Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: New York State Department of Health
Docket No. A-06-28
Control No. NY-2005-005-MAP
Decision No. 2066

DATE: February 8, 2007

DECISION

The New York State Department of Health (New York) appealed a determination by the Centers for Medicare & Medicaid Services (CMS). CMS disallowed $7,642,194 in federal financial participation (FFP) that New York claimed as medical assistance under title XIX of the Social Security Act (Act) for certain medical and ancillary services provided to children who resided in private psychiatric hospitals or residential treatment facilities that were "institutions for mental diseases" (IMDs). CMS based the disallowance on an Office of the Inspector General (OIG) audit report. The auditors found that New York had improperly claimed FFP in payments for inpatient acute hospital care, physician, clinic, pharmacy, laboratory, dental, and other services rendered by providers other than the IMDs in which the children resided. The Act excludes from the definition of "medical assistance" for which FFP is available payment for any services to an individual who is under age 65 and is in an IMD. We refer to this as the "IMD exclusion." The OIG auditors, relying on the CMS State Operations Manual, took the position that, although the Act and regulations provide for an exception to the IMD exclusion for "inpatient psychiatric services for individuals under age 21," FFP is not available under the exception for the services at issue because they do not meet the definition of "inpatient psychiatric services for individuals under age 21."

New York argues that individuals under age 21 receiving inpatient psychiatric hospital services are properly eligible for FFP for <u>all</u> Medicaid covered services provided to those individuals. New York points out that the Act includes "inpatient psychiatric hospital services to individuals under the age of 21" in the list of covered Medicaid services. According to New York, it

logically follows that, if eligible individuals happen to be under the age of 21, they are entitled to receive inpatient psychiatric hospital services in addition to the other benefits set out in the statute. New York notes that nothing in the statutory list of covered services indicates that such individuals may *only* receive inpatient psychiatric services. New York also argues that the interpretation on which the OIG relied is a change in longstanding policy inconsistent with the legislative history of the IMD exclusion, that prohibiting FFP for Medicaid recipients as a result of their being hospitalized for mental illness violates the Rehabilitation Act of 1973, and that coverage of the services at issue is required under the Early and Periodic Screening, Diagnosis, and Treatment program. In its reply brief, New York also asserts that the services at issue are inpatient medical services provided by hospitals which also provided psychiatric services to the individuals. New York reasons that, since the Act covers inpatient psychiatric hospital services for individuals under age 21 in an IMD and CMS concedes that the individuals who received the services at issue were "in" IMDs, FFP is available for the services.

We uphold the disallowance for the reasons explained below, including that–

- New York's argument based on the list of covered services in section 1905(a) of the Act ignores the wording of the IMD exclusion (which follows the list) and the wording of the only exception to that exclusion. Specifically, while section 1905(a) of the Act defines the term "medical assistance" as meaning payment for the listed covered services, it goes on to say that the term does not include "any such payments" for any individual under age 65 who is a patient in an IMD "except as otherwise provided in paragraph (16)." That paragraph in turn provides for payment only for "inpatient psychiatric hospital services for individuals under age 21" as defined in subsection 1905(h) of the Act.

- Subsection 1905(h) defines "inpatient psychiatric hospital services for individuals under age 21" to include "only" certain inpatient services provided in a qualifying psychiatric hospital (or distinct part thereof) or other qualifying inpatient setting. The implementing regulations define the term to include only inpatient services provided by a qualifying hospital, hospital program, or facility. Thus, contrary to what New York argues, the Act and the regulations do indicate

that the exception makes FFP available only for services provided by the qualifying IMD.

- New York's arguments based on the legislative history of the IMD exclusion and the definition of an IMD confuse the question of the scope of the IMD exclusion with the issue here concerning the scope of the exception. Congress considered care in mental institutions (including medical care) to be a traditional state responsibility. That does not mean, however, that, in creating the exception, Congress intended to assume responsibility for all Medicaid services provided to children institutionalized in qualifying IMDs, no matter who provided them. Indeed, the exception was narrowly tailored to ensure that the covered services would promote active treatment in a setting meeting federal standards. The legislative history of the exception is consistent with CMS's reading of the statutory language to mean that Congress intended for Medicaid to assume responsibility only for the category of services defined in subsection 1905(h).

- CMS policy issuances have for over ten years clearly set out CMS's interpretation that the exception does not make FFP available for noninstitutional services provided outside of the qualifying IMD by other providers. This policy is consistent with the plain language of the Act. At most, the policy is an interpretative rule (not subject to notice and comment rulemaking) of which New York had timely notice. New York did not establish that CMS had a previous, longstanding interpretation that Medicaid would pay for the type of services at issue here. None of the earlier policy issuances on which New York relies directly addresses the issue. Moreover, wording in a Medicaid regulation which New York cites is at most ambiguous, and, in any event, its history and context clearly indicate that it did not constitute a CMS interpretation that FFP is available for all services to children in IMDs receiving inpatient psychiatric services, regardless of who provides the services.

- While subsection 1905(a)(16) uses the term "inpatient psychiatric hospital services," the word "hospital" in that section does not mean that all hospital services qualify for the exception so long as psychiatric services are a component. The term "inpatient psychiatric hospital services for individuals under age

21" has a specific statutory and regulatory meaning and, indeed, includes qualifying services in inpatient settings other than hospitals. While the expectation is that an IMD qualified to provide those services will provide care and services to meet the child's medical needs, that does not mean that FFP is available for medical services provided to the child by other hospital or non-hospital providers outside of the IMD. The mere fact that the children who received the claimed services were still considered to be institutionalized "in" an IMD for purposes of the IMD exclusion cannot transform those services into inpatient services provided by the qualifying IMD. We also note that New York does not deny that the disallowed claims included not only acute care hospital services, but also physician, clinic, pharmacy, laboratory, and dental services.

- New York's other arguments have no merit.

