



Division of Medicaid & Children's Health, Region VI

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

December 23, 2014

DISALLOWANCE LA/2014/001/MAP

Ms. Ruth Kennedy, Medicaid Director
Bureau of Health Services Financing
Department of Health and Hospitals (DHH)
628 North 4th Street
Baton Rouge, LA. 70821-9030

Dear Ms. Kennedy:

This letter serves as notice of a disallowance in the amount of \$311,576,411 Total Computable (TC), \$189,999,295 Federal Financial Participation (FFP) due to Louisiana's collection of impermissible provider-related donations. On May 9, 2014, CMS notified your agency that it had disapproved the proposed State Plan Amendments (SPA) 13-23, 13-25, and 13-28 as a result of provisions in the related cooperative endeavor agreements (CEAs) that required substantial advance lease payments by the participating hospitals that were linked to increased Medicaid payments to the same privately-owned hospitals.

Section 1903(w) of the Social Security Act (the Act) generally places limitations on the use of provider-related donations and taxes as funding sources for expenditures claimed by states as the basis for federal financial participation (FFP). Among these limitations, as set forth in implementing regulations at 42 C.F.R. § 433.54, FFP is not available to the extent that it would be based on the use of such financing sources when there is a "hold harmless arrangement" under which providers (or the provider class) could be effectively repaid for a provider-related tax or donation through any direct or indirect payment, offset, or waiver. A hold harmless arrangement is defined to include circumstances in which an increased Medicaid payment is conditional on the receipt of a donation.

Supplemental and Disproportionate Share Hospital (DSH) payments made under the disapproved SPAs are linked to CEAs that provide, among other things, for non-bona fide provider-related donations from privately owned hospitals that the state refers to as "advance lease payments." The CEAs provide for annual facility and equipment leases along with the advance lease payments. These advance lease payments are not usual and customary industry payment arrangements and are linked to the increased Medicaid payments. CMS has determined that these are not reasonable and necessary lease payments, but are, in fact, non-bona fide provider-related donations.

The state indicated that its base lease payments are based on fair market value appraisals done by independent third-party professionals in the field of hospital valuation, and thus appear to comport with normal business practices. The state did not provide similar independent analysis to justify the substantial advance lease payments. Additionally, information submitted by the state indicates that the lease payments themselves are in excess of the fair market value of the leased property. The state describes the advance lease payments as “an upfront, good faith gesture on the part of private partners required by the state in an effort to objectively express each private partner’s interest in and commitment to consummating the underlying relationship contemplated in the CEA.” However, we are not aware of any other examples of advance lease payments of this magnitude in the State’s ordinary course of business. As such, the unjustified advance lease payments are more aptly characterized as non-bona fide provider-related donations.

Furthermore, the substantial advance lease payments from select hospitals are directly linked to higher Medicaid payments to the same private hospitals; this established a prohibited hold harmless arrangement. Only providers that agree to participate in a CEA are eligible to receive the additional Medicaid and DSH payments under the proposed SPAs. The hospitals that sign the CEA agreements receive supplemental inpatient hospital payments capped at their Medicaid charge levels and DSH payments at 100% of net uncompensated care cost, whereas other private hospitals are paid less for inpatient care and at lower percentages for uncompensated care. The payments were made in lump sums that assumed that the private hospitals participating in the CEAs would provide similar levels of Medicaid and uninsured care as was previously provided by the public charity care hospital system.

This letter constitutes your notice of disallowance in the amount of \$311,576,411 TC, \$189,999,295 FFP. Please make a decreasing adjustment on line 10(b) of the next quarterly expenditure report (CMS-64) in the amount of \$311,576,411 TC, \$189,999,295 FFP and reference LA/2014/001/MAP. Also, you must adjust your state’s letter of credit in accordance with the Annual Grant Award (AGA) Pilot Project Memorandum of Understanding (MOU) for the final disallowed amount plus any interest computed pursuant to section 1903(d)(5). Under the terms of the MOU, you must adjust, if you have not already done so, your next cash draw request in the Payment Management System for any disallowed expenditures appealed. Your adjustment must appear as a recognizable, separate entry on your request.

