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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-164031(3),118 DATE: AUG 30 1978

MATTER OF: Medicaid--Use of Countercyclical Revenue Sharing Funds as Non-Federal Share

DIGEST: Funds distributed by the Department of the Treasury under title II, Public Works Employment Act of 1976 (Countercyclical Revenue Sharing), Pub. L. No. 94-369, 90 Stat. 1002, as amended (42 U.S.C.A. § 6721 et seq.) may be used to meet non-Federal share matching requirements of Medicaid program, 42 U.S.C. §§ 1396-1396j. Congress intends that Federal funds distributed under title II be treated in the same "no strings" manner as general revenue sharing funds under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §§ 1221 et seq. rather than as grants. Accordingly, the lack of specific statutory language permitting use of these funds as non-Federal share does not stand in the way of such use as it would in the case of grants.

This decision responds to a request from the Administrator of the Health Care Financing Administration, Department of Health, Education and Welfare (HEW), for a decision on whether Federal payments to the State of Alabama under title II of the Public Works Employment Act of 1976 (Countercyclical Revenue Sharing)(Pub. L. No. 94-369, 90 Stat. 1002, as amended by Pub. L. No. 94-447, 90 Stat. 1498 and title VI, Pub. L. No. 95-30, 91 Stat. 164 (42 U.S.C.A. §§ 6721 et seq.)) may be used as the State's required non-Federal share under the Medicaid program (Social Security Act, sections 1901 et seq., 42 U.S.C. §§ 1396 et seq., as amended). The Administrator notes that, although the case at hand involves Alabama, this same question may arise with respect to any State's Medicaid program.

On February 25, 1977, the Office of Revenue Sharing, Department of the Treasury, which administers the title II program, advised the State of Alabama that funds available to the State under title II of Pub. L. No. 94-369 could be used as the State's required non-Federal matching share under the Medicaid program. On March 25, HEW's Regional Commissioner informed the State to the contrary. The State of Alabama has asked HEW to reconsider its decision.

HEW's position is summarized as follows by the Administrator:

> "Section 1903 of the Social Security Act, 42 USC §1396b, limits the extent of Federal financial participation in a State's Medicaid program to stated percentages of sums expended by the state in carrying out the program.
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> "45 CFR §74.52(b) (5) precludes Federal funds from being utilized as the non-Federal share for HEW programs 'unless the other grant or contract may, under authority of law, be used for matching or costs sharing * * *.' We have always interpreted this requirement to mean that the other statute must itself specifically authorize its use as the non-Federal share or that unambiguous legislative history evinces a clear Congressional intent that it be so used. Neither is found in connection with P.L. 94-369."

In 56 Comp. Gen. 646, 648 (1977), we recently summarized the usual rule with respect to grants as follows:

> "We have consistently held that in the absence of specific statutory authority, Federal grant-in-aid funds from one program may not be used to satisfy the local matching requirements of another Federal grant-in-aid program."

The Department of the Treasury's response to our request for comments is premised on the view that title II of the Public Works Employment Act is a form of revenue sharing--i.e., general budget support as opposed to categorical or block grants or contracts--which must be interpreted in the context of the general revenue sharing program, 31 U.S.C. §§ 1221 et seq. (Supp. V 1975). Treasury argues in effect that, if it is so understood, there is no difficulty in interpreting title II as permitting the use of its funds as non-Federal share in the Medicaid program because of the policy of "no strings" on local expenditures which is fundamental to the revenue sharing concept and which distinguishes it from grants and other forms of Federal assistance. See S. Rep. No. 92-1050 at 1 (1972); 118 Cong. Rec. 35498 (Oct. 12, 1972). Treasury comments that HEW's regulation, 45 C.F.R. § 74.52(b)(5) (1976), which prohibits the use of funds from Federal grants and

contracts for matching or cost sharing with HEW programs unless authorized by law is not applicable because title II payments are not grants or contracts.

