Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

New Jersey Department of Human Services
Docket No. A-12-128
Decision No. 2518
June 21, 2013

DECISION

The New Jersey Department of Human Services (New Jersey, DHS) appeals in part the Centers for Medicare & Medicaid Services' (CMS) determination disallowing $875,838 in federal financial participation (FFP) New Jersey claimed under the Medicaid program for administrative expenditures during calendar years 2006 and 2007. Of that amount, New Jersey appeals the disallowance of $447,970.89 in salary costs claimed at the enhanced rate of 75 percent FFP available for administrative costs directly attributable to the operation of a state's Medicaid Management Information System (MMIS). CMS allowed the claimed costs at the 50 percent rate generally available for Medicaid administrative costs and disallowed the amount New Jersey claimed in excess of that rate.

New Jersey argues that the costs were for activities directly attributable to the operation of its MMIS and were designated as qualifying for enhanced funding in New Jersey's approved Cost Allocation Plan. New Jersey also requests that the Board instruct CMS to permit New Jersey to reclaim, under an exception to the two-year deadline for claiming costs, $54,825.31 in disallowed salary costs as Medicaid skilled professional medical personnel (SPMP) costs. For the reasons explained below, we sustain the disallowance, and we decline New Jersey's request.

Legal background

The Medicaid program at title XIX of the Social Security Act (Act) authorizes FFP for 75 percent of a state's costs attributable to the operation of "mechanized claims processing and information retrieval systems" approved by the Secretary of the Department of Health and Human Services (HHS) as "likely to provide more efficient, economical, and effective administration" of a state Medicaid plan. Act § 1903(a)(3), (r)(1); s*ee also* 42 C.F.R. § 433.15(b)(4). "*Medicaid Management Information System* (MMIS) is a commonly accepted term for" mechanized claims processing and information retrieval systems. 45 C.F.R. § 95.605.

Medicaid regulations provide 75 percent FFP "[f]or personnel engaged directly in the operation of mechanized claims processing and information retrieval systems[.]" 42 C.F.R. § 432.50(b)(2). Other administrative costs necessary for the proper and efficient administration of a state's Medicaid plan generally receive 50 percent FFP. Act § 1903(a)(7); *see* 42 C.F.R. § 432.50(b)(6) (50 percent FFP available for "all other staff of the [state] Medicaid agency"). "Operation means the automated processing of data" used in the administration of the state plan and "includes the use of supplies, software, hardware, and personnel directly associated with the functioning of the mechanized system." 45 C.F.R. § 95.605, made applicable by 42 C.F.R. § 433.111(a).

MMIS regulations in 42 C.F.R. Part 433 identify part 11 of CMS's State Medicaid Manual (SMM) as containing "additional . . . CMS procedures for implementing these regulations." 42 C.F.R. § 433.110(a)(1). As relevant here, the SMM states:

> FFP at 75 percent is available for direct costs directly attributable to the Medicaid program for ongoing automated processing of claims, payments, and reports. Included are forms, use of system hardware and supplies, maintenance of software and documentation, and personnel costs of operations control clerks, suspense and/or exception claims processing clerks, data entry operators, microfilm operators, terminal operators, peripheral equipment operators, computer operators, and claims coding clerks if the coded data is used in the MMIS, and all direct costs specifically identified to these cost objectives. Report users, such as staff who perform follow-up investigations, are not considered part of the MMIS.

SMM § 11276.3(A).[1]

<u>Background</u>

The HHS Office of Inspector General (OIG) reviewed New Jersey's MMIS expenditures for the years 2006 and 2007 and determined that of $61,086,032 New Jersey received in MMIS funding during that time, $875,838 was unallowable and should be returned to CMS. That amount, OIG determined, comprises $823,938 in excess FFP New Jersey received by claiming costs for salary, postage, audit, and other general administrative

[1] The SMM identifies the page containing section 11276.3 as having been issued in July 1998. The language quoted from section 11276.3(A) appeared in a transmittal issued in February 1992. *See Utah Dep't of Health*, DAB No. 1486, at 3 n.1 (1994). The SMM is available at http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html?DLPage=1&DLSort=0&DLSortDir=ascending.

