

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

New Jersey Department of Health
Docket No. A-12-68
Decision No. 2497
February 27, 2013

DECISION

The New Jersey Department of Health (New Jersey, DOH) appeals a determination by the Health Resources and Services Administration (HRSA) disallowing \$2,498,819 in federal funds paid to New Jersey under the federally-funded Ryan White HIV/AIDS Program, for the costs of medications for low-income people with HIV/AIDS, during the period April 1, 2003 through June 30, 2004. New Jersey does not dispute that it failed to obtain payment for those drugs through its Medicaid program as required by statute. New Jersey instead argues that the disallowance should be reduced to reflect the savings it says accrued to federal funding sources as a result of New Jersey's expenditure of state funds on allowable Ryan White costs for which it did not claim federal Ryan White funding.

As discussed below, New Jersey has not met its basic obligation as a recipient of federal funds to document that the unclaimed expenditures by which it seeks to reduce the disallowance were allowable charges to its federal grant under the requirements in the applicable cost principles. Accordingly, we sustain the disallowance.

Background

The Ryan White Comprehensive AIDS Resources Emergency Act of 1990 (Ryan White Act) authorizes grants to states for a range of HIV/AIDS programs that provide items and services including AIDS drugs for eligible low-income individuals under the AIDS Drug Assistance Program (ADAP). 42 U.S.C. §§ 300ff-21, 22, 26. States receiving grant funds must, among other requirements, “ensure that grant funds are not utilized” to pay for any item or service “to the extent that payment has been made, or can reasonably be expected to be made . . . under any State compensation program, under an insurance policy, or under any Federal or State health benefits program[.]” 42 U.S.C. § 300ff-27(b)(7)(F) (emphasis added). On January 20, 2004, the Commissioner of the New Jersey DOH signed an assurance that New Jersey would “ensure that grant funds are not utilized to make payments for any item or service to the extent that payment has been made, or reasonably can be expected to be made . . . under any . . . Federal or State health benefits program” HRSA Ex. 3, at ¶ B.8.

The HHS Office of Inspector General (OIG) conducted a review of New Jersey's ADAP for the period April 1, 2003 through March 31, 2006 to determine whether New Jersey had complied with this "payer-of-last-resort requirement." New Jersey Ex. A, at i (OIG Report A-02-08-02007, *Review of Ryan White Title II AIDS Drug Assistance Program Funding in New Jersey* (Oct. 2010)). OIG determined, and New Jersey does not dispute, that during the period April 1, 2003 through June 30, 2004, New Jersey billed the Ryan White program for \$2,498,819 for 8,613 claims for drugs for ADAP clients who had applied for and were subsequently determined to be eligible for Medicaid. *Id.* OIG determined that "[o]nce these individuals were determined eligible for the Medicaid program [New Jersey] should have retroactively billed the State Medicaid agency for ADAP drug costs incurred since the dates of the individuals' Medicaid applications." *Id.* at 5.

OIG noted that New Jersey implemented a procedure in July 2004 to bill its state Medicaid agency for ADAP claims on behalf of clients also enrolled in Medicaid, retroactively to the date they applied for Medicaid, but OIG found that the state had not retroactively billed Medicaid for ADAP claims submitted before July 2004. *Id.* at 5-6. OIG recommended that New Jersey refund \$2,498,819 paid for 8,613 ADAP claims for ADAP clients eligible for Medicaid. *Id.* HRSA adopted OIG's findings and recommendation and disallowed \$2,498,819 in Ryan White Act funds for failure to comply with the payer-of-last-resort requirement.

Analysis

New Jersey, as noted, does not dispute OIG's findings. Indeed, correspondence between New Jersey's DOH and its state Medicaid agency documents the latter's refusal "to back bill Medicaid where claims are paid by ADDP [the AIDS Distribution Drug Program, which administers the Ryan White ADAP in New Jersey] during a retroactive Medicaid eligibility period" because "this proposal will unnecessarily increase State expenditures as Medicaid is funded only 50% by the federal government." HRSA Ex. 2, Att. 5. DOH's Director of Management and Administration acknowledged the existence of a "billing dispute" with the state Medicaid agency over the required reimbursement related to the disallowance period. Certification of John Fasanella at ¶ 3.

