

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: Michigan Department of Social Services
Docket No. 78-15-MI-ME
Decision No. 64

DATE:
AUG. 16, 1979

DECISION

The Michigan Department of Social Services, by letter dated and postmarked May 4, 1978 filed an application for review of disallowances of \$33,361.94 of Federal financial participation (FFP) under the Medicaid Program, Title XIX of the Social Security Act, made by former Region V Commissioner, SRS, Clyde Downing, and affirmed in a letter dated April 5, 1978, by Robert A. Derzon, then Administrator of the Health Care Financing Administration (HCFA).

I. Procedural Background

In a letter dated May 17, 1978, the Executive Secretary of the Departmental Grant Appeals Board requested that the State, which was entitled to make an election between proceeding under 45 CFR Part 16 and 45 CFR 201.14, make a clearer statement of the procedures under which it was seeking review. In a letter dated May 26, 1978, the State expressed its intent to proceed under 45 CFR Part 16.

On June 12, 1978 the Executive Secretary of the Departmental Grant Appeals Board notified HCFA of the State of Michigan's appeal and requested a response within thirty days. The Agency requested and was granted an extension of time until August 31, 1978 in which to respond. The Agency submitted on August 31, 1978 a "Response of the Health Care Financing Administration to the Application for Review of the State of Michigan," accompanied by a "Memorandum in Support of Respondent's Response to Petitioner's Application for Review and in Support of Respondent's Motion for Decision on the Record."

On May 1, 1979 the Chairman issued an Order to Show Cause to the parties requesting a response within 30 days. The Agency on May 8, 1979 filed a "Response of the Health Care Financing Administration to the Grant Appeals Board's May 1, 1979 Order to Show Cause." In a letter dated May 14, 1979 the Executive Secretary advised the Agency that its May 8, 1979 submission failed to respond to the questions raised in the Order and that the panel might proceed to decision drawing whatever inferences may appear appropriate from the Agency's failure to respond. On May 15, 1979 the Agency filed a "Further Response of the Health Care Financing Administration to the Grant Appeals Board's May 1, 1979 Order to Show Cause and to the Executive Secretary's May 14, 1979 letter."

Counsel's filing of May 15, 1979 does constitute a formally correct response to the question and a formally correct response is clearly better than none. We had hoped to make clear however at the May 3 conference on Board procedures in reconsideration cases that our objective is never merely formal compliance. It is a basic principle of the Board's approach to eliminate mere formalities wherever possible and to get as directly as we are able to the substance of the issue. If we had felt that mere formal compliance was sufficient, we would not have asked the question at all and would thus have eliminated an unnecessary formal step. The expression "other related costs incurred as a direct result of survey or survey related activity" occurs (in an Agency Information Memorandum IM-17 discussed below) in a way that can be read broadly as including a wide range of survey related activity as the State contends or narrowly as controlled by its context: "travel and per diem allowances and other related costs..." The reason we asked the question was that, while tentatively the position of the agency appeared persuasive on the question of the interpretation of the term "survey related" and other similar expressions, there appeared to be enough doubt as to its correctness to require serious consideration of the possibility of a contrary view, especially in the light of the obvious principle that an ambiguity may properly be resolved against the draftsman. Faced with this doubt, it would have been helpful to the Board in reaching an informed conclusion to have the benefit of counsel's assistance in a more than merely formal compliance. This is why the question was asked and why the answer was disappointing. Deprived of counsel's assistance, we have examined the question further, relying principally on the statute itself and its legislative history rather than on the Agency interpretation, but we would have welcomed a fuller response from the Agency.

The State filed its response in a letter dated May 31, 1979.

Statement of the Case

Section 1903(a)(4) of the Social Security Act (SSA) authorizes 100% reimbursement of costs incurred by a State for compensation or training of personnel responsible for inspecting public or private institutions to determine whether they comply with health or safety standards. Other provisions of the SSA authorize various lower levels of reimbursement. In particular, section 1902(a)(7) authorizes 50% reimbursement of costs incurred for expenses not specifically covered in other subsections of 1903(a).

The FFP disallowance in this case was claimed by the State for expenses of the Regulation and Review Unit (RRU) of the Michigan Department of Social Services. Disallowances of FFP for the expenses of the RRU were made for the quarters ending, June 30, 1974 (\$10,640); September 30, 1974 (\$6,750.14); December 31, 1974 (\$8,112); and March 31, 1975 (\$7,859). The respective disallowances represent the difference between the 100% Federal reimbursement rate claimed by the State and 50% reimbursement which the Agency contends is the proper rate.

