

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: New Mexico Children, Youth and Families Department
Docket No. A-08-2
Decision No. 2159

DATE: March 4, 2008

DECISION

The New Mexico Children, Youth and Families Department (New Mexico) appealed a determination by the Administration for Children and Families (ACF) disallowing federal financial participation (FFP) New Mexico claimed under title IV-E of the Social Security Act (Act). ACF based the disallowance on an audit that found that New Mexico had submitted \$1,235,888 in unallowable claims for FFP in training and administrative costs. New Mexico challenges ACF's disallowance of \$888,147 in FFP claimed for amounts New Mexico paid to three universities, but does not appeal the remaining disallowance.

For the reasons stated below, we uphold the disallowance in full.

Legal Background

Title IV-E establishes a program for foster care maintenance and adoption assistance. States with approved state plans may claim FFP in payments for foster care maintenance and adoption assistance. In addition, FFP is available in amounts "found necessary by the Secretary for the provision of child placement services and for the proper and efficient administration of the State plan" at rates that vary depending on the type of cost. Act, § 474(a)(3). FFP is available at a 75% rate for expenditures for--

the training (including both short- and long-term training at educational institutions through grants to such institutions or by direct financial assistance to students enrolled in such institutions) of personnel employed or preparing for employment by the State agency

or by the local agency administering the plan in the political subdivision[.]

Act, § 474(a)(3)(A). FFP is available at a 50% rate for general administrative costs. Act, § 474(a)(3)(E).

Title IV-E regulations are at 45 C.F.R. Part 1356. Section 1356.60(b) provides in pertinent part:

Federal matching funds for State and local training for foster care and adoption assistance under title IV-E.

(1) Federal financial participation is available at the rate of seventy-five percent (75%) in the costs of:

(i) Training personnel employed or preparing for employment by the State or local agency administering the plan, and;

(ii) Providing short-term training . . . to current or prospective foster or adoptive parents

(2) All training activities and costs funded under title IV-E shall be included in the State agency's training plan for title IV-B.

(3) Short and long term training at educational institutions and in-service training may be provided in accordance with the provisions of §§ 235.63 through 235.66(a) of this title.

Sections 235.63 through 235.66(a) set out conditions for who may be trained and when FFP is available for their training; set out conditions for grants to educational institutions; identify activities and costs matchable or not matchable as training expenditures; and identify permissible sources of matching funds for such expenditures.

The conditions for grants to educational institutions in section 235.63(c) include that the grants are made "for the purpose of developing, expanding, or improving training," that the grants are for an educational program "directly related to the agency's program," that the grants are made to an accredited institution and program, that the State agency has "written policies establishing conditions and procedures for such grants," that each grant "describes objectives" related to the federal program and state or local manpower needs, and that an evaluation of the program is done according to the regulation.

Section 235.64 provides, in pertinent part, that FFP is available for the following costs:

(a) Salaries, fringe benefits, travel and per diem for-

(1) Staff development personnel (including support staff) assigned full time to training functions and;

(2) Staff development personnel assigned part time to training functions to the extent time is spent performing such functions.

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(c) For training and education outside of the agency, FFP is available for-

(1) Salaries, fringe benefits, dependency allowance, travel, tuition, books, and educational supplies for employees in full-time, long-term training programs (with no assigned agency duties);

(2) Salaries, fringe benefits, travel, tuition, books, and educational supplies for employees in full-time, short-term training programs of four or more consecutive work weeks;

(3) Travel, per diem, tuition, books and educational supplies for employees in short-term training programs of less than four consecutive work weeks, or part-time training programs; and

(4) Stipends, travel, tuition, books and educational supplies for persons preparing for employment with the State or local agency.

(d) FFP is available for payments to educational institutions, as described in § 235.63(c) for salaries, fringe benefits, and travel of instructors, clerical assistance, teaching materials and equipment.

These provisions from Part 235 have been in effect since 1980. 45 Fed. Reg. 29,831 (May 6, 1980). The proposed rule indicated the Department's intent to distinguish between costs that would be considered matchable as training costs and costs that would be matchable as administrative expenses. 42 Fed. Reg. 2440, 2447 (Jan. 11, 1977).