Legal Background

Title XIX of the Act establishes the Medicaid program, in which the federal government and the states jointly share in the cost of providing health care to low-income persons and families.[1] Each state operates its own Medicaid program in accordance with broad federal requirements and the terms of its Medicaid state plan.

Section 1903(a)(1) of the Act makes FFP available on a quarterly basis (at a rate called the "Federal medical assistance percentage") for amounts expended "as medical assistance under the State plan . . . ." The term "medical assistance" is defined in section 1905(a) of the Act. That section begins by defining the term to mean payments for "the following care and services" if they meet certain conditions and are provided to specified eligible individuals, and then lists various categories of services that either must or may be covered under a State Medicaid plan. Some of the service categories for inpatient services include the parenthetical "(other than services in an

[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

institution for mental diseases)."[2] After the list of services, the definition of "medical assistance" contains the following language:

> [E]xcept as otherwise provided in paragraph (16), such term does not include-
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> * * *
>
> (B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for mental diseases.

(Emphasis added.)

Paragraph (16) identifies (as one of the categories of service for which payment qualifies as "medical assistance") "inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h)."

Subsection (h)(1) of section 1905 states:

> For purposes of paragraph (16) of subsection (a), the term "inpatient psychiatric hospital services for individuals under age 21" includes only-
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> (A) inpatient services which are provided in an institution (or distinct part thereof) which is a psychiatric hospital . . . or in another inpatient setting that the Secretary has specified in regulations;
> (B) inpatient services which, in the case of any individual (i) involve active treatment . . . , and (ii) a team . . . has determined are necessary on an inpatient basis and can reasonably be expected to improve the condition, by reason of which such services are necessary, to the extent that eventually such services will no longer be necessary; and
> (C) inpatient services which, in the case of any individual, are provided prior to (i) the date such individual attains age 21, or (ii) in the case of an

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[2] The term "institution for mental diseases" is defined in subsection 1905(i) of the Act to mean "a hospital, nursing facility, or other institution of more than 16 beds, that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases, including medical attention, nursing care, and related services."

> individual who was receiving such services in the period immediately preceding the date on which he attained age 21, (I) the date such individual no longer requires such services, or (II) if earlier, the date such individual attains age 22; . . .

(Emphasis added.) Subsection (h)(2) provides, essentially, that states must maintain efforts prior to 1971 to fund either such services or outpatient services to eligible mentally ill children from non-Federal funds.

The general IMD exclusion in section 1905(a) of the Act is implemented by regulations that address limitations on funding for "Institutionalized individuals." Specifically, section 435.1008 of 42 C.F.R. provides:

> (a) FFP is not available in expenditures for services provided to-
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> * * *
>
> (2) Individuals under age 65 who are patients in any institution for mental diseases unless they are under age 22 and are receiving inpatient psychiatric services under § 440.160 of this subchapter.
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> * * *
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> (c) An individual on conditional release or convalescent leave from an institution for mental diseases is not considered to be a patient in that institution. However, such an individual who is under age 22 and has been receiving inpatient psychiatric services under § 440.160 of this subchapter is considered to be a patient in the institution until he is unconditionally released, or, if earlier, the date he reaches age 22.

See, also, §§ 436.1004; 441.13(a). The phrase "[i]n an institution" refers to "an individual who is admitted to live there and receive treatment or services provided there that are appropriate to his requirements." 42 C.F.R. § 435.1009.

Section 440.160 defines "[i]npatient psychiatric services for individuals under age 21" to mean services that-

> (a) Are provided under the direction of a physician;
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> (b) Are provided by -
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> (1) A psychiatric hospital or an inpatient psychiatric program in a hospital, accredited by the Joint Commission on Accreditation of Healthcare Organizations, or

> (2) A psychiatric facility which is accredited by the Joint Commission on Accreditation of Healthcare Organizations, the Council on Accreditation of Rehabilitation Facilities, or by any other accrediting organization, with comparable standards, that is recognized by the State.
>
> (c) Meet the requirements in § 441.151 of this subchapter.

(Emphasis added.) Section 441.151 contains general requirements for inpatient psychiatric services for individuals under age 21. Other provisions in subpart D of part 441 of 42 C.F.R. explain other requirements from section 1905(h) of the Act, such as the requirements regarding the need for services on an inpatient basis and for active treatment, as well as the maintenance of effort requirement.

Factual Background

The OIG conducted a review "to determine if controls were in place to preclude New York State from claiming Federal financial participation (FFP) under the Medicaid program for all medical services, except inpatient psychiatric services, provided to residents of institutions for mental diseases (IMDs) under the age of 21." CMS Ex. 1, at i. OIG auditors reviewed "1,144 claims with an FFP amount equal to or greater than $2,500." Id. The auditors also reviewed a "stratified random sample of 120 claims with an FFP amount less than $2,500." Id. The auditors found that New York improperly claimed FFP for 512 of the 1,144 claims and 81 of the 120 claims. Id. The auditors found that 505 of the 512 improper claims were "inpatient claims made during periods when the IMD residents were temporarily released to acute care hospitals for medical treatment" and that seven claims were for home health agency services or durable medical equipment. Id. at 5. The 81 sample claims the auditors found improper "consisted of 28 clinic, 20 practitioner, 17 pharmacy, 6 inpatient, 5 laboratory, 3 home health agency, and 2 dental claims." Id. at 6. The auditors determined that New York had improperly claimed a total of $7,642,194 in FFP.

According to the auditors, the improper claims from private psychiatric hospitals occurred because New York did not have controls to prevent FFP from being claimed for medical services. The audit report states: "Although New York officials stated that the inpatient psychiatric per diem rates for private psychiatric hospitals and residential treatment facilities were all inclusive and that medical and ancillary services should not be separately claimed by outside medical providers, they had no

controls or edits in place to prevent these claims from being paid and claimed for FFP." Id. at 6-7.