We find considerable merit in the Department of the Treasury's arguments for considering title II to be derivative from the State and Local Fiscal Assistance Act of 1972 (the so-called Revenue Sharing Act), Pub. L. No. 92-512, 31 U.S.C. §§ 1221 et seq. (Supp. V 1975), as amended. It should be noted at the outset that "revenue sharing" is not a statutory term. The phrase does, however, dominate most legislative discussion of the State and Local Fiscal Assistance Act, and references to similar provisions of title II. In such discussion, the phrase appears to describe two aspects of the program that are not always distinguished. These are, first, the policy or program purpose of distributing Federal revenue to State and local governments under a particular formula and, second, the distribution method and conditions that are provided to carry out these purposes. Further, the adoption of "revenue sharing" in 1972 was a departure in both concept and methodology from existing methods of distributing Federal funds to State and local governments. See S. Rep. No. 92-1050, at 11 (1972).

There is little legislative history available to guide us in interpreting title II of Pub. L. No. 94-369. Title II was not part of either the House or Senate bills reported out of committee; it was introduced as a floor amendment to the Senate bill (S. 3201, 95th Congress) and is briefly described in the conference report as follows:

> "Title II of the Senate amendment provides for the strengthening of the Federal Government's role as guarantor of a stable national economy by promoting greater coordination, during times of economic downturn, between national economic policy--as articulated at the Federal level--and budgetary actions of State and local governments. Title II of the Senate amendment would accomplish this purpose by providing emergency Federal assistance to State and local governments hard hit by recessionary pressures, in order to reduce the reliance of these governments upon budgetary actions which run counter to Federal efforts to stimulate speedier economic recovery. The assistance provided is designed to meet the following criteria of a limited, anti-recession program:

> "First, the assistance provided would go quickly into the economy, with as little administrative delay as possible.
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> "Second, the assistance provided is selectively targeted, by means of the formula, to go to only those governments substantially affected by the recession.
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> "Third, the assistance provided would phase itself out, as the economy improves.
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> "A fundamental premise underlying title II of the Senate amendments is that the amount and quality of government services at the State and local levels should not be determined by national economic conditions over which State and local governments have no control. In other words, the conferees, in accepting title II, have concluded that it is not sound governmental policy for a jurisdiction to be able to provide good police protection, fire protection, trash collection, and public education during good economic times, but be forced to lower the quality of those services significantly, whenever the health of the economy declines." S. Rep. No. 94-939, 25-26 (1976).

In floor debate in both Houses of Congress much of the discussion focused on the "revenue sharing" description of the program. In the Senate, title II opponents contended that because a State with unemployment as low as 4.5 percent would still be eligible to participate in the program, the measure actually amounted to nothing more than general revenue sharing or its equivalent. Cong. Rec. S5667, 5669 (daily ed. April 13, 1976) (remarks of Senator Baker); id., S5671 (remarks of Senator Buckley).

Senator Muskie insisted that despite its critics, title II still retained "the essence of the countercyclical idea." Cong. Rec. S5668 (daily ed. April 13, 1976). He did, however, also refer to the measure as countercyclical revenue sharing (Id., S5675).

The argument about whether title II is to be called "revenue sharing" or not seems to arise out of the earlier noted distinction between the policy objective of unrestricted distribution of Federal revenue and the countercyclical public employment support objective of title II. The argument in the congressional debates

was not concerned with the method of distributing the program funds or the use of the funds distributed. Senator Muskie's description of title II as "countercyclical revenue sharing" would appear particularly significant in this light. It suggests a mix of a more specific program objective--to counteract the impact on local government of economic cycles--with the method of distributing Federal funds associated with the revenue sharing "no strings" approach.

The method of distribution created by title II resembles that used under Revenue Sharing Act, in that funds are distributed upon the submission of prescribed assurances by the recipients. Compare section 205, Pub. L. No. 94-369, 90 Stat. 1006 (42 U.S.C.A. § 6725) with 31 U.S.C. § 1243 (Supp. V 1975), as amended by Pub. L. No. 94-488, 90 Stat. 2341 (October 13, 1976). Moreover, under both title II and the Revenue Sharing Act, the Office of Revenue Sharing has no discretion to decide whether to make an award and upon what terms and conditions. As Treasury points out, funds are paid to a class of recipients defined by statute in amounts determined by statutory formulas, to be expended without Federal approval and without regard to Federal restrictions, except as expressly provided.