The title IV-E grants at issue here were also subject to general grant administrative requirements at 45 C.F.R. Part 74 (with some exceptions not relevant here). 45 C.F.R. § 74.1(a)(3) (2000-2002). Title IV-E grants were later made subject to the requirements at 45 C.F.R. Part 92, which New Mexico erroneously cites. 45 C.F.R. § 92.4, as amended Sept. 6, 2003. Both Parts, in any event, provide that the allowability of costs incurred by educational institutions is determined by the cost principles in

Office of Management and Budget (OMB) Circular A-21.¹ 45 C.F.R. §§ 74.27, 92.22.

Factors affecting allowability of costs under OMB Circular A-21 include whether the cost is allocable to the cost objective to which it is charged. OMB Circular A-21, Attachment, ¶ C.2. A cost is allocable to a particular cost objective "if the goods or services are chargeable or assignable to such cost objective in accordance with relative benefits received or other equitable relationship." Id., ¶ C.4.a.

The Circular defines "direct costs" as "those costs that can be identified specifically with a particular sponsored project, an instructional activity, or any other institutional activity, or that can be directly assigned to such activities relatively easily with a high degree of accuracy." Id., ¶ D.1. For purposes of OMB Circular A-21, the term "facilities and administrative (F&A) costs" is used for "costs that are incurred for common or joint objectives and, therefore, cannot be identified readily and specifically with a particular sponsored project, an instructional activity, or any other institutional activity." Id., ¶ B.4. As the Circular notes, F&A costs are synonymous with "indirect" costs, as previously used in the Circular. Id.

F&A costs are distributed to benefitting activities using a distribution base. Generally, the distribution base is "modified total direct costs, consisting of all salaries and wages, fringe benefits, materials and supplies, services, travel, and subgrants and subcontracts up to the first \$25,000 of each subgrant or subcontract (regardless of the period covered by the subgrant or subcontract)." Id., ¶ G.2. The Circular lists items that are excluded from the distribution base, including equipment, scholarships, and fellowships, and provides that other items may be excluded "where necessary to avoid a serious inequity in the distribution of F&A costs." Id. To determine an F&A rate for a major function of the institution (such as organized research or instruction), separate categories of F&A costs allocated to that function are aggregated and treated as a common pool for that function, and then the amount in that pool is divided by the distribution base to arrive at the rate for that function. Id., ¶ G.1.a. The rate is expressed as the percentage that the amount

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ACF provided as Exhibit 4 a copy of OMB Circular A-21 as revised on 5/10/04. The provisions relevant here, however, were in effect during the entire disallowance period.

of the F&A cost pool is of the modified total direct costs identified with that pool. Id., ¶ G.2.

For certain institutions, separate categories of F&A costs may first need to be accumulated in intermediary cost pools and then allocated to the institution's major functions using appropriate distribution bases, or separate rates may be needed for work performed in different environments. Where the total direct cost of work covered by OMB Circular A-21 at an institution does not exceed \$10 million, a simplified procedure may be used to establish a rate with either a salaries and wages base or a modified total direct cost base. Id., ¶ H. If a salaries and wages base is used to calculate the F&A rate, then that rate is applied to direct salaries and wages for individual agreements to determine the amount of F&A costs allocable to such agreements. Id., ¶ H.2.e. If a modified total direct cost base is used to calculate the F&A rate, then that rate is applied to modified total direct costs for individual agreements to determine the amount of F&A costs allocable to such agreements.

Cost elements that are not included in the direct cost base used to determine an indirect cost rate may not be included in the direct cost base to which that rate is applied. See University of California, DAB No. 763 (1986); Texas Health and Human Services Commission, DAB No. 2136 (2007).

Case Background

The Office of the Inspector General (OIG) of the federal Department of Health and Human Services conducted an audit of the title IV-E training costs that New Mexico claimed for amounts paid under contracts New Mexico had with three universities for the two-year period ending September 30, 2002. ACF Ex. 3, Audit Report No. A-06-06-00045. In a final audit report issued on February 16, 2007, the auditors concluded that the State agency did not adequately negotiate or monitor its training contracts with the universities. Id. at 6. As a result, the auditors found, New Mexico claimed the following unallowable or unsupported amounts of FFP totalling \$1,188,154:

- \$491,605 for "administrative costs that two universities computed using an incorrect distribution base";
- \$348,808 for "three universities' administrative costs that were overstated because costs were incorrectly billed at the 75-percent training rate rather than the 50-percent administrative rate"; and
- \$347,741 for "one university's direct training costs that were not supported by ledgers or invoices, [were]

expressly unallowable (such as donations and entertainment), or [were] not reasonable and necessary for operating the program, as well as the indirect costs associated with these unallowable amounts.”