With respect to claims for residents of State-operated psychiatric facilities, the auditors reported that "New York Office of Mental Health officials stated that . . . the same general controls for medical and ancillary services existed for the under-21-year-old population as those for the population aged 21 to 64." Id. at 7. The auditors noted that a prior audit report (A-02-01-01014) previously found that Office of Mental Health Officials had sent directions and instructions to local resource offices that indicated that medical and ancillary services should be paid with State funds and not claimed for Medicaid payment and had "stated that when a State-operated psychiatric hospital beneficiary (including a beneficiary under the age of 21) goes for services to an outside medical provider, they notify the provider to bill New York and not Medicaid." Id. The auditors concluded, however, that these controls were not effective. The auditors also noted that a different prior audit (A-02-99-01031) had determined that, effective September 1, 1998, New York had "established controls to prevent FFP from being claimed for residents of State-operated psychiatric hospitals aged 21 to 64 who were temporarily released to acute care hospitals for medical treatment," but that these controls were not applied to the under-21-year-old population. Id. The auditors reported that "New York officials stated that they believe if a patient under the age of 21 was temporarily released from a State-operated psychiatric hospital to an acute care hospital for medical treatment, claims for FFP under the Medicaid program would be allowable." Id. The auditors disagreed, relying on CMS policy that "individuals residing in IMDs retain their IMD status when they are temporarily released to acute care hospitals for medical treatment, . . ." Id.

In response to the audit report, New York did not challenge the auditors' factual findings or sampling method, but raised a number of legal arguments similar to those raised here. New York also sought and received a letter from two members of Congress challenging the OIG's position in the audit report. NY Ex. 4. CMS responded to this letter, stating that the "proposed disallowances correctly reflect the statute, regulations, and policy related to restrictions on Federal financial participation for services provided outside an IMD." CMS Ex. 2 (1st page). In October 2005, CMS notified New York that it was disallowing $7,642,194 in FFP based on the audit report. New York appealed.

Analysis

1. The plain language of the statutory exception to the general IMD exclusion provides funding only for services that qualify as "inpatient psychiatric hospital services."

New York argues that the exception to the IMD exclusion is established by section 1905(a)(16), which New York describes as making FFP "available for inpatient psychiatric services for individuals under age 21, as defined in subsection (h) (which relates to circumstances in which coverage extends until the individual attains the age of 22)." NY Br. at 6. New York points out that section 1905(a) "sets out many other services that are eligible for FFP, including such things as outpatient hospital services, clinic services, and numerous other ancillary services." Id. New York asserts that "the logical interpretation of the statutory language . . . is that if the eligible individuals happen to be under the age of 21, in addition to the other benefits set out in the statute, they are *also* entitled to receive inpatient psychiatric hospital services." Id. (emphasis in original). New York asserts that "[t]here is nothing in this language to indicate that such individuals may *only* receive inpatient psychiatric services." Id. (emphasis in original). CMS responds that the plain wording of the statutory language supports its position, not New York's.

We agree with CMS. New York's argument ignores the statutory language following the list of covered services in section 1905(a) of the Act. This general IMD exclusion provides broadly that the term "medical assistance" (for which FFP is available) does not include any such payment for services provided to an individual who is under age 65 and in an IMD. In other words, it qualifies the part of section 1905(a), on which New York relies, defining "medical assistance" as payment for the listed services. Contrary to what New York suggests, the relevant language creating the exception to this broad prohibition on FFP in any payment for services to individuals under age 65 in IMDs does not appear in paragraph 1905(a)(16). Instead, Congress created the exception not only by adding paragraph (16) to section 1905(a) but by adding the phrase "except as otherwise provided in paragraph (16)" before the general IMD exclusion and after the list of services. Pub. L. 92-603 (1972 Amendments). Paragraph (16) itself provides for only one category of Medicaid service - inpatient psychiatric hospital services for individuals under age 21 as defined in subsection (h). That section in turn defines those services to mean "only" those inpatient services that are provided under the direction of a physician in an institution

that qualifies and that meet other specified requirements. New York points to nothing in the statutory language of the exception or in paragraph (16) from which it logically follows that the exception was intended to make FFP available for all services to individuals under the age of 21 who are receiving the inpatient psychiatric hospital services, irrespective of who provides them.

2. The "OIG's interpretation" is not contrary to legislative intent.

New York argues that the "erroneous nature of the OIG's interpretation is confirmed by the legislative history of the IMD exclusion." NY Br. at 9. New York relies on a statement in a Board decision describing the IMD exclusion as "based upon a congressional belief that care in mental institutions was a traditional State responsibility, as well as on Congress' general distrust of the effectiveness and efficiency of care in IMDs." NY Br. at 9-10, citing DAB No. 1549. New York apparently would have us conclude from this that the exclusion applies only to services provided in IMDs.

This argument ignores the fact that section 1905(a) not only defines certain categories of inpatient services as "other than in an IMD" but also more generally excludes from the definition of "medical assistance" any payment for services to individuals under age 65 in IMDs except as otherwise provided in paragraph (16). In other words, the IMD exclusion applies not just to payment for services provided in IMDs but to any payment for services that are provided to individuals in IMDs who are under age 65 and are not the services referred to in paragraph (16). This makes sense because, if Congress had excluded from the definition of "medical assistance" only the services provided in or by an IMD, a state could (at least in part) avoid its traditional responsibility for institutionalized individuals simply by sending them outside of the institution to get the services.

Moreover, the legislative history of the exception to the IMD exclusion is consistent with a reading that the exception was created only for a particular category of service. The Senate Report on the bill that became the 1972 Amendments to the Act does refer to "Medicare Coverage of Mentally Ill Children," but states that the "committee bill would authorize coverage of inpatient care in mental institutions for medicaid eligibles under age 21, provided that the care consists of a program of active treatment, that it is provided in an accredited medical institution, and that the State maintains its own level of fiscal expenditures for the care of the mentally ill under 21." S. REP.