Thus, at least the method of distribution of title II funds and funds under the Revenue Sharing Act is distinguishable from the method of distribution under established grant-in-aid procedures, where a Federal grantor agency in its discretion approves an application or plan before making an award. (We note, however, that both assistance under title II and revenue sharing would appear to be the kind of transaction which section 5 of the Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. No. 95-224, 92 Stat. 3, 4 February 3, 1978) requires to be governed by "a type of grant agreement.")

Even in the case of block grants, which are available under title I of the Omnibus Crime Control and Safe Streets Act of 1968 (Pub. L. No. 90-351, as amended, 42 U.S.C. §§ 3701 et seq.) and the Housing and Community Development Act of 1974 (Pub. L. No. 93-383, 42 U.S.C. §§ 5301 et seq. (Supp. V 1975)), which involve formula distribution and require approval of a general plan submitted by the grantee, the traditional grant-in-aid procedure of significant prior Federal program review is retained. In the case of the Housing and Community Development Act program, specific

authority is included to permit funds to be used as non-Federal share in other Federal grant-in-aid programs undertaken as part of the grantee's Community Development Program, 42 U.S.C. § 5305 (a)(9)(Supp. V 1975). In the absence of such authority, that use would be prohibited. 56 Comp. Gen. 646 (1977).

By contrast, in the case of the Revenue Sharing Act, Congress originally included a provision prohibiting the use of revenue sharing funds as non-Federal share in other Federal programs, Pub. L. No. 92-512, § 104, 86 Stat. 920. When Congress amended the Act to permit the use of revenue sharing funds to meet local share requirements of Federal programs, it did so simply by repealing the prohibition--no positive grant of such authority was considered necessary. Pub. L. No. 94-488, § 4(a), 90 Stat. 2341 (October 13, 1976).

We are faced with the question whether there is sufficient reason to distinguish Revenue Sharing Act payments from title II countercyclical payments for purposes of their availability as non-Federal share. The answer to this question will determine whether specific authority for the use of these program funds to satisfy local matching share requirements must be present, as is the rule for grant-in-aid programs.

HEW suggests that since Congress included express authority to apply funds authorized by title I of Pub. L. No. 94-369, as non-Federal share in certain instances, the absence of such a provision in title II indicates that Congress did not intend title II funds to be so applied. However, title I of Pub. L. No. 94-369, the Local Public Works Capital Development and Investment Act of 1976, is essentially a grant-in-aid program. We are persuaded that our general rule with respect to grant-in-aid programs does not apply to title II because Congress patterned the method of distributing funds on the Revenue Sharing Act rather than on the more traditional grant program.

This conclusion is further reinforced by the amendment to section 204 of title II (42 U.S.C. § 6724), which removed a reference to the payments under title II as "grants." Section 201(4), Pub. L. No. 94-447, 90 Stat. 1498 (October 1, 1976). While "grant" is a term that may have a different meaning depending on the context, Treasury construes the change as intended to clarify the non-application of normal grant-in-aid restrictions to title II payments. We agree with that construction.

Because of these considerations, we believe that the Department of Treasury's interpretation of title II as permitting payments under it to be applied as non-Federal share in the Medicaid program is reasonable. The Treasury Department has issued interim regulations that are intended to have this effect. 31 C.F.R. § 52.45 (42 F.R. 48552, September 23, 1977). It is our practice to place great reliance on the statutory interpretations of agencies responsible for administering a statute.

Accordingly, we conclude that title II countercyclical funds may be used as a State's non-Federal share in the Medicaid program so long as such funds are used for purposes authorized by title II.

Although it has no effect on this decision, we call attention to our earlier comment that title II distributions may fall under section 5 of the Federal Grant and Cooperative Agreement Act of 1977. It would seem prudent for the Department of the Treasury, under these circumstances to clarify this status or request an exception from OMB, if necessary, as provided in sections 9 and 10 of that Act.

R.F. KELLER

Deputy Comptroller General
of the United States