine's characterization of the employers' contributions as donations or donated funds, or Maine's argument that its receipt of the employers' contributions was protected by the restrictions on provider-related donations and taxes.⁷

III. The disallowance amount does not reflect the basis for the disallowance.

As noted above, the corrected disallowance amount (\$233,367) represents Maine's entire claim for managed care payments for Medicaid recipients enrolled in DirigoChoice. The record shows that the revised disallowance amount is the result of adding

⁶ But see Tennessee Dept. of Human Services, DAB No. 1094 (1989) (regulation in the former AFDC program permitting states to use donations as the state share of staff training expenses supported an inference that the federal agency intended donations to be prohibited as the state share in all other areas). Prior to the time the Texas decision was issued but after the relevant time period in that case, CMS's predecessor issued regulations permitting donated funds to be used as the state share, a fact the Board noted in Texas. Additionally, section 1903(w) of the Act, enacted in 1991, permits states to receive donations in the form of expenditures by hospitals, clinics, or similar entities for the direct costs of State agency personnel stationed therein who perform Medicaid eligibility determinations or provide other outreach services to individuals eligible or potentially eligible for Medicaid. Act § 1903(w)(2)(C).

⁷ Maine did not assert that any of the employers who made payments to DirigoChoice for coverage for Medicaid recipient employees were health care providers. Thus, we need not consider whether any payments from employers qualified as permissible provider donations under the statute and regulations.

together the total amounts of FFP Maine claimed for all the managed care payments for the quarters in question, rather than just the FFP in the unallowable amounts covered by employer contributions. CMS Ex. A (Maine's Quarterly Medicaid Statements of Expenditures); Maine Exs. 4-6 (CMS letters deferring Maine's claims).⁸

The treatment of all of the payments MDHHS made to Anthem as unallowable is inconsistent with the disallowance letter, which cited Maine's failure to "offset the total payments claimed for Medicaid eligible DirigoChoice members by the amount of contributions paid by the member's employer." Maine Ex. 3, at 1. The record also indicates, and CMS does not dispute, that the employers' contributions were generally only 60% of the cost of covering each employee, with Maine paying the remaining amount on behalf of employees and their families who are Medicaid recipients. Maine Reply Ex. 1, at ¶ 9. The record shows that the employers' contributions on behalf of Medicaid recipients did not account for Maine's entire cost of providing medical assistance to those recipients in which Maine claimed FFP. Thus, even the corrected disallowance amount clearly overstates the extent to which Maine's claims for FFP resulted from a failure to treat employer contributions as applicable credits.

We thus agree with Maine that a determination that employers' contributions on behalf of Medicaid recipients enrolled in DirigoChoice were applicable credits, which we make here, does not mean we should uphold the full disallowance.⁹ The record,

⁸ The reduction of the disallowance amount to \$233,367 merely corrects for the fact that CMS originally disallowed the amount of Maine's total expenditures for managed care capitation payments (\$58,885) for the quarter ended March 31, 2006, rather than just the amount of FFP that Maine claimed in the expenditures (\$37,039), as CMS did for the other quarters. CMS Br. at 1, n.1; see CMS Ex. A, at 10th unnumbered page, line 18A.

⁹ Maine also argues that the disallowance amount "fails to take into account that employer contributions make up only a small percentage of state funding for DirigoChoice" and notes that DHA draws "on a number of sources to finance DirigoChoice . . ." Maine Br. at 22. The proportion of funding for the operation of the entire DirigoChoice program represented by employer contributions is irrelevant to the determination of the amount of contributions employers made on behalf of Medicaid recipients, which effectively reduced Maine's cost in the managed
(continued...)

however, does not contain sufficient information to permit us to calculate the disallowance amount. We know the total amount of the payments for each quarter but the employer contribution was not necessarily always 60%, and some employers may have made optional contributions on behalf of employees' dependents. A DirigoChoice accountant spreadsheet that CMS provided, while listing contributions from individual employers, does not clearly indicate the amount of contributions attributable to Medicaid recipients, and covers only one month of the disallowance period. CMS Ex. G.

Accordingly, while we sustain the disallowance in principle based on our conclusion that Maine received applicable credits, we remand the appeal for CMS to determine the amount of such applicable credits consistent with our conclusion. On remand, Maine must provide to CMS the information needed to calculate a correct disallowance amount if it has not already done so.¹⁰ If the parties cannot agree on the correct amount, CMS should provide Maine with a written notice of its determination, and Maine may appeal that determination to the Board.

IV. CMS has not developed the alternate bases for a disallowance that it raised in its brief.

In its brief, CMS proposes other possible bases for disallowing amounts associated with the DirigoChoice program, but none of those bases would justify disallowing all of the FFP Maine claimed.

CMS argues that Maine has made "no attempt to account for savings offset payments from insurance companies that are provided for in the Dirigo plan." CMS Br. at 10. CMS did not mention this basis in its disallowance letter, and does not explain how the savings

⁹(...continued)
care capitation payments that MDHSS made to Anthem.