costs at the enhanced 75 percent rate instead of the applicable 50 percent rate, and $51,900 in other unallowable expenses. OIG Report No. A-02-08-01015 (Sept. 27, 2010).[2] As relevant here, the $823,938 in excess FFP includes $588,581 New Jersey received because it "incorrectly claimed salary costs totaling $2,354,323 at the enhanced 75-percent Federal reimbursement rate for employees in cost centers whose functions were not directly related to the operations of the MMIS rather than at the standard 50 percent rate." *Id*. at New Jersey Exs. at Aa037. CMS accepted OIG's findings and disallowed the entire $875,838 in total unallowable MMIS costs that OIG identified.

Of the $588,581 in excess enhanced FFP received for salary costs, New Jersey challenges the disallowance of $447,970.89 for salary costs it reported in five "cost centers," or office units, within the DHS Division of Medical Assistance and Health Services (DMAHS), New Jersey's state Medicaid agency. Four of the cost centers were located in the DMAHS Office of Research (cost centers 705, 729, 752, 790) and one in the DMAHS Bureau of Financial Reporting (cost center 753).

Analysis

I. New Jersey has not met its burden of demonstrating that the disallowed salary costs were eligible for enhanced 75 percent FFP.

The Board has long held that "[e]nhanced funding is available only for . . . costs which would not be incurred but for the operation of the MMIS" and "functions which would not be performed but for the existence" of an MMIS. *N.Y. State Dep't of Soc. Servs.*, DAB No. 1405, at 2, 14 (1993), *aff'd*, *N.Y. v. Shalala*, No. 93 CIV. 1330 (JFK), 1996 WL 87240 (S.D.N.Y. Feb. 29, 1996). Conversely, "functions which would occur regardless of the MMIS. . . are not functions which directly benefit the MMIS and, consequently, are not functions which warrant the incentive of an enhanced rate of reimbursement." *Pa. Dep't of Pub. Welfare*, DAB No. 832, at 12 (1987); *see also Cal. Dep't of Health Servs*., DAB No. 1606, at 4-5 (1996), quoting *Pa. Dep't of Pub. Welfare*. In *Pennsylvania*, DAB No. 832 , the Board recognized the difference between "actually operating" an MMIS, which is eligible for enhanced FFP, and the "[m]ere use of information from the system," which is not. *Pa. Dep't of Pub. Welfare* at 10-11; *see also N.J. Dep't of Human Servs. v. Sec'y of HHS*, 748 F. Supp. 1120, at 1126 (D.N.J. 1990) (describing "the Medicaid tasks performed by an MMIS" as "claim processing and data retrieval").

[2] http://oig.hhs.gov/oas/reports/region2/20801015.pdf.

The Board in past cases has concluded that CMS's "long-standing 'overall policy' has been to consider as costs 'attributable to the operation of the MMIS,' and therefore eligible for enhanced funding, only 'a relatively narrow and circumscribed group.'" *N.Y. State Dep't of Soc. Servs.*, DAB No. 1405, at 17, citing *N.Y. State Dep't of Soc. Servs.*, DAB No. 1023, at 8-9 (1989), and *N.Y. State Dep't of Soc. Servs.*, DAB No. 1205, at 3 (1990). The Board has also held in a variety of contexts that where a state claims enhanced reimbursement at a rate higher than the 50 percent rate generally available for administrative costs, the state has the burden both to document the costs claimed and to show that it is entitled to the higher rate. *Cal. Dep't of Health Servs*., DAB No. 1606, at 2. The Board has held that enhanced funding is special, and that a state's ever-present burden to document the allowability of its costs is especially heavy when FFP is being claimed at an enhanced rate, requiring a clear showing that all claimed costs meet applicable reimbursement requirements. *Ill. Dep't of Pub. Aid*, DAB No. 2021, at 16-17 (2006); *Cal. Dep't of Health Servs*., DAB No. 1539, at 7-8 (1995) (citations omitted).

