

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: New Hampshire Department of Health and Human Services
Docket No. A-07-70
Control No. A-01-05-02500
Decision No. 2117

DATE: October 1, 2007

DECISION

The New Hampshire Department of Health and Human Services (New Hampshire) appealed a determination by the Administration for Children and Families (ACF) disallowing federal financial participation (FFP) of \$1,761,128 claimed under title IV-E of the Social Security Act for foster care and adoption assistance training costs incurred from July 2000 through June 2003. The disallowance was based on a Department of Health and Human Services (HHS) audit report. The report found that these training costs were overstated because most of the costs were charged directly to title IV-E instead of being allocated among title IV-E and other benefitting programs. The auditors recalculated the allowable IV-E training costs based on the percentage of IV-E-eligible children in New Hampshire's foster care and adoption assistance caseload (the "saturation rate").

New Hampshire argues generally that its claim for IV-E training costs was made in accordance with the cost allocation plan (CAP) approved by HHS's Division of Cost Allocation (DCA) for the period in question.

For the reasons explained below, we conclude that, contrary to what ACF argues, the evidence shows that New Hampshire did follow its approved CAP for the period in question in claiming training costs under title IV-E. Accordingly, we reverse the disallowance in full. This decision does not preclude ACF from issuing a new disallowance if it determines that any of the costs allocated to title IV-E pursuant to the methodology in the approved CAP were not for training activities eligible for the enhanced rate of FFP.

Legal Background

Title IV-E was originally enacted as part of the Adoption Assistance and Child Welfare Act of 1980, Public Law No. 96-272. This title authorizes appropriations to enable states "to provide, in appropriate cases, foster care . . . for children who otherwise would be eligible for assistance" under a state's former Aid to Families with Dependent Children (AFDC) program and "adoption assistance for children with special needs." Section 470 of the Act.¹

The primary purpose of title IV-E is to assist states with foster care maintenance payments and adoption assistance payments for eligible children. Sections 474(a)(1) and 474(a)(2) of the Act. In addition, the program provides for funding for expenditures "found necessary by the Secretary for the provision of child placement services and for the proper and efficient administration of the State plan." Section 474(a)(3) of the Act. The expenditures incurred in the administration of the state plan are divided into three categories: expenditures "for the training . . . of personnel employed or preparing for employment by the State agency or by the local agency administering the plan . . ." (section 474(a)(3)(A)); expenditures "(including travel and per diem expenses) . . . for the short-term training of current or prospective foster or adoptive parents and the members of the staff of State-licensed or State-approved child care institutions providing care to foster and adopted children receiving assistance under this part . . ." (section 474(a)(3)(B)); and other expenditures (section 474(a)(3)(C), (D) and (E)). Section 474 provides for FFP in training expenditures at the rate of 75% and reimbursement of the remaining administrative costs at the rate of 50% FFP. A state's title IV-B plan must include a training plan which covers training activities and costs funded under title IV-E. 45 C.F.R. §§ 1356.60(b)(2) and 1357.15(t)(1).

¹ The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law No. 104-193, repealed the AFDC program and amended title IV-E so that it refers to certain provisions of former title IV-A of the Act as they were in effect on June 1, 1995. 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.

The title IV-E regulations provide that a state's "cost allocation plan shall identify which costs are allocated and claimed under this program" (45 C.F.R. § 1356.60(c)) and make the regulations on public assistance cost allocation plans at 45 C.F.R. Part 95, subpart E, applicable to title IV-E (45 C.F.R. § 1356.30(c)). Section 95.505 of 45 C.F.R. defines a public assistance CAP as "a narrative description of the procedures that the State agency will use in identifying, measuring, and allocating all State agency costs incurred in support of all programs administered by the State agency." 45 C.F.R. § 95.505. A state is required to submit a CAP to DCA for approval. 45 C.F.R. § 95.507(a). In reviewing a proposed CAP or CAP amendment, DCA is directed to consult with the "affected Operating Divisions." 45 C.F.R. § 95.511(a). For the IV-E program, the Operating Division is ACF. A state may amend its CAP for various reasons, including the discovery of a material defect in the CAP or a change which makes the allocation basis or procedures in the approved CAP invalid. 45 C.F.R. § 95.509(a). A state may claim FFP "for costs associated with a program only in accordance with its approved cost allocation plan" (although, if not otherwise advised by DCA, a state may claim FFP based on a proposed CAP which has not yet been approved and, if necessary, retroactively adjust its claims in accordance with the subsequently approved CAP). 45 C.F.R. § 95.517.