Id. The first finding relates to the types of costs that may be included in the direct cost base for distributing the indirect costs of the two universities. The auditors also identified as unallowable \$47,734 for one of these two universities “that indirectly computed administrative costs using an unsupported indirect-cost rate.” Id. The auditors recommended that the State agency refund the \$1,188,154 and “work with ACF to identify the allowable portion of the \$47,734 in indirect costs allocated to the Title IV-E program.”

ACF issued a disallowance determination, which stated that ACF was disallowing \$1,235,888, based on the audit report.

New Mexico does not appeal the finding that \$347,741 of one university’s direct training costs were unsupported or unallowable, but appeals the remaining disallowance of \$888,147.

Analysis

Below, we first discuss the disallowance related to two universities’ indirect cost rates (the \$491,605 disallowed because the federally approved rates were applied to incorrect distribution bases and the \$47,734 disallowed because the indirect cost rate used for one year was unsupported). We set out in detail the audit findings, New Mexico’s response, and our analysis of each of the arguments. We then similarly discuss the disallowance of \$348,808 that relates to the FFP rate available for the three universities’ administrative costs. Finally, we address some general arguments New Mexico made.

Administrative costs computed using an incorrect distribution base or an unsupported indirect cost rate are not allowable.

The audit found that New Mexico had claimed \$491,605 in FFP for indirect administrative costs that two universities, New Mexico Highlands University (Highlands) and Western New Mexico University (Western), had incorrectly computed using an incorrect distribution base. Specifically, the audit report stated:

- Highlands computed its administrative costs by applying its indirect-cost rate to a direct-cost base that incorrectly included equipment and stipends.

These costs should not have been part of the base according to [Highland's] federally negotiated agreements, which were in effect during our 2-year period ended September 30, 2002.

- Western computed its administrative costs by applying its indirect-cost rate to a direct cost base that incorrectly included equipment, supplies, travel, and other nonsalary and nonwage items. These costs should not have been part of the base according to [Western's] federally negotiated agreement, which was in effect during the first year of our audit period until June 30, 2001.

ACF Ex. 3, at 12. The audit also questioned an additional \$47,734 in FFP claimed for the period when Western did not have a federally negotiated indirect cost agreement. The audit found:

Western computed and claimed its administrative costs during the year ended September 30, 2002, using a State-contracted indirect cost rate that it set and negotiated with the State agency However, the State-contracted rate was unsupported, and there was no information on the indirect-cost pools or distribution base used to set the rate.

Id. The audit report recognized that the \$47,734 might include some allowable costs and, therefore, set it aside for further review by the State agency and ACF. Id. at 13. ACF determined to disallow both the \$491,605 and the \$47,734 in FFP for indirect costs, finding that New Mexico had "contracted with universities using distribution bases that were inconsistent with the terms of OMB Circular A-21, and was unable to support State-contracted rates" Disallowance Ltr. at 3. ACF determined to disallow all of the \$47,734 questioned by the auditors since ACF had not received any information on how the State-contracted rate was derived or any documentation supporting the allowability of the claimed costs. Disallowance Ltr. at 5.

The record supports ACF's determination that New Mexico claimed costs for the two universities that were inconsistent with their federally negotiated rate agreements. With respect to Highlands, ACF submitted a printout of the federally negotiated F&A rate agreement, dated December 1, 1999. ACF Ex. 5, at 1. This agreement set a predetermined rate of 43% for on-campus, organized research and instruction for the period 7/1/99 through

6/30/03. The base for the established rates is described in this agreement as follows:

Modified total direct costs, consisting of all salaries and wages, fringe benefits, materials, supplies, services, travel and subgrants and subcontracts up to the first \$25,000 of each subgrant or subcontract (regardless of the period covered by the subgrant or subcontract). Modified total direct costs shall exclude equipment, capital expenditures, charges for patient care, tuition remission, rental costs of off-site facilities, scholarships, and fellowships as well as the portion of each subgrant and subcontract in excess of \$25,000.