New Jersey has not met its burden of demonstrating that all of the salary costs assigned to the five disputed cost centers qualified as costs directly attributable to the operation of its MMIS under the SMM as required for the receipt of enhanced FFP in excess of the 50 percent CMS allowed.

New Jersey argues that the cost centers in the Office of Research "incurred direct costs attributable to the ongoing automated processing of claims, payments and reports for the Title XIX Medicaid program," including "the use of system hardware and software" and "the use and compilation of data" that "were properly claimed at the 75% Federal reimbursement rate." New Jersey Br. at 10-12. New Jersey states that costs in the Bureau of Financial Reporting qualify for enhanced funding because that cost center "involves clerical and manual intervention and the use of forms for processing claims and payments." *Id*. at 15. The SMM states that "some manual intervention is necessary to make any computer system perform properly" but cautions that "only those manual functions which are directly attributable to the operation of the MMIS are funded at the enhanced FFP." SMM § 11276.6.

In support of its arguments, New Jersey relies solely on descriptions of these cost centers in excerpts from its Cost Allocation Plan (CAP) approved by the HHS Division of Cost Allocation (DCA), in the form of three amendments or revisions New Jersey submitted to DCA in 2004, 2007, and 2009. New Jersey Exs. at Aa043-Aa94. These descriptions plainly show that these cost centers' functions included activities, typically involving the use and analysis of data the MMIS produced, that go beyond the limited tasks the SMM describes as directly attributable to MMIS. New Jersey claimed enhanced FFP in all of the salary costs collected in each cost center and makes no attempt to distinguish and exclude those costs that qualified only for 50 percent FFP as Medicaid administrative expenses.

The language in the CAP cost center descriptions does not expressly mention New Jersey's MMIS, making it difficult to discern which of the described activities, if any, related directly to MMIS operations such as to qualify for enhanced 75 percent FFP. To the extent that the broad language of the descriptions, quoted below, raises the possibility that the some of those activities did relate directly to MMIS operations, New Jersey failed to identify those activities and their specific costs and provided no means of separating them from costs that were eligible only for 50 percent FFP. New Jersey thus has failed to meet its burden of demonstrating that all of the charges in its claims were eligible for enhanced FFP. *See, e.g., Cal. Dep't of Health Servs*., DAB No. 1606, at 6-7 (State "did not offer any evidence that refutes the basic finding of the audit that the [fiscal agent] was performing some functions that were ineligible for enhanced funding" and had "no documentation . . . that would show or support an allocation of . . . staff time between enhanced functions and non-enhanced functions."); *Cal. Dep't of Health Servs*., DAB No. 1539 (state failed to document percentage of employees' time spent on MMIS operational activities eligible for 75 percent vs. 50 percent FFP and thus failed to meet the burden of documenting its claim for enhanced FFP).

The CAP descriptions of each cost center, followed by our analysis, are set forth below. The amount of the disallowance attributable to each cost center as reported by New Jersey appears in parentheses next to each cost center's title.

Cost center 705: Office of Research ($89,606.23)

The CAP description provides that:

> The Office's responsibilities are to assist this and other agencies in obtaining vital information to allow them to make intelligent, informed and fiscally responsible decisions based on sound, accurate data. Through its four units of expertise it provides: a better overview of management information; the ability to analyze and monitor program changes; the ability to determine the effects of system inefficiencies or inaccuracies, follow thru with recommendations for change, and quantify the benefits of remediation; and analyze data to ensure that adequate services are being rendered to our clients and if not determine where to spend to ensure the clients get the needed services.

New Jersey Exs. at Aa055, Aa070, Aa088; New Jersey Br. at 2.

New Jersey asserts that the Office of Research (cost center 705, and its included cost centers 729, 752, and 790, addressed below) "provides all MMIS data to CMS." New Jersey Br. at 8. New Jersey reports that the Office of Research performs other MMIS operational activities such as helping the Office of Finance "make changes to the MMIS reports to reflect changes in the Medicaid program," providing "temporary ad hoc reporting through the data warehouse when needed," providing "all MMIS data to CMS," and "processing mass rate adjustments and making wrap around fee for service payments to the Division's Managed Care Organizations (MCOs) based on encounter data." *Id*. New Jersey argues that cost center 705 in particular "incurred direct costs directly attributable to the Medicaid program for processing reports . . . assists in developing, maintaining, and processing MMIS reports used for federal reporting" and "helps the Bureau of Financial Reporting make changes to the MMIS reports to reflect changes in the Medicaid program." New Jersey Reply at 4-5.