General requirements for allocating costs incurred by state governments under federal grants are set out in Office of Management and Budget (OMB) Circular A-87. OMB Circular A-87 is currently made applicable to the title IV-E program by 45 C.F.R. §§ 92.4(a)(3) and 92.22(b), and was previously made applicable by 45 C.F.R. § 74.27(a) (for periods prior to the 2003 amendments to Part 92). See 68 Fed. Reg. 52,844 (Sept. 8, 2003). OMB Circular A-87 states that, in order to be allowable, a cost must "[b]e necessary and reasonable for proper and efficient performance and administration of Federal awards" and "[b]e allocable to Federal awards" OMB Circular A-87, Attachment (Att.) A, ¶ C.1. The Circular further states: "A cost is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received." Id., ¶ C.3.a.²

² We quote here from the version of OMB Circular A-87 which was issued by OMB in 1995. 60 Fed. Reg. 26,484 (May 17, 1995). The previous version of the circular stated in part that a "cost is allocable to a particular cost objective to the extent of benefits received by such objective." Att. A, ¶ C.2.a.

(continued...)

Case Background

Effective July 1, 2000, New Hampshire had an approved Public Assistance CAP which provided for allocating the costs of training provided by the Division for Children, Youth and Families (DCYF) Staff Development Unit based on four allocation methods: 1) Division Allocation, 2) DCYF State Office Allocation, 3) DCYF Random Moment Sampling Allocation, and 4) Direct Charge to Other Benefiting Grants/Programs. NH Ex. H at 73 (excerpt from CAP). The training costs for the three years beginning July 1, 2000 were charged under eleven "job numbers," or cost pools. See NH Ex. I. The direct charge allocation method was used for four of the cost pools during this period. Id.³ There were approximately 90 programs, including title IV-E, to which the costs accumulated in the cost pools could potentially be allocated. See NH Ex. K at 80-86.

All of the costs accumulated in the cost pools that used the direct charge allocation method were allocated to title IV-E (although, as discussed later, New Hampshire maintains that it incurred additional training costs that were not included in these cost pools and were not charged to title IV-E). Costs in the remaining cost pools were allocated to programs in addition to, or other than, title IV-E. One of the five cost pools assigned the direct charge methodology, identified as "Training - Foster Care - 75%" ("job number" 40100216), accounted for most of the costs allocated to title IV-E. See NH Exs. I and K through V.

According to New Hampshire, it revised its allocation methodology after meeting with ACF staff in May 2003 and again in August 2003

²(...continued)

A 1997 amendment did not affect the provisions of ¶ C.3, nor did the codification of OMB Circular A-87 at 2 C.F.R. Chapter II in 2005.

³ The excerpt from the approved CAP (New Hampshire Exhibit H) does not specify the cost pools to which the direct charge allocation method is assigned, and it is not clear whether this information was included elsewhere in the CAP. However, a list of the eleven cost pools submitted by New Hampshire shows that the direct charge allocation method was assigned to five of them. NH Ex. J. There were no training costs in one of the five cost pools ("job number" 40038000) during the three years in question. NH Ex. I.

to discuss New Hampshire's allocation of title IV-E training costs. New Hampshire alleges that, at the latter meeting -

it was agreed that New Hampshire would develop a CAP in accordance with ACF's guidance and in particular in accordance with ACF policy documents, ACYF-PA-90-01 & ACF-IM-91-15. [footnote omitted] Because New Hampshire's approved CAP provided for several allocation methods, it was determined that the CAP did not require amendment, rather NH DHHS agreed to interpret and apply its approved CAP, prospectively and from July 1, 2003, in accordance with ACF's interpretation of the policy documents. Department staff understood that New Hampshire would *not* be asked to make an adjustment for claimed expenses prior to July 1, 2003, the effective date of NH DHHS' modified interpretation and application of its approved CAP.