¹⁰ Maine did not state the amount that the employers paid to Maine on behalf of DirigoChoice employees and dependents who were Medicaid recipients (Group A enrollees). Maine reported that 53 employees were enrolled in DirigoChoice Group A during the disallowance period (out of a total of 276 DirigoChoice Group A participants), that most Group A members are "dependents of non-Medicaid-eligible employees" and that most employers participating in DirigoChoice did not make contributions on behalf of the dependents of employees. Maine Ex. 1, at ¶ 22; Maine Reply Ex. 1, at ¶ 9.

offset payments would constitute applicable credits or argue that other legal principles required their deduction from Maine's claims. The record describes the savings offset payments as "an assessment on insurers' gross premium revenues" that "is only levied if and when health care cost savings occur." CMS Ex. C, at unnumbered 1st page. Although apparently some such assessments were made, CMS has not calculated any amount of savings offset payments that might be considered credits applicable to the expenditures in which Maine claimed FFP.

CMS also argues that the managed care contract between MDHHS and Anthem does not meet requirements for Medicaid managed care contracts. CMS asserts that Maine has not shown that its claims under the contract reflect actuarially sound payment rates and that Maine's managed care activities have not been reviewed by an "External Quality Review Organization" (EQRO). CMS Br. at 10-12, citing Act §§ 1903(m)(2)(A)(iii), (xii); 1932; 42 C.F.R. Part 438, Subpart E (Managed Care, External Quality Review). Maine replies that the rates were approved by CMS, citing a letter from the CMS Associate Regional Administrator, dated December 23, 2004, stating that CMS had reviewed Maine's submission of an actuary's documentation indicating that the capitation payments had been developed in an actuarially sound manner and that CMS had found that the contract was in compliance with the Part 438 regulations. Maine Ex. 10 (letter from MDHHS Comm'r to CMS Associate Regional Administrator, Sept. 16, 2004, forwarding actuary's certification); Maine Ex. 11. Maine also replies that CMS had advised Maine in 2005 that it would not be required to have "an EQRO component" due the low number of Medicaid recipients in the DirigoChoice program, citing CMS Exhibit E (letter to CMS from MDHHS Commissioner, Aug. 31, 2007). CMS's disallowance letter did not mention the rates or the lack of review by an EQRO, nor did CMS seek to respond to Maine's evidence on these issues.

CMS also argues that providing FFP "to match employer participation in the DirigoChoice health plan" violates the principle that Medicaid is the payor of last resort and the requirement that recoveries be made from liable third parties.¹¹

¹¹ The "well-established" principle that Medicaid is the payor of last resort originates from requirements in section 1902(a)(25) of the Act that the state Medicaid agency "ascertain the legal liabilities of third parties" to pay for Medicaid care and services and "seek reimbursement for such assistance to the extent of such legal liability" Oklahoma Health Care

CMS Br. at 4, 6-7. Maine argues that, as it informed CMS in 2004, employers participating in DirigoChoice are not liable third parties because they are not providing coverage to their employees under an employer-sponsored health insurance plan. Maine Reply Ex. 2. Again, the CMS disallowance letter did not rely on the third party liability rules, nor did CMS seek to respond here to Maine's argument about why those rules do not apply here. Even if those rules did apply, moreover, CMS does not explain how those requirements would support reducing Maine's claims by amounts in excess of the federal share of the employer contributions on behalf of their employees (or employee dependents) who were Medicaid recipients.

The Board generally does not preclude an agency from raising alternative bases for a disallowance during an appeal, as long as the appellant is granted a full opportunity to respond. East Missouri Action Agency, Inc., DAB No. 1656, at 11, n.4 (1998); Illinois Dept. of Children and Family Services, DAB No. 1462, at 7, n.5 (1994). Moreover, the Board has upheld some disallowances on such alternative bases. See, e.g., Illinois Dept. of Public Aid, DAB No. 2021, at 2 (2006). Here, however, CMS has simply not adequately developed these new bases for the disallowance or explained how they support disallowance of the entire amount of Maine's claims. On the limited record here, moreover, they appear to lack merit.

Conclusion

For the reasons stated above, we conclude that contributions Maine received from employers for DirigoChoice coverage for their employees and dependents who were Medicaid recipients were applicable credits that reduced the allowable costs of medical assistance for which Maine was entitled to claim FFP. We sustain the disallowance in principle on that basis. We remand the case to CMS to recalculate the amount of the disallowance consistent with our decision. If Maine disputes CMS's revised determination of the disallowance amount, it may appeal that determination to

¹¹(...continued)
Authority, DAB No. 1924, at 3, 18-19 (2004).

the Board by filing a notice of appeal within 30 days after receiving CMS's written determination. See 45 C.F.R. Part 16.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Judith A. Ballard
Presiding Board Member