New Jersey frames its argument that its state-funded ADAP expenditures should nevertheless be used to reduce the amount of the disallowance in two ways. First, New Jersey states that its DOH "sought and was appropriated \$11.7 million in State funds for the ADDP program for FY 2005 (July 1, 2004 through June 30, 2005)" which was "fully expended in that year," and that "[a]s a result of this State funding, the Department was able to carry forward \$2,035,766 in Title II ADAP funds to the next fiscal year." New Jersey Br. at 5-6, citing Fasanella Cert. at ¶ 4. New Jersey thus "asserts that the amount of the reimbursement sought by [HRSA] should be reduced by \$2,035,766, the amount of federal funding saved during the relevant funding period as a direct result of the State's

use of state-only expenditures for allowable costs of ADAP services for which federal funding was not claimed.” New Jersey Response to Request for Comments (Resp.) at 3. New Jersey further argues that the disallowance should simply be reduced by the amount of expenditures eligible for federal Ryan White funds for which New Jersey did not claim federal funding. New Jersey Br. at 6; New Jersey Resp. at 4. We address both approaches below.

1. Applicable regulations do not permit New Jersey to offset the disallowance by the amount of federal funds unspent at the end of the applicable grant periods.

The disallowed claims were from the period April 1, 2003 – June 30, 2004 and were thus made during the two grant “budget periods” of April 1, 2003 – March 31, 2004 and April 1, 2004 – March 31, 2005 shown in the Notices of Grant Award. HRSA Ex. 1; New Jersey Ex. A, at i, 5. In proposing that the disallowance be reduced by the \$2,035,766 in federal funds New Jersey says remained available (and thus presumably unobligated) at the end of the grant period for which they were awarded, New Jersey essentially seeks to retain those “carry over” funds as state funds.

The problem with this request is that HHS regulations containing administrative requirements applicable to grants to state governments and made applicable by the Notices of Grant Award, at 45 C.F.R. Part 92, require that federal grant funds unobligated at the end of the budget period for which they were awarded be spent during the next budget period (if carrying over funds is permitted at all), and do not provide for the carried-over funds to be kept by the state. HRSA Ex. 1. The regulation at 45 C.F.R. § 92.23(a) provides that if “carryover of unobligated balances is permitted . . . the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.” While the record does not state whether carryover of funds was permitted under the grant or HRSA policy, the Notices of Grant Award calculate the amount of each award as “Authorized Financial Assistance This Period . . . Less Unobligated Balance from Prior Budget Periods,” indicating that funds carried over from the previous grant/budget year would reduce the amount of funds awarded in the later grant/budget year. HRSA Ex. 1. The Board is bound by all applicable laws and regulations, 45 C.F.R. § 16.14, and cannot ignore the requirements they impose regarding the disposition of unobligated federal grant funds.

We find no legal basis to permit New Jersey to offset the disallowance by the amount of federal funds that DOH had identified as an unobligated balance that remained unspent at the end of the applicable budget periods and which therefore had to be either applied to allowable costs of a subsequent period or returned to the federal government.

2. *New Jersey has not satisfied its burden as a grantee of demonstrating the allowability of the ADAP expenditures for which federal funding was not claimed and by which it seeks to offset the disallowance.*

New Jersey seeks to offset the disallowance by the amount of the allowable costs of ADAP services that New Jersey paid with state funds for which it did not claim federal reimbursement. We conclude that this relief is not available because New Jersey has not met its burden as a grantee of demonstrating the allowability of the costs by which it seeks to offset the disallowance.

