STATE OF NEW HAMPSHIRE
HOME CARE FOR CHILDREN WITH SEVERE DISABILITIES

PERFORMANCE AUDIT
APRIL 2004

To The Fiscal Committee Of The General Court:

We have conducted an audit of the Home Care For Children With Severe Disabilities optional Medicaid eligibility group to address the recommendation made to you by the Legislative Performance Audit and Oversight Committee. We conducted our audit in accordance with the standards applicable to performance audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States. Those standards require we plan and perform the audit to provide a reasonable basis for our findings and conclusions. Accordingly, we have performed such procedures as we considered necessary in the circumstances.

The purpose of the audit was to determine whether New Hampshire's Home Care For Children With Severe Disabilities administrative rules complied with federal laws and regulations and State statutes.

This report is the result of our evaluation of the information noted above and is intended solely for the information of the Department of Health and Human Services and the Fiscal Committee of the General Court. This restriction is not intended to limit the distribution of this report, which upon acceptance by the Fiscal Committee is a matter of public record.

Office Of Legislative Budget Assistant
Office Of Legislative Budget Assistant

April 2004

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ABBREVIATIONS

CFR	Code Of Federal Regulations
CMS	Center For Medicare And Medicaid Services
CSD	Children With Severe Disabilities
DHHS	Department Of Health And Human Services
HC-CSD	Home Care For Children With Severe Disabilities
HCFA	Health Care Financing Administration
RSA	Revised Statutes Annotated
SFY	State Fiscal Year
SSI	Supplemental Security Income
USC	U.S. Code
U.S. DHHS	U.S. Department Of Health And Human Services

SUMMARY

Purpose And Scope Of Audit

This audit was performed at the request of the Fiscal Committee of the General Court consistent with a recommendation by the Legislative Performance Audit and Oversight Committee. The audit's purpose was to determine whether enrollment and eligibility guidelines for the optional Medicaid coverage group, Home Care For Children With Severe Disabilities (HC-CSD), are in compliance with federal laws and regulations and State statutes. The audit was conducted in accordance with generally accepted government auditing standards.

Background

Medicaid is a means-tested entitlement program jointly financed by the federal and state governments. It entitles eligible individuals to receive coverage for basic health and long-term care services. State Medicaid programs operate within broad federal income and resource standard guidelines. As a result there are substantial variations in eligibility policies not only from state to state but also among eligibility population groups within a state.

Eligibility for Medicaid is based on a combination of financial and categorical requirements. Low income and limited financial resources alone are not enough to become eligible for Medicaid; individuals must also belong to a mandatory or optional coverage group.

The Medicaid program was amended with the enactment of section 134 of the Tax Equity and Fiscal Responsibility Act of 1982, also known as the Katie Beckett provision, which gives states the option of making Medicaid coverage available to children who qualify as disabled for Supplemental Security Income (SSI) under certain conditions. The Katie Beckett provision gives states the option to determine as eligible for Medicaid disabled children who are 18 years old and younger, and who live at home but would be eligible for Medicaid if living in an institution. If a state chooses this option, only the child's income and resources are counted when determining Medicaid eligibility. The Katie Beckett provision bestows the same Medicaid services as it does to any other eligible Medicaid recipient.

In New Hampshire, RSA 167:3-c, VI directs the Department of Health and Human Services (DHHS) commissioner to adopt administrative rules establishing an optional state coverage group to provide medical assistance for children under 18 years of age who are severely disabled. As a result, the DHHS created the HC-CSD Medicaid eligibility optional coverage group, which was implemented in 1989. Our audit work determined the intent of RSA 167:3-c, VI was to provide medical assistance coverage to severely disabled children under the age of 18. It is clear from State statute and Legislative history the Legislature intended the DHHS commissioner to adopt administrative rules to effectuate medical assistance coverage for severely disabled children under the Medicaid State plan. The statute provides the commissioner broad discretion to adopt rules enabling the State to provide Medicaid to children with severe disabilities, but does not include critical definitions such as what constitutes a severely disabled child.