These arguments, like New Jersey's arguments in support of the other cost centers, addressed below, are not persuasive. New Jersey's descriptions of the cost centers' activities are either inconsistent with or unsupported by the CAP language describing those units. New Jersey also did not offer any evidence, such as witness declarations, to support its assertions about the units' activities. Moreover, New Jersey provided no means for us to discern what percentage of each cost centers' claimed costs were directly attributable to the operations of its MMIS and thus eligible for enhanced FFP.

For example, the quoted CAP language for cost center 705 shows that salary costs in that cost center necessarily included costs attributable to the utilization and analysis of MMIS data and reports, activities that under longstanding CMS policy are not directly attributable to MMIS operations as required to qualify for enhanced 75 percent FFP. The activities performed by employees in cost center 705 included the overview of management information and the analysis of data, program changes and system inefficiencies or inaccuracies. Thus, this description raises significant questions about the extent to which salary costs assigned to the disputed cost center were directly attributable to the actual operation of New Jersey's MMIS, as opposed to utilizing and analyzing the data and performing follow-up investigations, activities not entitled to FFP beyond the 50 percent CMS allowed.

Finally, New Jersey offered no evidence that would justify us disregarding the plain language of the CAP provision, which indicates that at least some of the cost center's functions go beyond the mere operation of the MMIS and instead venture into the realm of data usage and analysis, eligible for only 50 percent FFP. We do not agree with New Jersey that CMS claimed that cost center 705 "engaged <u>only</u> in remote follow-up investigations and assurance activities." New Jersey Reply at 4 (emphasis added), citing CMS Br. (at 8). The presence of language in the CAP indicating that cost center 705 did in fact engage in some follow-up activities involving the use of MMIS data indicates that not all (if any) of the costs in that center were directly attributable to actual MMIS operations and thus eligible for enhanced FFP. That suffices to require New Jersey to come forward with documentation showing which costs <u>were</u> directly attributable to MMIS operations, which New Jersey has failed to do here.

Cost center 729: Office of Research–Research Unit/Research Data Unit[3] ($66,148.05)

The CAP description provides that:

> This unit compiles and extrapolates data through statistical probability sampling, regression or correlation analysis, computer file extracts and manipulation, geographical presentation, or other research methods which will enable management to make informed decisions.

New Jersey Exs. at Aa055, Aa070, Aa088; New Jersey Br. at 2. New Jersey argues that cost center 729 contains costs "for the use of system hardware and software, and for the use and compilation of data" and "incurred direct costs for processing reports for federal claiming." New Jersey Br. at 10; New Jersey Reply at 5. However, the quoted CAP language clearly indicates that cost center 729's activities included obtaining and analyzing data, tasks beyond merely operating the MMIS. New Jersey also insists that "this cost center does not *solely* engage in follow-up investigations." New Jersey Reply at 5 (emphasis added). The fact that cost center 729 admittedly engages in at least some follow-up investigations, for which the SMM precludes enhanced FFP, supports CMS's determination that New Jersey was not entitled to enhanced FFP for all salary costs in that cost center. As with the previous cost center, New Jersey has provided no means for us to determine the amount of costs from cost center 729 that may be directly attributable to MMIS operations and thus eligible for enhanced FFP.

Cost center 752: Office of Research–MARS Reporting and Research Coordination Unit/MARS Reporting and Research ($109,874.96)

The CAP description provides that:

> This unit maintains the library of reports for the division. It reviews any that are identified with inaccuracies, writes change requests if necessary and promotes the identification and use of these reports to division personnel. This unit is *[They are]*[4] responsible for the completion of mass rate adjustments for the division and the coordination and tracking of information requests that are the responsibility of the Office of Research. The Unit will also be responsible for the Eligibility Redetermination budget initiative which will terminate recipients who have moved out of state.