In March 1974, the Michigan Department of Social Services established the RRU, the major purpose of which was to monitor and coordinate the survey, certification, and also to review activities of all state agencies involved with long-term care providers participating in the Title XIX program to insure compliance with federal rules and regulations. (See Record-Tab 3).

Although the RRU is described as "responsible for monitoring each skilled nursing facility (SNF) and intermediate care facility (ICF) to ensure compliance with Federal regulations pertaining to the Medicaid program" (See Record - Tab 19), it did not itself conduct the on-site inspections. The following functions are performed by the RRU in accordance with the unit's organization chart [See Bureau of Medical Assistance Program Description (Tab 1) and finding by then Regional Commissioner, Clyde Downing, which were adopted by the Administrator, in his April 5, 1978 notification letter]:

- "(A) Review and interpret Federal regulations pertaining to SNF's and ICF's.
- (B) Coordinating with the Michigan Department of Public Health the general overall survey process, as it relates to certification and issuance of provider agreements.
- (C) Coordinating with HEW, Social and Rehabilitation Service representatives concerning certification and issuance of provider agreements.
- (D) Review and take necessary action as required on recipient and or provider certification complaints.
- (E) Review of Michigan Department of Public Health's physicians' reports and nursing evaluations to ensure that patients are receiving the proper level of care at all times and that accurate reports are being made on a timely enough basis in order for the single state agency to make proper payment.
- (F) Coordinating certification and issuance of provider agreements as it pertains to the State mental institutions and hospitals."

A February 7, 1975 letter from the then Acting Regional Commissioner, Clyde V. Downing, disallowed for 100% reimbursement the expenses of the RRU stating that "this department function is not on-site survey but coordination and monitoring which is an administrative function and therefore only matchable at 50%." A February 11, 1975 letter from Mr. Downing gave as the reason for disallowance of expenses of the RRU that it "does not conduct on-site inspections to determine whether institutions comply with health and safety standards...." (See Record - Tabs 4&5).

The State's November 4, 1976 "Brief in Support of Michigan Department of Social Services Claim for Reimbursement" states that: "The Petitioner does not quarrel with HEW's characterization of the function of the Regulation and Review unit."

The Statute

As noted above, Section 1903(a)(4) of the SSA (enacted October 30, 1972, effective for the period beginning October 1, 1972) provides:

"an amount equal to 100 per centum of the sums expended during such quarter (as found necessary by the Secretary for the proper and efficient administration of the State plan) which are attributable to compensation or training of personnel (of the State agency or any other public agency) responsible for inspecting public or private institutions (or portions thereof) providing long-term care to recipients of medical assistance to determine whether such institutions comply with health or safety standards applicable to such institutions under this Act;"

This full reimbursement is available only through FY 1980 and apparently is intended as an attempt to upgrade inspection activity rather than to establish a permanent system. The described functions of the RRU, while they have some relation to inspection do not appear to include either inspection or responsibility for inspection. The State's position that costs of activity which merely related in some way to on-site inspections should be reimbursable does not appear to match the stricter language of the statute.

Legislative History

One of the objectives of Congress in enacting section 1903(a)(4) as part of P.L. 92-603, Section 249B was to place the Medicaid and Medicare programs on the same footing with respect to reimbursement and survey personnel. The Senate report states:

"At present, Federal matching funds for inspection of skilled nursing facilities participating in the medicaid program are limited to 75% of necessary costs while reimbursement for inspection of medicare extended care facilities is 100 percent of necessary costs. The President has recommended that survey and inspection costs of nursing facilities participating in the medicaid program be 100% federally financed." S. Rep. No. 92-1230, 92nd Cong. 2d Sess 319 (1972).

The Senate Report also states that:

"Present State inspection systems for Medicaid skilled nursing facilities and intermediate care facilities are less effective than could be, due in part to the reduced reimbursement rate of these inspections... Another result of this difference in reimbursement has been an inadequate number of skilled nursing facility and intermediate care facility inspectors... full Federal funding of the reasonable costs of nursing facility inspections would improve the present system of determining an institution's qualifications to participate in medicaid and medicare and serve to upgrade and standardize the quality of services provided by nursing facilities." Id.

This passage suggests a direct relationship to actual inspection costs which the RRU does not appear to meet.