Results In Brief

Our audit work determined the DHHS substantially complies with State statutes regarding medical coverage for severely disabled children, primarily because RSA 167:3-c, VI provides broad discretion to the DHHS commissioner in adopting rules implementing HC-CSD.

Our audit presents seven observations and recommendations. Observation No. 1 discusses the department's inability to provide accurate and reliable HC-CSD information. We planned to report the number of severely disabled children eligible for Medicaid through the HC-CSD eligibility option and their associated costs. Although the DHHS provided some figures purporting the number of children found eligible through HC-CSD and related expenses, we were not confident the numbers were accurate. Therefore, we cannot report the number of children enrolled in Medicaid through the HC-CSD eligibility option or their associated costs. Without reliable and accurate program utilization and cost reports, DHHS management and the Legislature may not have information needed to make evidence-based decisions for future program direction.

Observation Nos. 2 through 5 address federal compliance issues. The DHHS reportedly operates the HC-CSD eligibility option according to 42 CFR 435.225. However, our audit work determined some administrative rules promulgated by the department do not comply with various requirements of this federal regulation and related statutes. State administrative rules did not comply with federal requirements in the areas of cost effectiveness, living arrangements, and the use of disability standards. In addition, State law does not comply with federal requirements to provide Medicaid services to severely disabled children 18 years old or younger.

Observation Nos. 6 and 7 discuss State compliance. Legislative intent is not clearly articulated in RSA 167:3-c, nor does the statute define key terms such as severely disabled child. Our audit work determined most HC-CSD administrative rules expired in 2002, meaning the DHHS has been making eligibility determinations without rules required by RSA 167:3-c, VI and RSA 541-A. We note the DHHS has drafted proposed rules.

RECOMMENDATION SUMMARY

Observation Number	Page	Legislative Action Required	Recommendation	Agency Response
1	8	No	Ensure information is accurately assembled and reported. Ensure the department has access to its data by requiring periodic data transfers from the contracted information systems provider.	Concur
2	11	Yes	Consider revising RSA 167:6 to define severely disabled children and HC-CSD eligibility, and revise administrative rules to reflect Supplemental Security Income disability standards consistent with federal law.	Concur In Part
3	12	No	Revise He-W 508.02 to define cost effectiveness consistent with federal law and regulations, and He-W 508.01.	Do Not Concur
4	13	No	Remove requirements in administrative rules requiring a child to live with at least one parent.	Concur
5	14	Yes	Consider revising age limits contained in RSA 167:3-c, VI to be consistent with federal law.	Concur
6	17	No	Immediately initiate the interim rulemaking process for the HC-CSD Medicaid eligibility option to comply with RSAs 167:3-c and 541-A and finalize proposed rules under regular rulemaking procedures.	Concur
7	18	No	Ensure references contained in administrative rules are accurate at the time of adoption and revise the rules when references change.	Concur In Part

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OVERVIEW

Pursuant to a request from the commissioner of the Department of Health and Human Services (DHHS), on November 19, 2003 the Fiscal Committee of the General Court approved a recommendation by the Legislative Performance Audit and Oversight Committee to conduct a performance audit of enrollment and eligibility requirements of the DHHS' Home Care For Children With Severe Disabilities (HC-CSD) Medicaid eligibility option, also known as the "Katie Beckett" option. An entrance conference was held with the DHHS on December 2, 2003.

SCOPE, OBJECTIVES, AND METHODOLOGY

This performance audit was conducted in accordance with generally accepted government auditing standards applicable to performance audits and accordingly included such procedures as we considered necessary in the circumstances.

Scope And Objectives

This report reflects our assessment of the extent to which New Hampshire's laws and rules governing HC-CSD enrollment and eligibility comply with federal requirements. The audit period covered State Fiscal Year (SFY) 1989 through SFY 2003.