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[3] Some cost center names vary among the three CAP submissions; all names are provided.

[4] Two of the three CAP submissions state "They are" instead of "This unit is."

New Jersey Exs. at Aa056, Aa071, Aa089; New Jersey Br. at 2. New Jersey argues that cost center 752 "incurs direct costs for processing reports for the Medicaid program." New Jersey Br. at 11. However, the CAP states that this cost center "maintains the library of reports for the division" and also "writes change requests," which indicates its activities included the storage, distribution and use of reports and MMIS information, rather than simply the automated preparation of reports or other activities that would be eligible for enhanced FFP. New Jersey has not established that maintaining a library of reports constitutes the "ongoing automated processing of . . . reports" eligible for enhanced FFP under SMM § 11276.3(A). New Jersey also states that cost center 752 incurred costs "for processing *and using* reports" which further indicates that it included report users, who are not considered part of the MMIS. New Jersey Reply at 5 (emphasis added); SMM § 11276.3(A) ("Report users . . . are not considered part of the MMIS."). Again, New Jersey also did not offer evidence, such as witness declarations, in support of its assertion that <u>all</u> of this cost center's activities were eligible for enhanced FFP.

We also note that prior to April 19, 2011, Medicaid regulations specifically stated that "[e]ligibility determination systems are not part of mechanized claims processing and information retrieval systems or enhancements to those systems" and "are not eligible for 75 percent FFP under this subpart." 45 C.F.R. §§ 433.111(b)(3), 433.112(c) (1990), *revised by* 76 Fed. Reg. 21,950, 21,973-74 (Apr. 19, 2011). This cost center's responsibility for eligibility redetermination budget initiatives thus demonstrates that it was engaged in at least some activities that are not eligible for enhanced reimbursement. New Jersey again provided no means for us to discern what percentage of this cost center's claimed costs were directly attributable to the operations of its MMIS and thus eligible for enhanced FFP.

> <u>Cost center 790: Office of Research–Encounter Data Unit/MC Encounter Reporting/ Encounter Data Monitoring Unit</u> ($89,668.21)

The CAP description provides that:

> This unit does encounter data monitoring and eligibility reporting. Encounter data submitted by HMOs are monitored and validated for completeness using various data systems. The unit staffs internal workgroup meetings and HMO Encounter Data meetings and is the primary contact point for HMO for correspondence regarding encounter reporting. Eligibility reporting includes the Managed Care, FamilyCare and HMO Capacity reports as well as CMS Quarterly, Annual and Semiannual SCHIP and Managed Care Enrollment reports.

New Jersey Exs. at Aa056, Aa071, Aa089; New Jersey Br. at 3. New Jersey argues that cost center 790 "incurs direct costs attributable to ongoing automated processing for claims, payments and eligibility reporting [that] were properly claimed at the 75% Federal reimbursement rate." New Jersey Br. at 12. However, the quoted CAP language plainly indicates a unit that analyzes data. Indeed, New Jersey does not dispute CMS's report that cost center 790's activities included data monitoring related to the operation of New Jersey's managed care program. CMS Br. at 9-10; *see also Utah Dep't of Health*, DAB No. 2462, at 11 (2012) ("Encounter data are claims records that detail the costs paid by a managed care organization that has contracted to provide Medicaid services.").

The CAP description moreover does not refer to processing claims or payments, and New Jersey offered no evidence, such as witness declarations, that establishes the unit performs additional tasks other than those described in the CAP. New Jersey's statement that the unit "engages in encounter data monitoring and eligibility reporting involving the MCOs, which implicitly involves the processing of claims" effectively acknowledges that the unit engages in the analysis of data, an activity beyond the operation of the MMIS. New Jersey Reply at 6. New Jersey also provided no means for us to discern what percentage of this cost center's claimed costs were directly attributable to the operations of its MMIS and thus eligible for enhanced FFP.