No. 1230, 92d Cong. 2d Sess., 57 (emphasis added). Moreover, the version of the exception that was enacted had been amended by the joint committee, which stated that the "House recedes with amendments as follows: (1) by providing that Federal matching would not be available with respect to any otherwise eligible individual unless such individual is formally certified to be in need of the institutional care and services authorized under the Senate amendment . . . ." H.R. REP. No. 1605, 92d Cong, 2d Sess., at 65 (emphasis added). In other words, Congress viewed itself as authorizing only limited coverage of institutional care and services provided to individuals under age 21 in qualified institutions, not as authorizing coverage of Medicaid services provided to those individuals by providers other than the qualifying institutions.

New York also relies on the letter to the CMS Administrator sent by two Members of Congress in response to the OIG's audit. That letter viewed the OIG's audits as based on "the premise that the federal government is not permitted to fund the medical care of children in mental institutions" and asserts that the OIG's initiative "has no basis in law and reverses decades of precedent in the Medicaid program." NY Ex. 4. We do not find this letter to be persuasive evidence of Congressional intent supporting New York's position. Not only is that letter a statement made over 30 years after the provision at issue was enacted, but the drafters of the letter clearly misunderstood what the auditors were doing. The letter indicates the drafters thought the OIG was interpreting the term "inpatient psychiatric hospital services" as including only psychiatric services and no medical care for children in mental institutions, whereas the auditors were recommending the disallowance only of medical services provided outside of the institutions, by other providers.[3] Moreover, the letter is based on the view that the OIG had

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[3] We note that the "active treatment" requirement for "inpatient psychiatric services for individuals under age 21" is defined to mean "implementation of a professionally developed and supervised individual plan of care" and that plan of care must be based on a "diagnostic evaluation of the medical, psychological, social, behavioral and developmental aspects of the recipient's situation . . . ." 42 C.F.R. §§ 441.154, 441.155. Also, New York concedes that the rate it paid to the private psychiatric hospitals and residential treatment facilities qualified to provide inpatient psychiatric services to children included payment for medical and ancillary services, not only for psychiatric services. The auditors did not question those payments.

"misread the law and regulation as permitting support only for 'inpatient psychiatric services' - dropping the word "hospital" when referring to the excepted services. NY Ex. 4, at 2. As we discuss below, CMS's longstanding regulatory interpretation of the statute is that the exception applies to inpatient psychiatric services in certain qualifying institutions that are not providing hospital level of care, and Congress ratified that interpretation in 1990 by amending the definition of "inpatient psychiatric hospital services" in subsection 1905(h) to refer to services provided "in another inpatient setting that the Secretary has specified in regulations." See section 4755(a) of Pub. L. 101-508 (the Omnibus Budget Reconciliation Act of 1990).

Finally, the letter appears to assume that the services at issue here were hospital services provided by mental institutions that qualify as "inpatient psychiatric hospitals." New York provided no evidence, however, that the services were provided in or by institutions qualifying as psychiatric hospitals, and the auditors found that the services were provided outside the qualifying IMDs by other providers such as acute care hospitals and clinics.

3. New York had notice of CMS's policy that the exception applies only to payments for a particular category of services.

In support of the disallowance, CMS relies on a provision of the State Medicaid Manual that was first issued to states in 1994. That provision states:

> The IMD exclusion is in 1905(a) of the Act in paragraph (B) following the list of Medicaid services. This paragraph states that FFP is not available for any medical assistance under XIX for services provided to any individual who is under age 65 and who is a patient in an IMD unless the payment is for inpatient psychiatric services for individuals under age 21.

State Medicaid Manual, § 4390.A.2.(emphasis added.)[4]

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[4] The OIG also cited transmittals from 1994 and 1996 used to issue this section of the manual and an amendment to it. New York points out that the transmittals do not themselves provide that no FFP is available for the services at issue. The point, however, is that the State Medicaid Manual provision, which makes this clear, was transmitted to the states through CMS's policy

(continued...)

CMS also relies on a memorandum issued by the Director of the Medicaid Bureau to the CMS Regional Administrator for the New York region on July 27, 1994, which directly addresses the issue presented here. That memorandum specifically states:

> The only statutory exception to the exclusion is the inpatient psychiatric services benefit for individuals under age 21, authorized by section 1905(a)(16).
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> Therefore, you are correct in concluding that FFP is not available for other Medicaid services provided to individuals under age 21 while they are patients in IMDs, even though they may have temporarily left the facility to receive medical services. We would consider that they are IMD patients until they are discharged from the facility.

CMS Ex. 4.[5]

New York does not deny that it had notice of these policy issuances and concedes that the "1994 memorandum . . . does put states on notice of the instant Federal policy." NY Reply Br. at

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[4](...continued)
system, so New York had notice of the provision. Indeed, New York does not deny that it had such notice. New York attempts to discount the manual provision since it does not use the statutory term "inpatient psychiatric hospital services." The manual's use of the term "inpatient psychiatric services" was hardly misleading, however, given that CMS has used this term in its regulations since shortly after the exception was enacted. As we discuss elsewhere in this decision, CMS interpreted the exception as applying to services provided by other accredited psychiatric facilities, as well as psychiatric hospitals.

[5] CMS also relies on a June 3, 1991 memorandum. CMS Ex. 3. As New York points out, this memorandum addresses a question regarding children who are in community residences that are IMDs, but are not qualifying psychiatric facilities. On the other hand, the response to the question states that "the only exception to the exclusion is the psych under 21 benefit." Id. This description of the exception (like statements in regulatory preambles issued as early as 1974) is more consistent with a view of the exception as applying only to certain psychiatric services than with the view that the exception makes FFP available for all services provided to individuals under age 21 who are receiving the qualifying psychiatric services.

6. New York contends, however, that this was a new interpretation that was invalid since it was a change in policy, not promulgated using notice and comment rulemaking.

As discussed next, however, New York did not establish that CMS had a different, longstanding interpretation that was changed by these policy issuances. Thus, court decisions holding that a change in interpretation must be promulgated through notice and comment rulemaking are inapposite.

4. New York has not shown that the longstanding interpretation of the exception was that FFP is available for payments for services such as those at issue here.