Our work was designed to answer the following question: **Are New Hampshire's enrollment and eligibility guidelines in compliance with federal laws and regulations and State statutes?** We did not conduct a thorough review of management controls over the HC-CSD eligibility option or how eligibility requirements are implemented given the limited scope of the audit and time constraints. We did not design any procedures to evaluate whether the DHHS is following its own rules in determining Medicaid eligibility through HC-CSD. Rather, our evaluation focused solely on the following two objectives:

1. Determine whether New Hampshire's HC-CSD enrollment and eligibility requirements comply with federal laws and regulations.
2. Determine whether current HC-CSD administrative rules meet the Legislative intent of State statutes.

We used the eligibility criteria for the Katie Beckett optional coverage group specified in 42 USC 1396a (e)(3) in determining compliance with federal laws.

Methodology

We reviewed pertinent State laws, administrative rules, and policies; federal laws and regulations; Center for Medicare and Medicaid Services (CMS) policies; New Hampshire House and Senate journals; the Senate Bill 323 study committee report and committee hearing minutes; Medicaid State plan; Medicaid Management Information System reports; and newspaper articles. We interviewed DHHS personnel, as well as knowledgeable individuals external to the DHHS such as employees of the Disabilities Rights Center and Franklin Pierce Institute on Health Law and Ethics. Information was also obtained from CMS personnel.

MEDICAID OVERVIEW

Medicaid is the third largest source of health insurance in the United States. It was established with the enactment of the Social Security Act of 1965 and is a voluntary program in which all states have elected to participate. Medicaid is a joint federal-state program providing three types of health care: (1) health insurance for low-income families with children and individuals with disabilities; (2) long-term care for the elderly and those with disabilities; and (3) supplemental coverage for low-income Medicare beneficiaries for services not covered by Medicare.

Medicaid is a means-tested entitlement program jointly financed by the federal and state governments. It entitles eligible individuals to receive coverage for basic health and long-term care services. It is not a uniform federal program like Medicare. State Medicaid programs operate within broad federal income and resource standard guidelines. This provides states flexibility in operating their programs, reflecting their own priorities in establishing eligibility standards, payment rates, and program administration. As a result there are substantial variations in eligibility policies not only from state to state but also among eligibility population groups within a state.

Eligibility for Medicaid is based on a combination of financial and categorical requirements. Low income and limited financial resources alone are not enough to become eligible for Medicaid; individuals must also belong to a mandatory coverage group such as Temporary Assistance to Needy Families recipients, certain pregnant women and children, recipients of foster care and adoption assistance, or low income Medicare beneficiaries. States may also choose to extend Medicaid to *optional* coverage groups. Some examples may include certain infants up to age one and pregnant women not eligible under mandatory coverage because of income limits, or individuals who would be eligible if institutionalized, but are receiving care under home and community-based services waivers.

Each coverage group, whether mandatory or optional, has its own unique financial or medical requirements defined by each state. These eligibility requirements are known as “pathways,” or ways of qualifying for Medicaid. An individual could qualify for Medicaid under more than one pathway given the myriad of pathways for attaining Medicaid eligibility. Individuals eligible under any pathway receive the same benefits as every other Medicaid beneficiary regardless of the pathway used to achieve eligibility.

All individuals eligible for Medicaid, whether under a mandatory or optional pathway, are guaranteed by law a minimum set of benefits. Each state defines their Medicaid benefit package based on broad federal guidelines, therefore benefit packages vary from state to state. Like eligibility groups, Medicaid benefits fall within two broad categories: mandatory and optional. States electing to provide Medicaid must cover a set of mandatory benefits such as physician services, inpatient hospital services, and rural health clinic services. States have the option of covering additional services that are allowable for federal matching funds including prescription drugs, dental services, and physical therapy. If a state chooses to cover additional services, the service must be available to all individuals eligible for Medicaid.

The CMS in the U.S. Department of Health and Human Services (U.S. DHHS) provides federal oversight of the program. State Medicaid agencies administer the Medicaid program on a day-to-day basis in accordance with a customized state plan, which must be approved by the U.S. DHHS.