> <u>Cost center 753: Bureau of Financial Reporting–Fiscal Transactions</u>
> ($92,673.44)

The CAP description provides that:

> This unit controls and processes MMIS financial transactions prepared by Division staff. Returned MMIS/Provider checks received from Unisys are processed through the completion of Financial Activity Forms to reflect activity on NJMMIS. This unit administers the lien/levy process and responds to provider inquires referred from Unisys provider services.

New Jersey Exs. at Aa057, Aa069, Aa090; New Jersey Br. at 2. New Jersey does not explain how administering "the lien/levy process" is directly attributable to the operation of its MMIS. New Jersey also did not respond to CMS's assertion in its brief that this activity did not involve MMIS claims processing. CMS Br. at 11. Nevertheless, New Jersey argues that cost center 753 processed Medicaid payments requiring higher levels of scrutiny and is responsible for processing some manual payments to Medicaid providers for which, New Jersey asserts, SMM § 11276.6 authorizes enhanced FFP. New Jersey Br. at 13-14; New Jersey Reply at 7. However, New Jersey's assertion is not supported by the CAP language, which does not refer to manual processing or intervention. Again, New Jersey did not offer evidence, such as witness declarations, in support of its assertion that all of this cost center's activities were eligible for enhanced FFP.

In any event, the Board has previously addressed CMS's policies that FFP should be available for manual intervention necessary to make the computer system perform its automated functions properly, but not for other clerical or manual processing activities which would be done by a state even in the absence of an MMIS, and found that the key distinction is whether the costs are for activities "necessary to keep the MMIS operating." *Neb. Dep't of Soc. Servs.*, DAB No. 1483, at 12 (1994); *see also, e.g.*, *N.Y. State Dep't of Soc. Servs.*, DAB No. 1405, at 23 (enhanced funding not available where "the need to collect and store the data required by the eligibility determination system would exist regardless of whether that data would be used in automated or manual claims processing."). New Jersey does not point to any evidence that the manual payment activities constituted manual intervention necessary to keep the MMIS operating.

New Jersey also argues that during the audit period "the federally required SURS (Surveillance and Utilization Review Subsystem) staff worked within the Office of Research[.]" New Jersey Br. at 8. Even if this statement is accurate, it does not provide any basis to reverse any of the disallowance. The CAPs show two cost centers not at issue here (736 and 785) assigned to the "SURS Subsystem" unit within the Office of Research and indicate that New Jersey claimed enhanced FFP for MMIS operations for these two cost centers. New Jersey Exs. at Aa055, Aa070; *see also* SMM at § 11276.11.B.2 (MMIS Operational Costs eligible for 75% FFP include "MMIS production of . . . SURS reports").

In summary, we conclude that New Jersey has not met its burden of demonstrating that all of the disallowed costs involving the five cost centers at issue were eligible for enhanced FFP in excess of the 50 percent FFP that CMS awarded.

II. Approval of New Jersey's CAP does not bar the disallowance.

New Jersey argues that, even if the disputed cost centers "should not be assigned to MMIS," CMS should not take the disallowance because DCA, with no objections from CMS, on three separate occasions approved the CAP amendments or revisions containing the cost center descriptions. New Jersey Br. at 16. New Jersey notes, and CMS does not dispute, that the CAPs indicate that the disputed cost centers would be charged to "MMIS Operations – 75%." New Jersey Br. at 19-21; New Jersey Exs. at Aa055-57, Aa60, Aa069-072, Aa088-090, Aa93. CMS also does not dispute that it reviewed the proposed CAP provisions and raised no objections to them. *See* New Jersey Exs. at Aa97-100 (e-mails from DCA to New Jersey stating that CMS reviewed and approved the CAP revisions and raised no objections to the assignment of the disputed cost centers to "MMIS Operations – 75%.").

New Jersey cites language from the regulations governing the submission and approval of CAPs requiring DCA to consult with the "operating division" (i.e., CMS) in determining whether to approve a CAP and requiring that a state claim FFP only in accordance with its approved cost CAP. New Jersey Br. at 16-20, 22, citing 45 C.F.R. § 95.507, 95.517(a) and New Jersey Exs. at Aa97-100. New Jersey thus argues that CMS's determination that the disputed costs were not eligible for enhanced FFP should only be applied prospectively.