Id. at 2.²

As ACF points out and New Mexico does not deny, a stipend is a type of scholarship or fellowship. ACF Br. at 7.³ Thus, the rate agreement expressly excludes from the distribution base the two costs - equipment and stipends - that the auditors found (and New Mexico does not deny) were included in the base used to calculate the claimed indirect costs.

ACF also submitted a printout of the negotiated rate agreement for Western, dated May 2, 2001, that establishes a predetermined on-campus rate of 43% applicable to all programs for the period from 7/1/97 to 6/30/01. ACF Ex. 5, at 5. This agreement describes the base as "[d]irect salaries and wages including vacation, holiday, sick pay and other paid absences but excluding all other fringe benefits." Id. The agreement also states: "EFFECTIVE 07/01/01, THIS ORGANIZATION DOES NOT RECEIVE DIRECTLY FROM THE FEDERAL GOVERNMENT, ACTIVE GRANTS OR CONTRACTS WHICH REQUIRE A NEGOTIATED INDIRECT COST RATE. HOWEVER, IF/WHEN SUCH A GRANT OR CONTRACT IS AWARDED, A NEW RATE WILL BE ESTABLISHED AT THAT TIME." Id. While New Mexico makes much of the fact that Western had sought, and was denied, a federal rate for the period

² "Equipment" is defined in the F&A rate agreement to mean "an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost of \$500 or more per unit. ACF Ex. 5, at 2.

³ New Mexico had an opportunity to submit a reply brief after ACF had submitted its brief, but chose not to do so.

beginning 07/01/01, New Mexico does not deny that the 43% approved rate applied to the earlier period, and was calculated using a salaries and wages distribution base.

New Mexico's response to the draft audit report was that 45 C.F.R. § 92.20(b)(5) sets standards for financial management systems and indicates that "applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability and allocability of costs." Notice of Appeal, Appendix (App.) B., at 2. According to New Mexico, Highlands and Western complied with the terms of the subcontract which "clearly stated the approved indirect cost rates for both universities could be applied to total direct cost (which includes stipends and equipment)." Id. New Mexico also asserted that ACF had approved these subcontracts on numerous occasions. Id. On appeal, New Mexico makes similar assertions, stating that the "universities generally calculated the administrative costs billed to [New Mexico] by applying their negotiated indirect cost rates to their direct training costs" and citing to its Exhibit 2 as support for the assertion that the "subcontracts clearly state that the approved indirect cost rates for [the two universities] could be applied to total direct costs (which include stipends and equipment)." NM Br. at 5.

We first note that the issue here is not whether the costs to which the universities applied their approved rates were or were not the direct costs of training. The issue is whether the base to which the rates were applied incorrectly included costs, such as equipment and stipends, that were excluded from the base used to calculate the rates. New Mexico does not directly dispute the audit findings in this regard, and the rate agreements are consistent with the audit findings. It is the federally negotiated rate agreements that establish the proper distribution base for allocating indirect costs.

Moreover, New Mexico's Exhibit 2 does not support New Mexico's assertion that the subcontracts state that the approved indirect cost rates could be applied to stipends and equipment. Exhibit 2 is a "Joint Powers Agreement Between New Mexico Highlands University and Children, Youth and Families Department" entered into in July 2005. The audit period, however, ends on September 30, 2002. New Mexico does not state how this agreement for a later period is relevant. Even if we assume that the terms of the earlier agreement were the same, moreover, this agreement does not support New Mexico's assertions. New Mexico does not cite to any page in the exhibit, so we reviewed the entire document. We could find no provision in the text of the

agreement addressing indirect costs. The provision on payment states:

The total amount payable . . . under this JPA shall be \$1,955,777.00, the total program cost is \$3,822,873.00 and [Highland's] match is \$1,867,096.00 as determined in accordance with the Financial Information Sheet appended to this as Attachment A and incorporated herein by reference.