The federal government contributes between 50 and 83 percent of the cost of services provided under each state's Medicaid program. The amount varies from state to state because payments are based on the average per capita income of each state. States with lower per capita income relative to the national average receive a higher federal matching rate. Since 1988, the federal match for New Hampshire has been 50 percent. As a result of the Jobs and Growth Tax Relief Reconciliation Act of 2003, effective on a temporary basis starting April 1, 2003 and lasting through June 30, 2004, the federal matching rate in New Hampshire was increased to 52.95 percent. The matching rate for administrative costs is generally 50 percent and is uniform for all states.

Katie Beckett Optional Coverage Group

The Medicaid program was amended with the enactment of section 134 of the Tax Equity and Fiscal Responsibility Act of 1982, also known as the Katie Beckett provision, which gives states the option of making Medicaid coverage available to children who qualify as disabled for SSI under certain conditions. Katie Beckett was an institutionalized, ventilator-dependent child. She was unable to go home, not due to medical reasons, but because she would no longer be eligible for Medicaid. At that time, if a disabled child lived at home a portion of the parents' income and resources were deemed as the child's income for purposes of determining eligibility. However, if the same child was institutionalized for 30 days or more only the child's income and resources were counted in determining eligibility, increasing the likelihood of qualifying for Medicaid. This created a financial incentive for parents living above the poverty level to place their disabled child in an institution because they could not meet the financial and medical needs of caring for their child at home. The Katie Beckett provision was enacted to neutralize the incentive to institutionalize a disabled child in order to become eligible for Medicaid.

The Katie Beckett provision gives states the option to determine as eligible for Medicaid disabled children who are 18 years old and younger, and who live at home but would be eligible for Medicaid if living in an institution. If a state chooses this option, only the child's income and resources are counted when determining Medicaid eligibility. The Katie Beckett provision bestows the same Medicaid services as it does to any other eligible Medicaid recipient. To qualify for Medicaid a child must meet SSI disability standards, and the following three conditions:

- The child requires the level of care provided in an institution.
- It is appropriate to provide care outside the facility.
- The estimated cost of care at home is no more than the estimated cost of institutional care.

As of 1996, 20 states used the Katie Beckett eligibility provision. States electing to use this option may not impose enrollment caps and must ensure it is open to all who qualify.

In New Hampshire, RSA 167:3-c VI directs the DHHS commissioner to adopt administrative rules establishing an optional state coverage group to provide medical assistance for children under 18 years of age who are severely disabled. Additionally, RSA 167:6, VII requires eligibility for this optional coverage group to comply with federal mandates. As a result the DHHS created the HC-CSD Medicaid eligibility optional coverage group, which was implemented in 1989.

HC-CSD Medicaid Eligibility Optional Coverage Group Enrollment

We planned to report the number of severely disabled children eligible for Medicaid through HC-CSD eligibility option and their associated costs. Although the DHHS was able to provide some figures purporting the number of children found eligible through HC-CSD and related expenses, we were not confident the numbers were accurate. For example, one report showed approximately 1,000 children were enrolled during SFY 2003. However, the DHHS reported to the Legislature in October 2003 there were over 1,200 children enrolled. Given the disparity of information in the reports we doubt the accuracy of the DHHS reporting data. Therefore, we cannot report the number of children enrolled in Medicaid through the HC-CSD eligibility option or their associated costs. Without reliable and accurate program utilization and cost reports, DHHS management and the Legislature may not have information needed to make evidence-based decisions for future program direction. Observation No. 1 discusses our finding and recommendation related to the accuracy and reliability of HC-CSD data reporting.

Observation No. 1:

Improve Availability And Reliability Of HC-CSD Data Reporting

As part of its oversight function, management is responsible for generating and reporting accurate program data. The DHHS was unable to provide reliable reports for the HC-CSD eligibility option. We asked for a data extract from the DHHS information systems and reports for all children eligible for Medicaid through the HC-CSD option and all associated costs. We determined this approach would be impractical for our reporting purposes because: (1) there is no system documentation to help identify the contents of the database and we were told DHHS personnel did not have time to assist us in defining our request, (2) few DHHS employees have direct access to the data and therefore the LBA would have to contract with the private company that manages the system for the DHHS to create a program to extract the needed information from the system, and (3) a DHHS official questioned the reliability of data prior to 2000.