As New Jersey recognizes, however, "[a]n approved CAP is not an unalterable 'contract' binding the parties, and approval of a CAP cannot make a cost allowable contrary to statute or regulation." New Jersey Br. at 17, citing *N.J. Dep't of Human Servs*., DAB No. 1801, at 3 (2001) (citations omitted). The Board also stated in DAB No. 1801 that "[c]osts claimed in accordance with the plan still must be allowable under the applicable cost principles, regulations, and law and are still subject to any administrative or statutory limitations." DAB No. 1801, at 3.

In *Pennsylvania*, DAB No. 832, the Board rejected a similar argument that approval of its CAP earmarking disputed cost centers as allocable to MMIS protected the state from a disallowance of costs not eligible for enhanced 75 percent FFP. The Board reiterated its previous findings that "CAPs function primarily to delineate proper cost allocation methods and procedures and do not address the full range of substantive issues raised by [CMS]'s programs," and that CAP approvals "cannot be viewed as policy judgments on the part of the Agency about cost allowability" and are "specifically limited and do not purport to be approval of the allowability of particular costs." *Pa. Dep't of Pub. Welfare* at 6, citing *N.Y. State Dep't of Soc. Servs.*, DAB No. 449 (1983).

In support of its argument that the appropriate remedy here would be for DCA to require New Jersey to amend its CAP, New Jersey cites *N.Y. State Office of Children and Family Servs.*, DAB No. 1831 (2002). New Jersey's reliance on that case is misplaced. There, the Board reversed DCA's disapproval of a proposed CAP provision that allocated, to the federal foster care program at title IV-E of the Act, costs that DCA determined were unallowable under the title IV-E regulations. In reversing that determination, the Board found that the HHS "operating division" – the Administration for Children and Families – had not adopted DCA's construction of the regulatory term at issue. Here, by contrast, CMS relies on a long-standing policy that has been recognized in numerous Board decisions and applied by regulation. There was also no disallowance at issue in DAB No. 1831, and the Board did not address the question of whether DCA's approval of a CAP would bar the operating division from subsequently disallowing claims for unallowable costs.

Finally, the issue here is not whether the disputed salary costs were allocable to New Jersey's Medicaid program or to its MMIS as administrative costs, but whether New Jersey has met its burden of showing that all of those costs were eligible for enhanced reimbursement in addition to the 50 percent FFP CMS awarded. Entitlement to enhanced FFP is a question of allowability and not of allocability, which is the subject of a CAP, and the CAP's allocation of the disputed cost centers to New Jersey's MMIS did not establish their allowability for enhanced FFP.[5] *See, e.g., N.Y. State Dep't of Soc. Servs.*, DAB No. 1205, at 3, 13-14 ("a connection to MMIS operations" for the costs at issue "only confirms that New York's cost allocation methodology was sound, not that the costs qualify for enhanced reimbursement" under SMM provisions then in effect).

As the Board stated in *Pennsylvania*, CAP approvals "cannot be viewed as a policy judgment on the part of the Agency about cost allowability." DAB No. 832, at 8. Thus, DCA's approval of New Jersey's CAP was not a determination that the costs associated with the cost centers at issue are also allowable and did not preclude the disallowance action here.

III. <u>We decline New Jersey's request to instruct CMS to permit New Jersey to reclaim some costs under an exception to the timely claims requirement.</u>

We decline New Jersey's request that we "instruct CMS to permit DHS to reclaim" a total of $54,825.31 "in salary costs attributable to two costs centers at the 75%" FFP rate available for SPMP costs "pursuant to the audit exception to the two-year claiming limitation" at 45 C.F.R. § 95.19(b). New Jersey Br. at 5, 23. That regulation and section 1132(a) of the Act provide that the two-year time limit for submitting claims for FFP under the Medicaid program does not apply to claims resulting from an "audit exception." 45 C.F.R. §§ 95.1(a), 95.19(b). An "audit exception" is "a proposed adjustment by the responsible Federal agency to any expenditure claimed by a State by virtue of an audit." 42 C.F.R. § 95.4. New Jersey states that this exception applies because the OIG audit revealed that New Jersey "mistakenly claimed," as MMIS costs for 2006 and 2007, salaries from costs centers 515 (Morris Medical Assistance Customer Center) and 554 (Camden Medical Assistance Customer Center) that the CAP "assigned to [SPMP] Function F4." New Jersey Br. at 23-24.