NH Br. at 8 (*italics in original*). New Hampshire subsequently submitted a revised CAP that allocated training costs using a saturation rate methodology, the same methodology used by the OIG in calculating the disallowance amount here. On November 19, 2003, DCA advised New Hampshire that its revised Public Assistance CAP was approved effective July 1, 2002, but made approval of the CAP subject to the following condition:

The Title IV-E training allocation methodology must be revised in accordance with ACF policy - ACYF-BC-PA-90-01 (6/14/90), and the revision must be retroactive to the beginning of the state fiscal year 2004, which is effective July 1, 2003.

NH Ex. G at 71.

The HHS Office of the Inspector General (OIG) conducted a review of New Hampshire's allocation methodology for the period July 2000 through June 2003 and issued a report in January 2006 finding that New Hampshire overstated the federal share of training costs for these years by \$1,761,128 because it did not follow ACF's policy for allocating training costs. NH Ex. A at 6. According to the audit report, New Hampshire allocated only training-related staff salaries between federal and state programs and failed to allocate the remainder of its training costs, resulting in 96% of total training costs being allocated to title IV-E. *Id.* at 4. The report cites the definition of allocability in OMB Circular A-87 as well as ACF Policy Announcement ACYF-PA-90-01, dated June 1990, which the report states "requires States to use the saturation rate or another

equitable method to allocate foster care and adoption assistance costs." Id. at 2.

ACF's February 20, 2007 disallowance letter adopts the OIG's finding that New Hampshire "did not fully comply with OMB Circular A-87 and ACF guidance in claiming costs for reimbursement." NH Ex. C at 64. The disallowance letter relies specifically on "ACF's Policy Announcement ACYF-PA-90-01, dated June 14, 1990, Information Memorandum ACF-IM-91-15, dated July 24, 1991, 45 CFR Part 95.507(a)(2) and the ACF Child Welfare Policy Manual." Id. The disallowance letter also indicates that New Hampshire revised its CAP to "incorporat[e] the provisions of OMB Circular A-87 and the specified ACF guidance," but that New Hampshire failed to adjust its claims "to account for the improper cost allocation of title IV-E training costs prior to the revision of the CAP effective July 1, 2002, or for the period after the CAP's approved effective date." Id.⁴

In its letter acknowledging receipt of New Hampshire's appeal, the Board noted a recent court decision which found that DCA improperly relied on ACYF-PA-90-01 and ACF-IM-91-15 in disapproving a proposed CAP amendment that would have allocated training costs common to the administration of several programs solely to title IV-E. Letter dated 4/11/07, at 2, citing Nebraska Dep't of Health & Human Servs. V. HHS, 340 F.Supp.2d 1 (D.D.C. 2004), rev'd and remanded 435 F.3d 326 (D.C. Cir. 2006) (reversing and remanding Nebraska Health and Human Services System, DAB No. 1882 (2003)).⁵ The Board therefore inquired whether ACF was still relying on these issuances as a basis for the disallowance. In response, ACF stated that it had "decided not to rely on the issuances called into question in the above cited Nebraska decisions" and will instead rely "upon OMB Circular A-87, Title IV-E, and the promulgating regulations, and 45 C.F.R. Parts 74 and 92." Letter dated 4/30/07. ACF also stated that it would "cite to [the] Board's line of prior

⁴ As ACF now appears to recognize, DCA's approval letter indicated that the effective date of the revised allocation methodology for IV-E training was July 1, 2003. See ACF Br. at 12-13, citing NH Ex. G at 71. The July 1, 2002 effective date referred to in the disallowance letter is the overall effective date of New Hampshire's revised Public Assistance CAP.

⁵ The District Court ruled that ACF's announcements were not validly promulgated. HHS did not challenge this ruling in its appeal to the Court of Appeals.

decisions on the subject of cost allocation in the Title IV-E area . . . , which discuss . . . other regulations which are applicable here." Id. at 2.