New York argues that the longstanding interpretation of the exception was that it makes FFP available for all services provided to children receiving inpatient psychiatric hospital services, irrespective of who provides the services or the nature of the services. In support, New York simply asserts that "the costs of the services in question were uniformly and routinely thought to be eligible for FFP, and were reimbursed as such by HHS." NY Br. at 14. New York provides no evidence to support this broad assertion and does not cite to any regulatory language or policy issuance directly addressing this issue. New York mistakenly relies on a quote from Medicaid State Operations Letter 91-1. NY Br. at 16. Specifically, New York relies on the following statement:

> Regulations at 42 CFR 435.1008 provide that individuals who are inmates of public institutions and individuals who are inpatients of IMDs *and are between the ages of 22 and 65* may not have Federal financial participation (FFP) paid on their behalf for medical services they receive.

NY Ex. 5 (emphasis added by New York). This statement, however, addresses the availability of FFP only with respect to individuals who are inpatients of IMDs and are between the ages of 22 and 65. It does not address the issue of when FFP is available for services provided to children who are in IMDs by providers other than the IMD, nor in any other way purport to be interpreting the exception to the IMD exclusion.

A footnote in New York's reply brief also describes Medicaid State Operations Letter 91-36 (which was submitted by CMS) as explaining that IMD residents under the age of 21 "would be eligible to receive FFP for services if the IMD met the

requirements of 42 C.F.R. § 440.160, or were Medicare certified hospitals" and "[i]f the facilities did not meet these requirements, this limitation would apply." NY Reply Br. at 3, n.1, citing CMS Ex.3. This is not an accurate description of this policy issuance. In response to a question about whether any services received by children in a community residence that is not a certified Medicare psychiatric hospital and does not meet the requirements of 42 C.F.R. § 440.160 are eligible for FFP, the letter states that a determination would have to be made about whether the residence is an IMD and then goes on to say,

> If it is an IMD, Medicaid payments could only be made if the residence had met the requirements of Subpart D of 42 CFR 441 or qualified as a Medicare psychiatric hospital. The fact that a need for the services was determined through an EPSDT screen would not provide a basis for paying for services for which we otherwise could not pay because of the IMD exclusion and the only exception to the exclusion is the psych under 21 benefit. In this situation, the facility does not qualify to provide the psych under 21 benefit and therefore all the residents under age 65 would be subject to the exclusion.

Like the other State Operations Letter, this one does not purport to specifically address the scope of the services for which Medicaid would pay if the residence did qualify to provide inpatient psychiatric services to children. Instead, it is responding to a question about a residence that does not qualify. If taken out of context, the next to the last sentence could, arguably, be read to imply that, if the residence did qualify to provide the "psych under 21 benefit," its residents would not be "subject to the exclusion" and, therefore, FFP would be available for all Medicaid services provided to those residents. This reading, however, would be inconsistent with the description in the letter of the "psych under 21 benefit" (a particular category of services that a facility must qualify to provide) as the "only exception to the exclusion." Thus, we reject New York's characterization of this letter as interpreting the exception to the exclusion as having the effect of making individuals eligible for FFP, for all Medicaid services provided to them.

In its briefs, New York also cites language in the implementing regulations providing that "FFP is not available in expenditures for services provided to . . . [i]ndividuals under age 65 who are patients in any institution for mental diseases unless they are under age 22 and are receiving inpatient psychiatric services . . . ." 42 C.F.R. § 435.1008; see, also, §§ 436.1004; 441.13(a).

Based on this language, New York argues that the limitation in the regulation is on individuals who are not receiving inpatient psychiatric services. New York says that there is no dispute that the individuals at issue here were receiving inpatient psychiatric services.

New York's reliance here on the regulatory wording is misplaced. Assuming that the wording permits a reading that implies that FFP is available in expenditures for all services for individuals under age 22 who are receiving inpatient psychiatric services, we do not think that New York could reasonably rely on that implication as an interpretation of the scope of the exception, for the following reasons:

- The plain language of the statute creates an exception from the exclusion only as provided in section 1905(a)(16). The statute (and other regulatory provisions) clearly define what services qualify under subsection 1905(a)(16) for the exception, defining them as inpatient services that are provided by an accredited psychiatric hospital, hospital program, or other facility.

- The wording cited by New York is in the context of provisions addressing broadly when FFP is not available for expenditures for services to institutionalized individuals and does not specifically address when, if ever, FFP is available in expenditures for noninstitutional services for individuals under age 22 who are receiving inpatient psychiatric services.

- The regulatory provision at 42 C.F.R. § 435.1008 was initially codified as 42 C.F.R. § 249.10(c). 41 Fed. Reg. 2198 (Jan. 14, 1976).[6] The preamble to the rulemaking initially adopting this regulation described the statutory provision at section 1905(a)(16) as "specifying that States may provide inpatient

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[6] This provision originally stated that "Federal financial participation in expenditures for medical and remedial care and services listed in paragraph (b) of this section is not available with respect to any individual . . . who has not attained 65 years of age and who is a patient in an institution for . . . mental diseases (except for an individual under age 22 who is receiving inpatient psychiatric facility services pursuant to paragraph (b)(16) of this section)." The provision was subsequently recodified as section 435.1008.

psychiatric services for individuals under age 21, as an optional item of medical care in their State Medicaid plans . . . ." Id. The preamble also states that "reimbursement to States for providing inpatient psychiatric services to patients under 21 is contingent on meeting maintenance of effort requirements . . . ." Nothing in this preamble indicates that the 1972 Amendments that enacted the exception were viewed as broadly authorizing FFP for all Medicaid services provided to individuals under age 21 receiving inpatient psychiatric services or that the Secretary intended the regulatory wording of the limitation on FFP as an interpretation of the scope of the exception.