NM Ex. 2, at 10th unnumbered page (emphasis in original). Attachment A is the 2005-2006 budget, with a column for university expenditures, a column for IV-E, and a column for total expenditures. The budget line items are in various categories. There is a sub-total for "Program Costs," a line for "Indirect Costs" immediately below this sub-total, and another subtotal for "Program Costs + Indirect Costs." The line for indirect costs says: "Indirect Costs @ 43% (Does not include costs for student services and equipment expenditures)." The heading "Student Services" appears below the subtotal for "Program Costs + Indirect Costs" and above line items for costs such as "Graduate Assistantships," "MSW Stipends" and "BSW Stipends." In other words, contrary to New Mexico's assertions that the subcontract approved by ACF provided for applying Highland's approved 43% rate to a direct cost base that included equipment and stipends, the subcontract budget (at least for later years) indicated that such costs would be excluded from the base.

We also note that the subcontract provided that Highlands would repay any disallowance of IV-E funds based on the acts or omissions of Highlands which violate applicable federal statutes or regulations. NM Ex.2 at 3rd unnumbered page. Given this and similar provisions, we do not think that ACF approval of the subcontract could reasonably be read as authorizing federal IV-E funding for claims for indirect costs that were not allocated to title IV-E using a method consistent with Highland's negotiated rate agreement. The effect of permitting Highlands to disregard the terms of its federally negotiated agreement and to apply its approved rate to an incorrect distribution base would be to allocate to title IV-E costs that do not benefit it. It could also have the effect of permitting Highlands to receive reimbursement amounts for indirect costs that exceed its total indirect costs or to shift to federal funds the indirect costs of non-federal projects.

With respect to Western, New Mexico presented no evidence whatsoever to support its assertion that Western was complying

with a subcontract that ACF had approved. Moreover, as indicated above, ACF's evidence shows that during the period Western's federally negotiated F&A rate agreement was in effect (that is, until 6/30/01), the approved rate of 43% was to be applied to direct salaries and wages as defined in the agreement. New Mexico does not dispute the audit finding that Western instead computed its administrative costs by applying its indirect cost rate to a direct cost base that included equipment, supplies, travel, and other nonsalary and nonwage items.

New Mexico does point out that, for the remainder of the disallowance period (from 7/1/01 through 9/30/02), there was no federally negotiated rate for Western. According to New Mexico, since the federal cognizant agency determined there was no need to establish a federal rate for this period for Western, New Mexico had the discretion to establish a rate through its subcontract with Western. Even assuming that New Mexico had discretion to establish a rate, however, that does not mean that FFP is available in the costs allocated to title IV-E using that rate, even if New Mexico cannot document that the rate resulted in an equitable allocation of costs. The audit found that there was no support for the rate used. New Mexico still has not provided any documentation or other evidence regarding Western's indirect costs that would support New Mexico's allocating any of these costs to title IV-E for this period, much less any evidence that the \$47,734 was allocable to title IV-E.

Accordingly, we uphold the disallowances of \$491,605 and \$47,734 in FFP for indirect costs that were not properly allocated to title IV-E.

Costs were incorrectly billed at the 75-percent training rate rather than the 50-percent administrative rate.

The audit report also recommended disallowing \$348,808 in FFP claimed for the administrative costs of three universities (Highlands, Western, and New Mexico State University) based on the finding that New Mexico incorrectly claimed federal reimbursement using the 75% training rate for costs that were eligible for reimbursement only at the 50% rate. The auditors found that the costs at issue were administrative costs and were not the types of training costs listed as allowable under 45 C.F.R. § 235.64(d). ACF Ex. 3, at 14. According to the auditors, the universities generally calculated the administrative part of their training costs billed to New Mexico by applying their State-contracted or federally negotiated indirect cost rates to their direct training costs. *Id.* The auditors said that New Mexico "should not have claimed these

costs at the 75-percent training rate because the universities calculated these costs based on (1) federally negotiated indirect-cost rates that included costs not listed as allowable under 45 C.F.R. § 235.64(d) or (2) State agency contracted rates for which there was no documentation to show that the rates were derived based only on costs listed as allowable under 45 C.F.R. § 235.64(d)." Id. The audit report also cited regulations at 45 C.F.R. § 74.21(b)(7), which require that source documentation must support accounting records. Id.

In response, New Mexico quotes from section 1356.60(b) of the title IV-E regulations and the provisions of sections 235.63 to 235.66(a) that are incorporated by reference into section 1356.60(b). New Mexico says that it believes the disallowance amounts in question are reimbursable at the 75% rate because "stipends are considered allowable" at that rate. NM Br. at 4.

