

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: New Mexico Human Services Department  
Docket No. 79-8-NM-HC  
Decision No. 83

DATE: February 25, 1980

DECISION

The State appealed by letter dated January 16, 1979, from the determination of the Director, Medicaid Bureau, Health Care Financing Administration, dated December 18, 1978, disallowing Federal financial participation in the amount of \$4,634 claimed for administering family planning services under Title XIX of the Social Security Act for the fiscal year ended June 30, 1976. After being notified by the Board's Executive Secretary that it had failed to attach to its appeal a copy of the notification of disallowance in accordance with 45 CFR 16.6(a)(2), the State completed its application for review by filing that document under cover of a letter dated February 7, 1979. The record in this case includes the application for review, HCFA's response to the appeal dated March 28, 1979, and the parties' responses to the Order to Show Cause issued by the Board Chairman on November 16, 1979, dated December 5 and December 31, 1979, in the case of the State, and January 2, 1980, in the case of HCFA.

Section 1903(a)(5) of the Social Security Act provides for 90 percent FFP in expenditures "attributable to the offering, arranging, and furnishing (directly or on a contract basis) of family planning services and supplies...." The State claimed a portion of the operational costs of its Medicaid Management Information System (MMIS) as well as certain MMIS supportive costs at a 90 percent rate of FFP on the ground that a certain number of the Medicaid claims processed under the MMIS were for family planning services. The Director of the Medicaid Bureau determined, however, that the MMIS operational costs were reimbursable instead at the 75 percent rate of FFP applicable to expenditures for the operation of mechanized claims processing and information retrieval systems under Section 1903(a)(3)(B) of the Act and that the MMIS supportive costs were reimbursable under Section 1903(a)(7) of the Act at the 50 percent rate of FFP applicable to all other expenditures necessary for the proper and efficient administration of the State plan.

The Order to Show Cause called for briefing on this issue, which was duly submitted by the parties. In addition, the Order called for briefing on a threshold issue: whether the disallowance was properly taken by the Director of the Medicaid Bureau in view of the fact that, nearly two years earlier, another HEW official had made an apparently final decision that the costs in question were allowable. That decision was

made by the Acting Regional Commissioner of the Social and Rehabilitation Service (SRS), Region VI, in a letter dated March 23, 1977, in which he advised the State that he disagreed with the position of the HEW Audit Agency--set forth in a January 25, 1977 letter from the Regional Audit Director to the State--that the costs were not claimed at the proper rate of FFP, and that since he had determined the costs to be allowable, no further action by the State was required. The State argued that this letter "constituted waiver by HEW as to any further claim," and further, that by not acting to disallow the costs until nearly two years later, HEW ratified its previous decision not to disallow. (Application for review, p. 3.)

For the reasons stated below, we find that the Acting Regional Commissioner's decision allowing the costs was a final determination not subject to further review by the Director of the Medicaid Bureau. We therefore do not reach the question whether the costs were claimed at the proper rate of FFP.

HCFA argued initially on the question of the finality of the March 1977 decision of the Acting Regional Commissioner that he did not have the authority to review audit findings, citing, among other things, a memorandum of the Administrator of HCFA dated November 28, 1978 listing those officials authorized to notify grantees of disallowances. (Response to appeal, pp. 3, 9-10.) The Order to Show Cause, relying on 45 CFR 201.14(b)(1) and (c)(1) and 201.13(a), noted, however, that before the Social and Rehabilitation Service was abolished and its functions with respect to the Medicaid program transferred to HCFA, the Regional Commissioners of SRS were responsible for making determinations as to the allowability of costs claimed under various titles of the Social Security Act, including Title XIX, with any disallowances taken by them subject to appeal by the State to the Administrator of SRS. (Order, pp. 1-2.) The Chairman of this Board in certain cases and the Board in others are successors to the authority of the Administrator of SRS.

In its response to the Order, HCFA conceded that the Acting Regional Commissioner of SRS was an authorized official and that there was no provision for reconsideration of his decision disallowing FFP except at the State's request. It advanced the new argument, however, that SRS and the HEW Audit Agency were "parallel agencies" and that where there were "substantive differences" between the Regional Commissioner of SRS and the Regional Audit Director "regarding fiscal compliance as it related to interpretation of regulations governing Federal financial participation," the matter had to be resolved by "higher authority within the structure of central administration responsible for resolution of intra agency conflicts." In this case, according to HCFA, the responsibility for resolving the conflict devolved upon the Director of the Medicaid Bureau. (HCFA's response to Order, pp. 2-4.)

We do not find HCFA's argument persuasive. It is contrary to the traditional relationship of auditor and program official. The auditor states an opinion and a recommendation. He does not make a determination. Responsibility for determinations rests with the cognizant program official. This was the pattern in HEW at the time of the events in question, and it is still true as far as has been shown. (Office of the Assistant Secretary, Comptroller, Statement of Organization, Functions, and Delegations of Authority, 39 FR 42403, 42408-9; Office of Inspector General, Statement of Organization, Functions, and Delegations of Authority, 42 FR 17530, 17531-2 (April 1, 1977).) Although some suggestions for changes in this pattern have been made, they have not as yet been adopted. (F.g., Issue Paper on Draft GAM Chapter on Audit Resolution, Organizational Level of Action Officials and Approving Officials, draft dated 5/31/79.)

45 CFR 201.12 provides in pertinent part that--

"(a) Annually, or at such frequencies as are considered necessary and appropriate, the operations of the State agency are audited by representatives of the Audit Agency of the Department....

(b) Reports of these audits are released by the Audit Agency simultaneously to program officials of the Department, and to the cognizant State officials. These audit reports relate the opinion of the Audit Agency on the ... allowability of costs audited at the State agency. Final determinations as to actions required on all matters reported are made by cognizant officials of the Department." 35 FR 12180, 12182 (July 29, 1970).

This clearly reflects the traditional pattern: the Audit Agency states a opinion, not a determination. The determination is made by a cognizant official.

A notice subsequently published in the Federal Register describing the organization and functions of SRS clearly indicated that the Regional Commissioners of SRS were cognizant officials of the Department authorized to make final determinations regarding costs questioned by the Audit Agency. The notice states that there is an SRS Regional Office in each of the ten HEW regions, each office being under the direction of a Regional Commissioner. It further states that "[t]he Regional Commissioner directs all SRS programs, personnel, funds and resources for the region," and, more specifically, that each Regional Office "reviews and approves formula grant awards and expenditures." (Social and Rehabilitation Service, Statement of Organization, Functions, and Delegations of Authority, 41 FR 53137, 53138 (December 3, 1976).)

Accordingly, we conclude that the decision of the Acting Regional Commissioner allowing the costs at the 90 percent rate of FFP claimed by the State was final, and that the appeal should be granted. HCFA's re-opening of the matter was inconsistent with a clearly defined procedure for the handling of audit recommendations. That there was as HCFA argues no harm to the State in this case from the delay in taking a disallowance, if true, would not be a sufficient reason for permitting the Agency to disregard this procedure.

We reach this conclusion in part because of the inadequacy of HCFA's briefing on this issue, which may perhaps be explained by the small dollar amount in dispute. If in a future case, the Agency were to present a different, more convincing analysis, a different result might be reached. The record in this case as made by the Agency, however, compels the conclusion we have reached here. The determination dated December 18, 1978 by the Director, Medicaid Bureau, HCFA, is unauthorized and is set aside.

/s/ Bernard E. Kelly

/s/ Thomas Malone

/s/ Malcolm S. Mason, Panel Chairman