- Prior to 1985, the Medicaid regulations provided FFP for noninstitutional services provided to an otherwise Medicaid-eligible individual during the month in which the individual was admitted to an IMD. In amending the regulations to delete this provision in 1985, CMS explained that it had provided this FFP for reasons of administrative convenience, but had determined that its regulation was inconsistent with the statutory exclusion. Thus, the preamble to this rulemaking said it was bringing the "regulations into conformance with the Medicaid statute by clarifying that no Federal financial participation (FFP) is available for any services furnished to certain institutionalized individuals." 50 Fed. Reg. 13,196 (Apr. 3, 1985). The preamble also described this clarification as meaning that "the exclusion in the statute and regulations applies to both services provided by the institution and to services rendered by other Medicaid providers to institutionalized individuals in the types of facilities specified by the law." Id. The preamble does say there is an exception to the exclusion for "individuals under age 22 who are receiving covered inpatient services in psychiatric facilities." Elsewhere, however, the preamble states that the "only legal exceptions to the preclusion of FFP for . . . patients in institutions for mental diseases . . . are those which are specified in the law at section 1905(a) of the Act" and that "[i]n limiting Medicaid funds for psychiatric services, the statute refers only to services for those under 65 in institutions for mental diseases . . . except for

covered inpatient services in psychiatric facilities for individuals under age 22."[7]

- In amending the definition of "inpatient psychiatric services for individuals under age 21" in 1998 to expand the type of qualifying accreditation, CMS stated:

  > The Social Security Amendments of 1972 (Public Law 92-603) amended the Medicaid statute to, among other things, allow States the option of covering inpatient psychiatric hospital services for individuals under age 21. In this preamble, we will refer to the "inpatient psychiatric hospital services benefit for individuals under age 21" as the "psychiatric/21 benefit." Originally the statute required that the psychiatric/21 benefit be provided by psychiatric hospitals that were accredited by the Joint Commission on Accreditation of Hospitals.

  63 Fed. Reg. 64,195 (Nov. 19, 1998). Essentially the same language appeared in the related notice of proposed rulemaking of November 17, 1994. 59 Fed. Reg. 59,624.

In sum, the history and context of the regulatory wording indicates that it was intended only to recognize that the exception existed and was not intended as an interpretation that the exception made FFP available for <u>all</u> Medicaid services provided to institutionalized children receiving qualifying inpatient psychiatric services, no matter who provides the services.

We note that some language in previous Board decisions addressing the effect of the exclusion on otherwise Medicaid-eligible individuals between the ages of 22 and 64 could be misinterpreted as supporting New York's position that the exclusion, and therefore the exception, applies to individuals, rather than to payment for services. There, we described the general IMD exclusion in section 1905(a) of the Act as effectively rendering individuals between the ages of 22 and 64 in IMDs ineligible for

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[7] We also note that the preamble to the notice of proposed rulemaking for this amendment stated: "Section 1905(a) of the Social Security Act prohibits Federal payments for services provided to . . . individuals under age 65 who are patients in an institution for mental diseases . . . except for inpatient psychiatric services received by individuals under age 22." 48 Fed. Reg. 13,446 (March 31, 1983).

any Medicaid services by reason of their institutional status. See, e.g., New Jersey Dept. of Human Services, DAB No. 1549 (1995), aff'd New Jersey Dep't of Human Services v. U.S. (D.N.J. 1997); New York State Dept. of Social Services, DAB No. 1577 (1996). It does not necessarily follow from this description of the exclusion, however, that the exception to the exclusion renders individuals under age 21 in IMDs eligible for FFP for all Medicaid services, as New York contends. Moreover, CMS described the general IMD exclusion as follows when it amended the regulations in 1985: "These regulations will not affect eligibility under Medicaid; they preclude FFP for services provided to individuals admitted to specific types of institutions." 50 Fed. Reg. 13,196 (emphasis added). This view of the IMD exclusion is more consistent with the placement of the statutory exclusion and with its wording, which provides that the term "medical assistance" does not include "any such payment" for services to individuals under age 65 in IMDs. It is also consistent with CMS's reading of the exception as making FFP available only for the category of services provided for in paragraph 1905(a)(16).

In any event, we do not find persuasive New York's assertion that the disallowed services were "provided to persons who were receiving inpatient psychiatric services" because "[w]hile they are in a general hospital for medical/surgical care, they continue to receive inpatient psychiatric services." NY Br. at 3. New York does not dispute the audit findings to the effect that none of the services, including the inpatient acute hospital services, was provided by an IMD that qualified as a psychiatric hospital, program, or other facility. Nor does New York specifically assert that the qualifying IMD continued to provide inpatient psychiatric services to the individuals in question while they were hospitalized for acute medical care or receiving other medical or ancillary services outside of the IMD. Thus, New York's assertion is evidently based on an unreasonable interpretation of the regulations as referring to an individual receiving any psychiatric services on an inpatient basis, even if they are an inpatient in an acute care hospital. In context, however, the regulation is clearly referring to individuals receiving the specific category of services the regulations call "inpatient psychiatric services to individuals under age 21."

Finally, New York has not shown that it in fact had interpreted the exception as applying to the individuals under age 21 who were receiving inpatient psychiatric services or that it relied on that interpretation in paying the claims at issue here. Indeed, the audit report indicates that New York officials had previously asserted they had controls in place, at least to

prevent FFP claims for medical and ancillary services by non-hospital providers, and that the problem was that the controls were not effective for private psychiatric hospitals and residential treatment facilities.[8] Thus, these officials at the very least did not rely on the broad interpretation that New York advances here that would permit FFP for all services to children receiving inpatient psychiatric hospital services, no matter who provided them.

5. New York's reliance on the statutory reference to "inpatient psychiatric hospital services" is misplaced.

In support of its argument that the services at issue should be covered, New York relies on the fact that paragraph 1905(a)(16) uses the term "inpatient psychiatric hospital services." According to New York, the services at issue qualify for the exception because they were provided by hospitals.

We first note that New York's assertion that the services at issue were provided by hospitals is inconsistent with the audit findings that describe only some of the services as "acute inpatient hospital services" and describe other services as physician services, clinic services, dental services, or other types of services that would not have been provided by hospitals. Indeed, "clinic services" are defined as outpatient services provided by a facility that is not part of a hospital. 42 C.F.R. § 440.90. Yet, New York provides no evidence in support of its assertion.