We also considered using data from a report generated by the New Hampshire Medicaid Management Information System. However, we determined this report was unreliable due to some months inexplicably missing from the report while previous and subsequent months appeared. For example, January 2003 was missing from a report showing HC-CSD eligible children receiving skilled nursing facility nursing home services while information from December 2002 and February 2003 were shown.

In the timeframe requested, the DHHS could not provide a reliable number of children who became eligible for Medicaid through the HC-CSD eligibility option or the costs associated with those children for the audit period with a reasonable degree of certainty.

Recommendation:

DHHS management should ensure information is accurately assembled and reported. DHHS management should also require the contracted information systems provider to provide documentation of the system and ensure the contract provides for periodic data transfers to the DHHS to ensure the DHHS has access to its data contained within the contracted information system.

Auditee Response:

We Concur.

The auditors recommended that DHHS management should ensure information contained in reports is accurately assembled and reported. The Department has taken significant action to correct management reporting.

Through 2003, EDS utilized Management Administrative Reporting Systems (MARS) to produce management reports from MMIS. Our experience with MARS in prior audits indicated that the MARS reporting program needed improvement in several areas, including:

- *Claims expense history*
- *Estimated incurred claims*
- *Analysis of non-routine transactions, such as pended or suspended claims*
- *Exception reporting*
- *Claim backlog information and statistics*

In fiscal 2003, the Department began the implementation of the Medicaid Decision Support Systems (MDSS). The MDSS, which will improve access to data to support program management, is currently under development. Although awaiting final acceptance testing, initial tests have documented the ability to more easily access information such as that requested by the LBA under this audit.

The auditors observed that DHHS could not provide a reliable number of children who became eligible for Medicaid through the HC-CSD program or the costs associated with those children for the audit period with a reasonable degree of certainty. The Department was unable, within the short time period provided and given existing staffing issues, to produce the information requested – all claims data for Katie Beckett children between 1995 and 2004. With further definition and analysis, the Department can produce all paid claims data for Katie Beckett (HC-CSD) eligible children between 1995 and 2004 within one month.

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FEDERAL COMPLIANCE

Our audit work determined not all DHHS administrative rules for the HC-CSD eligibility option comply with 42 USC 1396a (e)(3) and 42 CFR 435.225, which pertain to the Katie Beckett optional coverage provision. In addition RSA 167:3-c, VI itself does not comply with age requirements of 42 USC 1396a (e)(3).

The remainder of this chapter reports four findings and recommendations relative to federal compliance.

Observation No. 2:

State Statute And Administrative Rules Should Define Disability Standards For Eligibility Purposes

Federal law requires children to meet Supplemental Security Income (SSI) disability standards in order to qualify for medical assistance under an optional coverage group such as HC-CSD. State statute does not define severely disabled children nor does it identify eligibility standards a child must meet to be HC-CSD eligible for Medicaid. Additionally, federal SSI disability standards are not incorporated in administrative rules. State administrative rule He-W 508.02(b)(5) (expired), requires a child to "meet the medical criteria as outlined in He-W 507.03" to be eligible for medical assistance through HC-CSD. However, He-W 507.03 does not outline any medical criteria. Instead He-W 507.03 concerns continued Medicaid eligibility through Children with Severe Disabilities (CSD), a coverage group similar to but distinct from HC-CSD. A DHHS official reported SSI disability standards for eligibility determinations have been used for the last two years. It should be noted proposed revisions to administrative rule He-W 508, dated February 20, 2004 contain references to the correct federal disabilities standards.

Administrative rules formalize and communicate agency policies and procedures. By not specifying the disability standards a child must meet to be eligible for the HC-CSD Medicaid eligibility option, applicants do not know what standards are used to determine eligibility and may feel decisions are made arbitrarily. In addition, DHHS personnel making eligibility determinations may be uncertain with regard to what constitutes a severe disability under HC-CSD without administrative rules defining the standard.