The Agency Interpretation

The Agency, in an interpretation issued shortly after the enactment of the statute (approximately eight months), takes the view that 100% reimbursement is available for compensation of surveyor personnel engaged in on-site assessment and for expenses of supervisors of surveyors, for travel and per diem allowances and other related costs incurred as a direct result of survey or survey related activity, and for the clerical and secretarial staff directly supporting such activities. [Information Memorandum #17 ("IM-17"), apparently transmitted to all states, June, 1973]. The term "other related costs incurred as a direct result of survey or survey related activity" is indeed susceptible, standing alone, to a wide reading, but it occurs in a context that seems to confine it to a fairly narrow area.

In this case, the Agency, consistently with the IM-17 reading of the statute, takes the view that expenses for the activities of the RRU less directly related to survey activities, are not covered.

That interpretation, adopted and communicated shortly after the enactment of the statute appears to be a reasonable interpretation of the statute in the light of its purpose.

Regulation

45 CFR 250.120(d) (39 FR 16970, May 10, 1974-effective July 24, 1974) provides for 100% FFP for compensation and training costs of personnel who are responsible for inspecting public or private skilled nursing or intermediate care facilities. Subpart(e) of that section provides for FFP at 50% for costs of all other staff employed in the administration of the plan.

The Agency does not rely on these provisions to support the disallowances, recognizing that they became effective after certain of the claim periods involved. The Agency asserts, however, that these provisions could furnish support for the two disallowances (quarter ending December 31, 1974 and quarter ending March 31, 1975) after their effective date.

Issues raised by the parties

The State asserts that the RRU was established with the verbal understanding that 100% matching federal funds were available for its operation. (See Record-Tab 3). The Agency asserts that the allegation of verbal understanding is unsubstantiated and if accepted it would open the Department to great hazards. The Agency also argues that there is no way of testing the validity of the alleged statement of assurances. No further evidence has been offered by the State to corroborate its contention of a verbal understanding.

The Board will not readily accept unsupported allegations of verbal understandings, particularly when they are contrary to the Agency's clearly stated written position. Southern University, DGAB Docket No. 29, Decision No. 24, June 29, 1976, p. 3. Cf. State of Nebraska, Title I Audit Hearing Board Docket No. 8-(10)-74, October 16, 1975, p. 17.

The State asserts that IM-17 is unenforceable because it exceeds the scope of Section 1903(a)(4) in that the term "personnel responsible for inspecting institutions" is improperly limited by IM-17 to surveyor personnel only. As noted above, IM-17 appears to be consonant with the statute and the State has apparently misread IM-17, which clearly authorizes reimbursement not only for surveyor personnel compensation but also for the compensation of their supervisors and certain related support costs, but does not permit a looser application. The State's position does not appear tenable.

The State asserts that IM-17 is also unenforceable because it was not promulgated under rulemaking procedures prescribed in the Administrative Procedure Act, 5 USC §551(4), 552(a)(1) and 553. The Agency contends that IM-17 is an interpretive rule which does not have to meet the publication and notice and comment requirements of those sections, even though HEW has voluntarily adopted the notice and comment procedure for substantive rules. (36 FR 2532, February 5, 1971) The State argues however that even interpretive rules require notice and comment procedure if they have an immediate and substantial impact on those regulated. Morton v. Ruiz 415 US 199 (1974); Lewis-Mota v. Secretary of Labor 469 F.2d 478 (2nd Cir. 1972); NLRB v. Wyman-Gordon, 394 US 759 (1969) This does not appear to be such a case, however. The rule stated by IM-17 is, on the scope of reimbursable activity, merely a restatement for the assistance of the parties of a standard we would find persuasive under a direct application of the statute had IM-17 never been issued. It is difficult to see how that can constitute the "substantial impact" contemplated by the decisions.

The Agency contends that the issue of the procedural validity of IM-17 and its correctness as an interpretation of the statute are questions beyond the jurisdiction of the Board. A determination on these questions is unnecessary under the circumstances of this appeal since we feel that IM-17 was validly adopted and a sound reading of the statute.

Conclusion

In view of the foregoing discussion it is our opinion that the expenses incurred by the RRU are not costs contemplated by the statute for 100% reimbursement since they are not directly related to costs of inspection.

Accordingly, we deny the appeal and affirm the determination of disallowance in the sum of \$33,361.94. This decision constitutes the final administrative action on this matter.

/s/ David V. Dukes

/s/ Bernard E. Kelly

/s/ Malcolm S. Mason, Panel Chairman