The Board has long recognized that a grantee may reduce or offset a disallowance by documenting that it incurred unclaimed allowable costs that it paid for with its own funds; in effect, a grantee “may substitute, for unallowable costs, allowable costs for which it did not claim federal funding.” *Cent. Piedmont Action Council, Inc.*, DAB No. 1916, at 7 (2004), citing *Campesinos Unidos, Inc.*, DAB No. 1546 (1995) and *Seminole Nation of Okla.*, DAB No. 1385 (1993). A grantee seeking to offset a disallowance with unclaimed costs must, however, satisfy the burden on any recipient of federal grant funds, repeatedly stated by the Board, of documenting the existence and allowability of the costs for which it seeks federal funding. *See Benaroya Research Inst.*, DAB No. 2197, at 3 (2008), citing *Cent. Piedmont* (other citations omitted); *see also N.J. Dept. of Human Servs.*, DAB No. 2328, at 4-5 (2010) (citations omitted) (the Board “has consistently held that a state has the burden to document the allowability and allocability of its claims”). For states, this burden springs from the requirement in the regulations containing the cost principles for state, local, and Indian tribal governments, that costs claimed must “[b]e adequately documented,” 2 C.F.R. Part 225, Appendix (App.) A, ¶ C.1.j, and the administrative requirements, including the requirement that grantees maintain accounting records supported by source documentation, 45 C.F.R. § 92.20(b).

Among other things, New Jersey failed to document that the unclaimed costs here are “allocable to Federal awards” under applicable cost principles. 2 C.F.R. Part 225, App. A, ¶ C.1.b. This requirement means that any state-funded ADAP expenditures used to offset the disallowance must have been not only for the types of services meant to be funded under the ADAP, but also allocable to the same grant and grant funding or budget period (typically one year) to which the disallowed costs were allocable. The cost principles and applicable regulations do not permit shifting costs among different grant awards and grant funding or budget periods. *See id.* at ¶ C.3.c (costs “allocable to a particular Federal award . . . may not be charged to other Federal awards to overcome fund deficiencies, to avoid restrictions imposed by law or terms of the Federal awards, or for other reasons”), and 45 C.F.R. § 92.23(a) (“[w]here a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period . . .”). Based on these or comparable provisions, the Board has held that “[c]osts

arising in a particular program year are allocable to the award for that year, and not to the awards for other years” and has “rejected a grantee’s attempt to reduce a disallowance of funds awarded for one year by identifying unclaimed costs attributable to a different program year.” *Cent. Piedmont* at 4, citing *Seminole Nation of Okla.*¹

The Board provided an additional opportunity to New Jersey to address how the allowable and allocable amounts of any offset might be established. Board Request for Comments (Dec. 13, 2012). The Board noted there that New Jersey referenced funds spent during state fiscal years (SFYs) which only partially overlapped the relevant budget periods. Hence, the request asked the parties to address how the amount of any offset applicable to the relevant budget periods could be determined. As we discuss below, New Jersey’s submissions in this proceeding are insufficient to permit the Board to determine accurately the amount of state-funded ADAP expenditures that were allocable to the grants and budget periods in question.

New Jersey initially argued “that by expending \$11.7 million in State funds appropriated to the ADDP program in FY 2005 it, in effect, reimbursed the \$2,498,819 that should have been billed to Medicaid by contributing that amount and much more in State funds to the ADDP program.” New Jersey Br. at 6. In response to the Board’s request for comments, New Jersey stated that it “has demonstrated that it paid \$807,016.51 in state-only expenditures for allowable costs of ADAP services incurred during the relevant funding period, for which federal funding was not claimed,” and argues that “the amount of the reimbursement sought by HRSA should be reduced by \$807,016.51, the amount of allowable costs of ADAP services paid for with state-only funds during the April 1, 2004 through March 31, 2005 funding period, for which federal funding was not claimed.” New Jersey Resp. at 4.