Discussion

ACF's current rationale for the disallowance is not entirely clear from the record. ACF appears to take the position that the training costs were unallowable because they were not charged to title IV-E in accordance with New Hampshire's approved CAP for the period July 1, 2000 through June 30, 2003. ACF also appears to take the position that New Hampshire violated OMB Circular A-87 by direct-charging the training costs in some of its cost pools to title IV-E. (ACF also refers to other regulatory provisions and the IV-E statute having been violated, but does not identify any specific provisions.) As discussed below, we conclude that the disallowance was not justified on either of these grounds.

We note preliminarily that a state may claim FFP "for costs associated with a program only in accordance with its approved cost allocation plan." 45 C.F.R. § 95.517. If a material defect in the approved CAP is discovered, however, the state must amend its CAP and retroactively adjust its prior claims in accordance with the CAP as subsequently approved. 45 C.F.R. § 95.509(a). Under these provisions, the only situation in which a state is required to retroactively apply an amended CAP instead of claiming costs in accordance with the approved CAP for the period in question is where a material defect in the latter CAP has been identified. There is no indication in the record that DCA required New Hampshire to submit an amended CAP due to a material defect in the previously approved CAP. Indeed, DCA specifically made the allocation method for training costs in the revised CAP effective July 1, 2003 (after the period in question here).

Thus, New Hampshire was entitled to FFP for training costs that were allocated to title IV-E in accordance with New Hampshire's approved CAP for the period July 1, 2000 through June 30, 2003. Although ACF refers to this CAP as "a viable approved CAP," ACF argues that New Hampshire "did not use the methodologies identified in its CAP to allocate the costs identified by the auditors." ACF Br. at 20. However, ACF does not point to anything in the record that suggests that New Hampshire did not follow its approved CAP. As indicated above, the disallowed training costs were allocated to title IV-E using a direct charge allocation method. Direct charging was one of four allocation methods identified in the CAP. Since all of the other allocation methods require some type of pro rata allocation of the costs in

the relevant cost pools among benefitting programs, it seems clear that what New Hampshire's CAP meant by a direct charge allocation method was a method that charges the costs in particular cost pools to a program in their entirety. This is, moreover, the way New Hampshire consistently applied the CAP provision.

ACF does not offer any different interpretation of this allocation method. Instead, ACF argues, in effect, that the direct charge allocation method was not in fact an allocation method because all of the costs in the four cost pools to which this method was assigned were charged to a single program. See ACF Br. at 14-16. However, the approved CAP clearly identifies "Direct Charge to Other Benefiting Grants/Programs as appropriate" as one of the "Allocation Methods." NH Ex. H. Moreover, the approved CAP as a whole did not allocate training costs solely to title IV-E, but rather distributed these costs to numerous programs using several allocation methods, including the direct charge method. By looking only at how the costs in four of the eleven cost pools were allocated, ACF presents an incomplete picture of how New Hampshire's training costs were allocated.

Furthermore, as New Hampshire notes without contradiction, ACF's own reviewer concluded that New Hampshire followed its approved CAP. See NH Reply Br. at 3, citing ACF Ex. F. A statement signed by the reviewer states that she made two trips to the State agency in 2006 in order to "verify the dollar amounts of the reported costs claimed on the title IV-E expenditure reports under review, and verify that each expenditure claimed was properly cost allocated in accordance with the approved plan that was in place at the time of the period under review." ACF Ex. F at 1. The statement (written in the third person) continues, "Based on her findings, she acknowledged that the claims were based on an approved cost allocation plan[.]" Id.

Accordingly, we conclude that New Hampshire claimed the disputed training costs in accordance with its approved CAP for the period in question.