We agree that stipends may be allowable at the 75% rate if they meet the regulatory conditions. There is no indication here, however, that the auditors questioned claims for the costs of stipends. Indeed, the audit report specifically states that the auditors did not question direct stipend costs. ACF Ex. 3, at 18. The issue raised by the audit is whether all indirect costs of a university that are allocable to title IV-E training contracts are reimbursable at the enhanced rate. The answer to that question is clearly "no." The regulations list only certain categories of costs as training costs reimbursable at the enhanced rate because the Secretary determined that other types of costs, even if they benefitted the training objective, were more properly treated as administrative costs.

Under OMB Circular A-21, the costs that are ultimately pooled together in order to determine a university's F&A (indirect cost) rate could include many categories of costs, such as depreciation or a use allowance on buildings or equipment, interest on debt associated with certain buildings, operation and maintenance expenses, general administration, and student administration and services. OMB Circular A-21, Attachment, ¶ F.1. These categories include types of costs that are not listed in the applicable regulations as training costs reimbursable at the 75% enhanced rate. Moreover, the auditors found that New Mexico was unable to document what part of the indirect costs consisted of the types of costs listed in the regulation as reimbursable at 75%. New Mexico similarly has provided no documentation to us that would enable us to determine that some part of the indirect costs allocated to title IV-E were reimbursable at the 75% rate.

We note that we would reach this result regardless of whether section 235.64(d) applies (as the audit report indicated) or some other provision applies (as New Mexico seems to suggest). Section 235.64(d), which applies to grants to educational institutions meeting the conditions in section 235.63(c), provides for enhanced FFP only for payments "for salaries, fringe benefits, and travel of instructors, clerical assistance, teaching materials and equipment."⁴ Section 235.64(a) provides only for "salaries, fringe benefits, travel and per diem" for "staff development personnel" assigned full or part time to training activities. The costs covered in section 235.64(c) for training and education outside of the state or local agency are generally salary related costs of an employee of the state or local agency, stipends or tuition for someone preparing for such employment, or the costs incurred for such a person to pay for their travel, tuition, books, and educational supplies related to the title IV-E training. New Mexico could not have reasonably read any of the regulatory sections as providing FFP at the enhanced rate for all of the costs treated as F&A costs under OMB Circular A-21.

New Mexico's general arguments have no merit.

New Mexico argues that requiring it to reimburse ACF the disallowed amounts would "violate the spirit and intent" of the legislation authorizing enhanced FFP for child welfare training activities. NM Br. at 1. According to New Mexico, "Congress

⁴ It is not clear from the record before us whether part or all of the agreements between New Mexico and the universities qualified as a "grant" for which FFP is available under section 235.63(c). The regulations in Part 235 define "a grant to an educational institution" as "payments to an educational institution for services rendered under a time limited agreement between the State agency and the eligible educational institution which provides for the training of State or local agency employees or persons preparing for employment with the State or local agency." 45 C.F.R. § 235.61. One of the conditions in section 235.63(c) for FFP for such a grant is that the grant is "for the purpose of developing, expanding, or improving training" for qualified personnel. The agreement between Highlands and New Mexico for 2005-2006 - the only copy of an agreement in the record - seems to meet this purpose, but also to provide for Highlands to administer a program of stipends for qualifying personnel on behalf of New Mexico.

appreciated at the time it passed this legislation that training of service providers directly impacts the quality of services provided to children" New Mexico asserts that, since Congress authorized the enhanced funding for training costs, "regulations, policy announcements, information memorandums and Departmental Appeals Board decisions have been contradictory and ambiguous." Id. at 6. New Mexico asserts that, despite the lack of clear training regulations, New Mexico and its universities "made a good-faith effort to comply with the letter and intent of the laws and regulations governing Title IV-E reimbursement while striving to provide the highest quality of services to New Mexico families and children." Id. Moreover, New Mexico contends, "ACF was aware of what [New Mexico's] contracts with the universities provided at the time the contracts were entered into and voiced no objection at the time." Id.