Moreover, while the statute refers to "hospital services," CMS's longstanding interpretation is that the exception applies not only to inpatient psychiatric services provided by hospitals, but also to inpatient services provided by accredited programs within hospitals or by other accredited psychiatric facilities.[9]

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[8] New York asserts in its reply brief that the reason for these controls was that the "all-inclusive" rate paid to these facilities was intended to cover medical and ancillary services, but provides no evidence to support this assertion.

[9] CMS explained this as follows:

> In 1976, [CMS] published final regulations in 45 CFR part 249, implementing the psychiatric/21 benefit. These regulations allowed the coverage of this benefit in psychiatric facilities, other than psychiatric hospitals,

(continued...)

Congress ratified this interpretation in the Omnibus Budget and Reconciliation Act of 1990, when it amended subsection 1905(h) of the Act by inserting (in the definition of "inpatient psychiatric hospital services") the phrase "or in another inpatient setting that the Secretary has specified in regulations." Pub. L. 101-508, § 4755(a)(1)(A).

In any event, we do not agree with New York that the reference to "inpatient psychiatric hospital services" makes a difference here. New York argues in its reply brief that the services at issue were provided to persons who were receiving inpatient psychiatric hospital services. New York's reasoning is as follows:

> . . . the individuals in question, under the standards set out by the Office of the Inspector General and upheld by this Board, continue to be patients in an IMD. While they are in a general hospital for medical/surgical care, they continue to receive inpatient psychiatric services. Further, inpatient psychiatric services include medical/surgical care. All psychiatric hospitals are by definition IMDs, and the definition of an IMD is a "hospital, nursing facility, or other institution of more than 16 beds that is primarily engaged in providing diagnosis, treatment or care of persons with mental diseases, *including medical attention, nursing care, and related services.* 42 C.F.R. § 435.1009. (Emphasis added).

NY Reply Br. at 3. New York asserts that CMS's brief is in error in implying that the plain wording of the IMD exclusion requires that the services need to be provided "by" a psychiatric hospital. Id. at 2. According to New York, the requirement is that the services be provided "in" the institution, and CMS's

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[9](...continued)
that were accredited by the Joint Commission. The term "psychiatric facility" was used rather than the statutory term "psychiatric hospital" because the Joint Commission had modified its accrediting practices to encompass a broader range of settings providing psychiatric services. Since the statute then required Joint Commission accreditation, we wanted to keep our conditions of participation consistent with Joint Commission practices.

63 Fed. Reg. 64,195 (Nov. 19, 1998).

concession that these children were still considered to be "in" IMDs means that the medical services were covered. Id.

New York's argument confuses the issue of whether an individual is in an IMD for purposes of the exclusion with the issue of whether the services provided to an individual who is in an IMD qualify for the exception. The phrase "in an institution" is defined for purposes of the exclusion to refer to "an individual who is admitted to live there and receive treatment or services provided there that are appropriate to his requirements." 42 C.F.R. § 435.1009. Moreover, the Medicaid regulations specify:

> (c) An individual on conditional release or convalescent leave from an institution for mental diseases is not considered to be a patient in that institution. However, such an individual who is under age 22 and has been receiving inpatient psychiatric services under § 440.160 of this subchapter is considered to be a patient in the institution until he is unconditionally released, or, if earlier, the date he reaches age 22.

42 C.F.R. § 435.1008.

For purposes of the statutory exception, however, CMS is correct that the qualifying services cannot be provided outside the IMD by another provider. The definition of "inpatient psychiatric hospital services" in subsection 1905(h) refers to inpatient services "provided in an institution (or distinct part thereof) which is a psychiatric hospital . . . or in another inpatient setting that the Secretary has specified in regulations" and which, among other things, involve active treatment services that a team has determined are necessary on an inpatient basis. The regulations implement this definition by defining the term "inpatient psychiatric services to an individual under age 21" to mean services that are "provided by" an accredited psychiatric hospital or program or "by" another accredited psychiatric facility under the direction of a physician and meet other specified requirements.

The mere expectation that medical services, as well as psychiatric services, would be provided to children in IMDs, does not help New York's position. Both the definition of an IMD and the description of the plan of care required for children receiving qualifying inpatient psychiatric services do indicate that the institution is expected to provide some medical services necessary to meet the child's needs, as well as psychiatric services. But the issue here is whether FFP is available for

medical care and services provided outside of the institution, by other providers. Some of the services at issue were provided to children who were inpatients in acute care hospitals. But, even if these children were also receiving psychiatric services and were still considered to be "in" IMDs because they had not been unconditionally released from an IMD, that does not mean that the services at issue qualify as "inpatient psychiatric hospital services" within the meaning of the exception. New York provides no evidence that any of the medical services at issue were provided by a hospital, program, or facility that was qualified under the regulations to provide inpatient psychiatric services to individuals under age 21.

Moreover, the fact that State officials indicated to the OIG auditors that the Medicaid rates paid to the psychiatric facilities (that is, the IMDs in which the children were institutionalized) were "all-inclusive" rates that included amounts to cover medical care raises a question about the validity of the claims being submitted to Medicaid for reimbursement, rather than to the facilities. While New York says the rate was not intended to cover inpatient care in acute care hospitals, New York does not deny that the rate was intended to cover other medical care and ancillary services provided to the children, so payments for that care to other providers may have been in effect duplicate payments for the same service. In any event, the whole point of the IMD exclusion is that the institutionalized individuals were traditionally the responsibility of the states, and Congress therefore provided Medicaid funding for services to those individuals only for limited services meeting federal requirements.

6. Applying the IMD exclusion to prohibit FFP except for limited services does not violate the Rehabilitation Act of 1973.

New York argues that prohibiting FFP for Medicaid recipients as a result of their being hospitalized for mental illness violates the Rehabilitation Act of 1973.