This disallowance is my final decision. Under section 1116(e) of the Act, the state has the opportunity either to request reconsideration of this disallowance from the Secretary or to appeal this disallowance to the Departmental Appeals Board. This decision shall be the final decision of the Department unless, within 60 calendar days after the state receives this decision, the state delivers or mails (the state should use registered or certified mail to establish the date) a written request of reconsideration to the Secretary or a written notice of appeal to the Departmental Appeals Board.

Written requests for reconsideration should be delivered or mailed to the CMS Associate Regional Administrator at 1301 Young St. Suite 832, Dallas TX. 75202 (the state should use registered or certified mail to establish the date). Requests for reconsideration by the Secretary should include: (1) a copy of the disallowance letter; (2) a statement of the amount in dispute; (3) a brief statement of why the disallowance should be reversed or revised, including any information to support the state’s position with respect to each issue; (4) additional information regarding factual matters or policy considerations; and (5) a statement of your intent to return or

retain the funds. See 42 C.F.R. § 430.42(b)(2) published at 77 Fed. Reg. 31499, 31508 (May 29, 2012). The state should include in its request for reconsideration all of the information it believes is necessary for the Secretary's review of its request. If the state requests reconsideration from the Secretary and receives an unfavorable reconsideration of the disallowance from the Secretary, it may appeal the disallowance to the Departmental Appeals Board within 60 calendar days after the date that the state receives the unfavorable reconsideration.

Written requests for appeal should be delivered or mailed to:

U.S. Dept. of Health and Human Services
Departmental Appeals Board, MS 6127
Appellate Division
330 Independence Avenue, S.W.
Cohen Building, Room G-644
Washington, D.C. 20201

The state may appeal the disallowance to the DAB within 60 calendar days of the date you received this letter or, if applicable, within 60 calendar days after the date that the state receives the unfavorable reconsideration. If the state chooses to appeal this disallowance, written appeals request must include: (1) a copy of this disallowance decision; (2) a copy of the reconsideration decision, if applicable; (3) an expression of its intention to appeal the disallowance; (4) the amount in dispute; and (5) a brief statement of why the disallowance is wrong. In addition, the state should reference Disallowance Number LA-2014-001-MAP in the appeal request. The Board will notify the state of further procedures. Please also send a copy of your appeal to my attention at the following address Mr. Bill Brooks, Associate Regional Administrator; Centers for Medicare & Medicaid Services, Region 6; 1301 Young Street, Room 833; Dallas, Texas 75202.

A notice of appeal may also be submitted to the DAB by mail, by facsimile (fax) if under 10 pages, or electronically using the DAB's electronic filing system (DAB E-File). Submissions are considered made on the date they are postmarked, sent by certified or registered mail, deposited with a commercial mail delivery service, faxed (where permitted), or successfully submitted via DAB E-File. To use DAB E-File to submit your notice of appeal, you or your representative must first become a registered user by clicking "Register" at the bottom of the DAB E-File homepage, <https://dab/efile.hhs.gov/>; entering the information requested on the "Register New Account" form; and clicking the "Register Account" button. Once registered, you or your representative should login to DAB E-File using the e-mail address and password provided during registration; click "File New Appeal" on the menu; click the "Appellate" button; and provide and upload the requested information and documents on the "File New Appeal-Appellate Division" form. Detailed instructions can be found on the DAB E-File homepage.

If the state appeals the disallowance under section 1116(d) of the Act, section 1903(d) of the Act provides you the option of retaining the funds were previously paid to the state, which are now being disallowed by this notice, pending a final administrative decision. If the final decision upholds the disallowance and you elect to retain the funds during the appeals process, the proper amount of the disallowance plus interest computed pursuant to section 1903(d)(5) of the Act will be offset in a subsequent grant award. You may exercise your option to retain the disputed funds by notifying me, in writing, no later than 60 days after the date this letter is received. In the

absence of notification that the state elects to retain the funds, the Secretary will recover \$311,576,411 pending the final decision of the Departmental Appeals Board.

If you have any question please contact Demetria Carter at 225-342-0203 or Michael Jones at 214-767-6279 or, via email, at demetria.carter@cms.hhs.gov and michael.jones@cms.hhs.gov.

Sincerely,

Bill Brooks
Associate Regional Administrator
Division of Medicaid and Children's Health

cc via Email: Jeff Reynolds/DHH
Jen Steele/DHH
Pam Diez/ DHH