This argument has no merit. New Mexico points to nothing specific to show that it has received any contradictory or ambiguous guidance, much less to show that it reasonably thought it could claim the indirect costs at issue here at an enhanced rate. As discussed above, the requirements for determining indirect costs of universities are clear, and New Mexico points to nothing in those requirements that could reasonably be interpreted to permit it to claim indirect costs calculated using an incorrect distribution base. Using distribution bases that were inconsistent with federally negotiated agreements and an unsupported indirect cost rate resulted in the universities allocating costs to the title IV-E training contracts that did not benefit title IV-E. Disallowing costs that are not, in fact, costs of title IV-E training does not undercut the goals that justified providing enhanced funding for such training. Similarly, those goals are not undercut by denying reimbursement at the 75% rate for indirect costs that clearly include types of costs that, by regulation, are not considered training costs reimbursable at that higher rate.

We also note that, if the agreement New Mexico submitted to us is typical of the agreements it had with the universities during the disallowance period, that document actually undercuts New Mexico's argument that the universities were simply complying with terms ACF had approved. As discussed above, the attached budget document shows that the parties understood (at least by 2005) that the indirect cost rate of 43% for Highlands was not to be applied to the student services costs (including stipends) or to equipment. NM Ex. 2, Att. A. The budget document also contains a line at the bottom for "title IV-E ffp on indirects" in the amount of \$54,920 (which it describes parenthetically as "less than allowed") and which is far less than 75% of the amount

determined by applying the 43% indirect cost rate to total program costs. Id.

New Mexico also argues that it has reviewed OIG audits conducted in Kentucky, New Hampshire, and Delaware within the past several years, for which the audit scope was similar to that of New Mexico, and that "there were no audit findings on the university grants or stipends for which all universities included an indirect cost as part of the grant/stipend and were allowed at the enhanced rate of seventy-five percent." NM Br. at 7. According to New Mexico, the federal regulations and guidance documents "only address indirect costs as they apply to the state agency indirect costs associated with the agencies' internal training programs and the direct service worker indirect costs associated with attending training." Id. New Mexico says it is "being unfairly singled out among other states that the OIG has audited, and the DAB should reverse the ACF directive that it reimburse funds." Id.

This argument is vague and unsupported by any evidence of exactly what costs claimed by Kentucky, New Hampshire, or Delaware were allowed at the 75% rate. New Mexico made the same argument in response to the draft audit report. The auditors responded:

The three [OIG] audit reports that the State agency reviewed either did not include a review of university grants and stipends or did not find errors in the use of the 75-percent enhanced rate for grants and stipends. However, in a report issued on December 14, 2004 (A-01-03-02503), we questioned a university's use of the 75-percent enhanced rate for costs that were derived using an indirect cost rate that was not specific to training. The indirect rate applied to the general operations of the university and did not meet the requirements for the 75-percent enhanced rate.

ACF Ex. 3, at 18. The auditors also cited to two Board decisions that held that the enhanced rate must be limited to specific cost items identified in section 235.64 regardless of whether they were claimed as direct or indirect costs. Id., citing Illinois Dept. of Children and Family Services, DAB No. 1645 (1998) and New York State Dept. of Social Services, DAB No. 1666 (1998). Despite the response in the audit report, New Mexico simply repeats its disparate treatment argument to us, without providing any basis for disagreeing with what the auditors said regarding the facts concerning other States' audits. Moreover, New Mexico disregarded the cited decisions (which addressed the indirect costs of educational institutions), arguing erroneously that past

Board decisions addressed only indirect costs incurred by state agencies.

In any event, New Mexico does not explain how a failure by auditors to question whether the 75% rate is available for costs claimed by other states would provide a basis for allowing New Mexico to claim the 75% rate for costs that are not the types of costs for which the regulations say the enhanced rate is available. Cf. National Behavioral Center, Inc., DAB No. 1760, at 4 (2001) ("allegations of disparate treatment, even if true, do not prohibit an agency of this Department from exercising its responsibility to enforce statutory requirements"), citing Edison Medical Laboratories, Inc., DAB No. 1713 (1999), aff'd, Edison Medical Lab. v. Thompson, 250 F.3d 735 (3rd Cir. 2001); and Rural Day Care Association of Northeastern North Carolina, DAB No. 1489 (1994), aff'd, Rural Day Care Ass'n of Northeastern N.C. v. Shalala, No. 2:94-CV-40-BO (E.D. N.C. Dec. 20, 1995).

Conclusion

For the reasons stated above, we uphold the disallowance.

_____/s/_____
Sheila Ann Hegy

_____/s/_____
Constance B. Tobias

_____/s/_____
Judith A. Ballard
Presiding Board Member