The \$807,016.51 figure apparently derives from information in a certified statement of the DOH Director of Financial Services submitted with New Jersey’s response. The Director of Financial Services states that \$276,963.51 was transferred on May 20, 2005 “from the ADDP Account to the DHS Account . . . to reimburse the [New Jersey] Department of Human Services (DHS) for a portion of the cost of anti-retroviral drugs purchased by DHS on behalf of ADDP program participants during SFY 2005,” and that “\$530,053 in State funds were expended on July 23 and 30, 2004 for the purchase of anti-

¹ *Central Piedmont* addressed cost principles and requirements for grants to nonprofit organizations at OMB Circular A-122 (since codified at 2 C.F.R. Part 230) and 45 C.F.R. Part 74 that are essentially the same as those imposed on state and local governments by 2 C.F.R. Part 225, App. A and 45 C.F.R. § 92.23(a), and its analysis is relevant here. *See, e.g.*, 45 C.F.R. § 74.28, “Period of availability of funds.”

retroviral drugs purchased on behalf of ADDP program participants during the first quarter of the federal budget period April 1, 2004 – March 31, 2005.” Valora Cert. at ¶¶ 4, 6. The \$530,053 was “[i]n addition to the \$11.7 million in State funds that were specifically allocated to the ADDP in SFY 2005.” *Id.* at ¶ 6.

New Jersey admits that these figures might not be accurate. Regarding the \$276,963.51 transferred from the ADDP Account to the DHS Account on May 20, 2005, the Director of Financial Services, citing a spreadsheet submitted with his certification, states that, “[a]lthough the notations [on the spreadsheet] indicate that the \$276,963.51 may have been for ‘ADDP 3RD QUARTER BENEFITS,’ and that the \$11,423,036.49 may have been for ‘ADDP - 4TH QTR,’” DOH is “unable to confirm this because the documents that would have shown the dates of the transactions for anti-retroviral drug purchases which the funds were intended to reimburse have been disposed of in accordance with the Department's standard record retention policies.”² *Id.* at ¶ 5 citing Ex. C. The Board is simply unable to determine from the submitted spreadsheets the actual amount of state-funded unclaimed ADAP expenditures that were allocable to the relevant grant budget periods. *Id.* at Exs. A-C.

Similarly, the certification of a Principal Claims Reviewer with the New Jersey DHS, along with an attached chart titled “ADDP Monthly expenditure on HIV drugs” for program participants for the period July 1, 2003 – June 30, 2005, does not clarify, and indeed raises questions about, what portion of the monthly expenditures was made with state-only funds. Mills Cert., Ex. A. The chart, for example, shows total expenditures of \$6,585,785.77 in the quarter ending June 30, 2005 (the fourth quarter of SFY 2005), which does not correspond to the \$11,423,036.49 in state-only expenditure that the Director of Financial Services states may have been for ADDP services during that quarter. The chart also shows total expenditures of \$7,097,935.06 in the quarter ending March 31, 2005 and provides no way of verifying that \$276,963.51 came from state funds.

In addition, the record does not permit the Board to conclude that the state-only expenditures by which New Jersey seeks to offset the disallowance were for items or services that complied with all applicable requirements to be eligible for reimbursement under the Ryan White ADAP. In this respect New Jersey has not met its burden as a recipient of federal funds of documenting the allowability of the charges for which it

² The 3rd and 4th quarters referenced in the notations presumably refer to the 3rd and 4th quarters of SFY 2005 – the quarters ending March 31 and June 30, 2005. New Jersey Br. at 5.

seeks federal reimbursement. As a state grantee, New Jersey is responsible for maintaining “records which adequately identify the source and application of funds provided for financially-assisted activities” that “contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures” 45 C.F.R. § 92.20(a)(2). A state moreover must maintain records required by the regulations for three years from the time it submits its single or last expenditure report for the applicable funding period, unless “any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration” of the 3-year period. 45 C.F.R. § 92.42(a)-(c). Even if New Jersey did not violate this retention requirement, New Jersey was aware during the budget periods at issue that it was not meeting the payer-of-last-resort requirement and could have timely submitted information as to alternative allowable ADAP expenditures while it was still able to document them. HRSA Ex. 2.