[5] In this respect, we do not agree with New Jersey that in DAB No. 1831, "the CAP concerned 'allowability, not allocability.'" New Jersey Br. at 19, citing DAB No. 1831. The Board there noted instead that "*even though* this case involve[d] a [CAP], the *issue* presented [was] one concerning allowability, not allocability." DAB No. 1831, at 12 (emphasis added). The Board also pointed out that, as here, it was the HHS operating division that had "primary responsibility" for determining whether a cost is allowable. *Id*.

First, New Jersey's request is premature. The Board's regulations authorize us to review "disallowances" under title XIX of the Act, and require that the appellant state "must have received a final written decision" that it timely appeals to the Board. 45 C.F.R. Part 16, App. A, ¶ B(1), § 16.3(b); *see also* Act § 1116(e)(2)(A) (a state "may appeal a disallowance of a claim for [FFP] under title XIX" to the Board). There is no indication that New Jersey has submitted to CMS, or that CMS has disallowed, a claim for the FFP in the identified costs as SPMP costs. In any event, to the extent New Jersey requests equitable relief (here in the nature of an injunction), we do not have authority to grant New Jersey's request. *See, e.g., Puerto Rico Dep't of Health*, DAB No. 2385, at 29 (2011) (Board lacks authority to grant request for what is essentially equitable relief).

Second, the record indicates that the claim New Jersey proposes would not qualify for the audit exception. The Board has "consistently . . . made clear that the regulatory definition of 'audit exception' excludes claims which do not originate in adjustments proposed by the federal agency based on an exception taken in an audit." *Kan. Health Policy Auth.*, DAB No. 2216, at 4 (2008), citing *N.Y. State Dep't of Soc. Servs.*, DAB No. 521, at 7 (1984), *Tenn. Dep't. of Health & Env't*, DAB No. 921, at 4 (1987) ("critical element of the definition of 'audit exception'" absent where no "proposed adjustment by the Agency based on an audit"), and *N.Y. State Dep't of Soc. Servs.*, DAB No. 1382, at 5 (1993) ("adjustment must be proposed by the responsible Federal agency"). This exception, like all the exceptions to the timely claims limit, is "to be narrowly construed." *Kan. Health Policy Auth.* at 4. Here, the audit exception does not apply because the record does not show that either DCA or CMS, based on the audit, proposed any adjustment to New Jersey's claims for SPMP costs for the years in question to account for the two cost centers that New Jersey mistakenly claimed as MMIS costs.

New Jersey argues that the OIG audit shows that the federal agency proposed the adjustment because OIG "created an excel chart where it specifically determined that cost centers 515 and 554 were designated in the CAPs as SPMP and even noted in the comments section that they had been identified by DMAHS as SPMP and that reclassification was pending the OIG audit report." New Jersey Reply at 10, citing New Jersey Exs. at Aa101-02. However, the OIG audit report (like the draft report and New Jersey's comments on the draft report) does not propose any reclassifications or adjustments to New Jersey's SPMP claims and nowhere addresses cost centers 515 or 554 or New Jersey's SPMP costs. New Jersey Exs. at Aa004-040. Moreover, the chart to which New Jersey cites states that CMS merely agreed that the two cost centers "are not related to MMIS operations." New Jersey Exs. at Aa101-02. The comment New Jersey cites merely indicates that New Jersey sought a reclassification of the costs. *Id*. Absent any showing that CMS or DCA proposed such an adjustment to New Jersey's SPMP claims (or even agreed with DMAHS that the charges were allowable SPMP), the audit exception would not apply, even if we had before us an appeal involving a disallowance of the costs at issue.

Conclusion

For the reasons stated above, we sustain the disallowance.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member