ACF also argues, however, that New Hampshire's use of the direct charge allocation method for four of the cost pools is contrary to OMB Circular A-87, asserting that the Board has held "that the allocation of direct costs among several benefitting cost objectives is required by" Attachment A, § C.2.a. of the Circular. ACF Br. at 20, citing Illinois Dept. of Children and Family Services, DAB No. 1645 (1998). Illinois, however, was the last in a line of cases holding that FFP at the 75% rate is not

available under the IV-E regulations for state agency indirect costs. Here, there is no finding that the cost pools charged entirely to title IV-E included such indirect costs. Moreover, the Board precedent cited in Illinois on allocation methodologies states that "an agency has considerable discretion to determine which of a range of methodologies would be 'equitable,' including a pro rata distribution as well as assignment of [costs that reasonably could be deemed fully assignable to each of several programs] exclusively to one of the fully benefitting programs." Illinois at 5, citing Illinois Dept. of Children and Family Services, DAB No. 1530, at 17 (1995) (quoting Oklahoma Dept. of Human Services, DAB No. 963 (1988)).⁶ In any event, regardless of what the Circular requires, ACF's argument has no merit. As we observed above, the overall effect of New Hampshire's approved CAP was in fact to allocate training costs among several benefitting cost objectives.

Nevertheless, as ACF notes, a very high percentage of the training costs reported by New Hampshire were allocated to title IV-E. New Hampshire asserts without contradiction, however, that the training costs accumulated in the cost pools did not reflect all of its training costs. For example, according to New Hampshire, it included in the direct-charge cost pools only the net cost of the DCYF annual conference, after subtracting revenue from fees paid by individuals from other programs to attend the conference. See NH Br. at 16; NH Ex. A at 20. The fees were direct-charged to those other programs, and averaged 48.62% of total conference costs. NH Ex. B at 57. When these training costs and the training costs in cost pools allocated using methods such as Random Moment Sampling are taken into account,

⁶ ACF also fails to mention that HHS has interpreted OMB Circular A-87 as not requiring allocation to all benefitting programs if a program's governing statute permits the program to pay for costs that benefit other programs. See HHS Implementation Guide for OMB Circular A-87, ASMB C-10 (issued April 8, 1997), ¶ 2.11 (allowing use of "the primary program concept" where the head of an awarding agency notifies the cognizant official for cost allocation of a determination that this is permitted by the agency's enabling legislation). Thus, even if New Hampshire's approved CAP provided for allocating all training costs to title IV-E (which it did not), this would not necessarily be contrary to OMB Circular A-87.

the percentage of training costs allocated to IV-E is less than the 96% figure cited by ACF.⁷

More importantly, ACF does not point to any basis for determining that any of the particular training costs allocated wholly to title IV-E benefitted other programs as well or were of no benefit to title IV-E. ACF does not dispute New Hampshire's assertion that, during the period in question, all DCYF caseworkers handled title IV-E cases or New Hampshire's assertion that DCYF's training program was specifically designed to meet the requirements of title IV-E. See NH Ex. Y (Affidavit of Roger R. Desrosiers dated 8/1/07). Moreover, before the Board, ACF expressly disavowed any reliance on ACF policy issuances addressing allocation of training costs. Furthermore, ACF acknowledges that "[n]o examination of the training programs to evaluate their appropriateness or content was made" by the auditors. ACF Br. at 3.

Finally, we note that it is immaterial if, as ACF appears to assert, neither it nor DCA was aware during the CAP approval process that the CAP would result in allocating most training costs to title IV-E. DCA should have known from New Hampshire's IV-B training plan the types of training costs that would be allocated. In any event, DCA did not determine that there was a material defect in the CAP which required that the revised CAP be applied retroactively.

Conclusion

For the reasons discussed above, we reverse the disallowance in full.⁸ This decision does not preclude ACF from issuing a new

⁷ The auditors determined the 96% by subtracting about \$20,000 in salary costs allocated among benefitting programs, which the auditors said represented 4% of training costs. See NH Ex. A at 12, n.1. New Hampshire presented analyses for each quarter, however, showing substantially more than that percentage of total training costs allocated to programs other than title IV-E, and ACF did not dispute those figures. See NH Exs. L-V.

⁸ New Hampshire raised substantial questions about the calculation of the disallowance amount. See, e.g., NH Reply Br. at 4. In view of our resolution of this case, we need not address these questions.

disallowance should it determine that some of the costs are not for training activities eligible for the enhanced rate of FFP.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Judith A. Ballard
Presiding Board Member