This argument has no merit and was rejected by the Board many years ago, based on the Supreme Court decision in Schweiker v. Wilson, 450 U.S. 221 (1980). DAB No. 1577, at 11. In Schweiker, the Supreme Court held that a statutory provision making Supplemental Security Income benefits unavailable to IMD residents who were not receiving Medicaid "made a distinction not between the mentally ill and a group composed of non-mentally ill, but between residents in public institutions receiving Medicaid funds and . . . residents in such institutions not

receiving Medicaid funds." 450 U.S. at 232. Similarly, the IMD exclusion does not distinguish individuals on the basis of their mental illness, but instead prohibits FFP in certain services provided to individuals by reason of their institutional status, age, and (for the exception) the nature of the services they are receiving.

7. The EPSDT provisions do not require federal funding for the services at issue.

New York argues that coverage of the services at issue is required under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program.

The EPSDT program is established by paragraph 1905(a)(4)(B) of the Act, which includes in the list of services in the definition of "medical assistance" the following: "Early and Periodic Screening, Diagnostic, and Treatment Services (as defined in subsection (r) for individuals who are eligible under the plan and are under the age of 21)." Subsection 1905(r) defines EPSDT services to include specified screening services, vision services, dental services, hearing services, and "other necessary health care, diagnostic services, treatment, and other measures described in section 1905(a) to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan."

New York argues that the definition of EPSDT services "makes clear the legislative intent that the full array of health services is to be made available to eligible individuals under the age of 21." NY Br. at 20. New York disputes the OIG's contention, in the audit report, that reading the requirement for EPSDT services to override the language of the IMD exclusion would render meaningless the language of the IMD exclusion if applied consistently to all enumerated mandatory services in subsection 1905(a). According to New York, its position would not have this effect since the EPSDT program pertains only to individuals under the age of 21, and its reading would have "no impact upon application of the IMD exclusion to individuals between the ages of 22 and 64 - the population to whom the exclusion is intended to pertain." Id. Instead, New York argues, the language of section 1905(r) is "fully consistent with the State's interpretation of the IMD exclusion, in that it requires coverage of the services that the State claims should not be excluded from Medicaid." Id. at 21. Under the OIG's interpretation, New York says, the language creating the EPSDT program and the language setting out the scope of the IMD exclusion are in conflict, whereas "the language should be read in such a way as to make the meaning consistent." Id.

We see no conflict between the EPSDT provisions and applying the IMD exclusion to preclude FFP in payments for EPSDT services that do not qualify as inpatient psychiatric services for individuals under age 21 under the statute and regulations. Contrary to what

New York suggests, the general IMD exclusion is not directed solely at individuals between the ages of 22 and 64. Instead, it provides that, "except as otherwise provided in paragraph (16)," the term "medical assistance" does not include "any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient" in an IMD. The phrase "any such payments" refers back to the payments previously defined as payments considered to be "medical assistance" - that is, payments for the listed care and services, including EPSDT services. Had Congress intended to cover EPSDT services for children in IMDs, it could have framed the exception differently. New York does not explain, however, how an exception that is limited to the payments provided for in paragraph (16) can be interpreted to extend to EPSDT services that do not qualify as "inpatient psychiatric hospital services to individuals under age 21."

The provision in subsection (r), requiring states to provide services for which the need is determined by an EPSDT screen "whether or not such services are covered under the State plan" does not conflict with the OIG's (and CMS's) reading here. The list of services in subsection 1905(a) includes some services that are considered mandatory and some that are considered optional. Specifically, a Medicaid State plan must include "at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1905(a)" for the categorically needy and other specified services for the medically needy (if eligible under the state plan). Paragraph 1902(a)(10) of the Act; see 42 C.F.R. §§ 440.210, 440.220, 440.225.[10] Generally, FFP is available for payments for services only if they are expended as

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[10] New York argues that, since section 440.220 provides that "[i]f the State plan includes services in an institution for mental diseases . . . for any group of medically needy," the plan must also cover certain other specified services, this means that coverage of IMD residents is not limited to psychiatric services. NY Br. at 9. Section 440.220, however, merely implements section 1902(a)(10)(C)(iv) of the Act, which makes certain services for the medically needy no longer optional if a state opts to include in its Medicaid state plan IMD services for the medically needy. Prior to the amendment to section 1902(a) in the Omnibus Budget Reconciliation Act of 1981, states were required to provide this range of services to all medically needy individuals. See 54 Fed. Reg. 39,421 (Sept. 26, 1989). The section does not address the issue of whether FFP is available for the covered services if they are provided to a child who is institutionalized in an IMD by a provider other than the IMD.

"medical assistance under the State plan; . . ." Subsection 1903(a)(1) of the Act. Thus, the clear purpose of the phrase in subsection (r) is to provide for some EPSDT services that otherwise would not be covered because they are optional services, not covered in the relevant state plan. New York points to no support in the legislative history or elsewhere for interpreting this language as expanding the exception to the IMD exclusion.

Moreover, in Medicaid State Operations Letter 91-36, the CMS Regional Administrator informed New York, in response to questions about whether FFP is available for services to children in IMDs, that the "fact that a need for the services was determined through an EPSDT screen would not provide a basis for paying for services for which we otherwise could not pay because of the IMD exclusion and the only exception to the exclusion is the psych under 21 benefit." CMS Ex. 3, at 1. While this response was in the context of questions about a community residence that did not qualify to provide inpatient psychiatric services to individuals under age 21, it reflects a reading (of which New York had notice) that the EPSDT requirements do not create an exception to the IMD exclusion.

Finally, we note that New York's argument assumes that the services for which payment was disallowed were EPSDT services. New York did not, however, provide any evidence to support this assertion.

Conclusion

For the reasons stated above, we uphold the disallowance of $7,642,194 in FFP that New York claimed as "medical assistance" for payments for services that did not meet the definition of that term because the services were provided to children who were institutionalized in IMDs and because the services did not fall

within the exception for "inpatient psychiatric hospital services for individuals under age 21."

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