Absent the ability to determine with any reasonable degree of accuracy the amount of allowable Ryan White ADAP expenditures for which New Jersey used state-only funds, the Board has no basis or authority to reverse or reduce the disallowance of the charges to federal ADAP funds that were admittedly unallowable due to New Jersey’s failure to comply with the payer-of-last-resort requirement. *See, e.g., N.J. Dept. of Human Servs., DAB No. 941 (1988) (offer to “split the difference of a contested amount” not an appropriate basis for the payment of federal funds).*

Our determination that New Jersey has not to date demonstrated that it is entitled to offset the disallowance by the amount of its unclaimed ADAP expenditures does not preclude HRSA from determining whether New Jersey can establish a basis for some reduction. HRSA stated in its response to the Board’s request for comments that an offset was possible in principle if HRSA were able to determine how much of the disallowance was actually attributable to the period after March 31, 2004 (a breakdown not done in the underlying OIG report) and if New Jersey provided “detailed and comprehensive documentation . . . reflecting the specific expenditures.” HRSA Response to Request for Comments at 2. Reviewing a grantee’s documentation of its expenditures to determine whether they are allowable charges for which the grantee is entitled to be reimbursed with federal grant funds is first and foremost the responsibility of the federal agency. Given that the Board has provided New Jersey with a full opportunity to present its case, however, the outcome of any discretionary HRSA review of further documentation to determine if an offset may be allowed would not generate additional appeal rights.

3. *Neither New Jersey's use of state funds nor its failure to use Medicaid funds to provide medications to Ryan White program participants entitles New Jersey to an offset.*

New Jersey also makes the essentially equitable argument that “regardless of whether the commitment of \$11.7 million in State funds” legally qualifies to offset the disallowance, “the fact remains that the Department took extraordinary steps to ensure that significant funds well in excess of the amount of unallowable claims made . . . were dedicated to the ADDP.” New Jersey Reply Br. at 2. New Jersey further points out that, if it had billed the disallowed \$2,498,819 to Medicaid as required, “half of that amount would have been paid out of federal Medicaid funds . . . and the \$2,498,819 that was originally paid from . . . ADAP funds would have been returned to ADDP’s coffers to be carried over for use in the next fiscal year.” New Jersey Br. at 6.

The Board is, as mentioned above, bound by all applicable laws and regulations and hence cannot order federal funds to be paid based on purely equitable considerations. *See W. Va. Dept. of Health and Human Res.*, DAB No. 2185, at 20 (2008) (claim for equitable relief is not a proper basis for overturning a disallowance because the Board lacks authority to grant such relief). In any case, New Jersey spending its own funds to meet the needs of its citizens suffering from HIV/AIDS does not create an obligation for the federal government to reimburse New Jersey for expenditures that admittedly do not meet the applicable payer-of-last-resort requirement. Moreover, the idea that New Jersey should somehow be credited for having saved the federal government its share of Medicaid payments for these costs is belied by the record evidence that the refusal of the State’s Medicaid agency to cover the costs was expressly premised on New Jersey’s effort to instead obtain 100% federal funding for those costs through the Ryan White program. *See HRSA Ex. 2, Att. 5.*

Furthermore, federal funding is not fungible between the Medicaid and Ryan White programs. Under the cost principles discussed above, New Jersey’s identification of unclaimed Medicaid costs cannot offset the disallowance of costs charged to a different grant program. *See 2 C.F.R. Part 225, App. A, ¶ C.3.c* (“Any cost allocable to a particular Federal award or cost objective under the principles provided for in 2 CFR part 225 may not be charged to other Federal awards to overcome fund deficiencies, to avoid restrictions imposed by law or terms of the Federal awards, or for other reasons.”). Therefore, foregoing partial federal Medicaid reimbursement for the cost of ADAP medications to Medicaid-eligible individuals does not entitle New Jersey to receive Ryan White ADAP funds for costs that admittedly did not qualify for reimbursement under the terms of the Ryan White Act.

Conclusion

For the reasons stated above, we sustain the disallowance. As explained above, nothing in our decision precludes HRSA from reducing the disallowance to the extent it determines that any unclaimed ADAP expenditures made with state funds are allowable and allocable.

/s/

Judith A. Ballard

/s/

Constance B. Tobias

*/s/*Leslie A. Sussan
Presiding Board Member