Recommendation:

The Legislature should consider amending RSA 167:6 to define severely disabled children and HC-CSD eligibility. In the interim, the DHHS should revise administrative rules governing HC-CSD eligibility to reflect SSI disability standards to be consistent with federal law.

Auditee Response:

We Concur In Part.

DHHS agrees that clear legislative direction and intent regarding the definition of severely disabled children and eligibility standards for the home care for children with severe disabilities program, including specifically, institutional level of care criteria are necessary for the agency to formulate rules that will be in accordance with legislative intent. For example, the Legislature has provided clear direction in RSA 151-E regarding eligibility criteria for the long term care population.

DHHS also agrees that the administrative rules formalize DHHS policies and procedures. However, DHHS does not agree that specific disability standards are not stated in the expired rules. He-W 508.02 (b) (6) requires a degree of institutional level of care that is outlined in He-W 508.03, which latter rule contains specific medical criteria. The reference in He-W 508.02 (b)(5) to He-W 507.03 refers to medical conditions for recipients under CSD. HC-CSD applicants must satisfy this criteria in order to then be evaluated for institutional level of care. He-W 508.02 (b)(6) then specifies that the additional criteria of institutional level of care contained in He-W 508.03 must then be satisfied.

DHHS agrees that its rules should clearly reflect the intent of Federal and State law regarding SSI disability standards. Thus, it would be clearer to explicitly express the social security standards. DHHS plans to move forward with proposed rules, which contain references to the federal disability standards. However, should the currently proposed legislation pass, DHHS would be prohibited from adopting any new administrative rules until June 2005.

Observation No. 3:

Administrative Rules Relative To Cost Effectiveness Need To Comply With Federal Law And Regulations

Administrative rules regarding the determination of cost effectiveness for the HC-CSD Medicaid eligibility option are not in compliance with federal law and regulations and therefore do not comply with State law. Federal statute and regulations require that in order for a child to be determined eligible for Medicaid under the HC-CSD eligibility option, the estimated Medicaid spending for the child outside an institution must not exceed estimated spending for the child in an institution. Furthermore, the cost effectiveness determination described in administrative rule He-W 508.02 (expired) is not consistent with the methodology described in the required state plan which describes a methodology that compares the cost of services received at home to the cost of services at an institution on a case-by-case basis.

DHHS administrative rules define “cost effective” in two different ways. He-W 508.01 (expired) defines “cost effective” as the estimated Medicaid cost of care outside an institution is less than the estimated Medicaid cost of an appropriate institutional placement, which mirrors language contained in federal law. In determining eligibility, however, He-W 508.02 (expired) uses the number of hours of nursing care as a proxy for overall Medicaid cost estimates. According to He-W 508.02 (expired), the services are considered cost effective if the child does not require more than 16 hours of nursing care per day. DHHS officials were unable to tell us how they determined 16 hours of nursing care is an appropriate measure for determining cost effectiveness.

Using only the number of hours of nursing care a child may need disregards other costs that may be associated with the caring for a severely disabled child such as therapeutic services, medications, and technologies needed to sustain life. This may understate the true cost of caring for a child at home; possibly resulting in children whose at-home Medicaid services costs exceed that of an institution, thereby increasing the cost to the State.

Recommendation:

DHHS management should revise He-W 508.02 to reflect the definition of cost effectiveness as defined in federal law and regulations and He-W 508.01. DHHS management should also ensure its eligibility determination procedures comply with the definition of cost effectiveness as stated in He-W 508.01.

Auditee Response:

We Do Not Concur.

DHHS does not agree that the current definition of cost effectiveness is in contravention of federal law and regulations. DHHS believes that the determination that 16 hours of nursing is cost effective is a reasonable and allowable agency determination. However, DHHS agrees that it is appropriate at this time to reassess the definition of cost effectiveness and has included a new definition within drafted proposed rules. However, if HB 1428 is adopted, DHHS will be mandated to adopt as interim rules the current expired rule which does not have the cost effectiveness language as specifically recommended by the finding.

Observation No. 4:

Rules Requiring A Child To Live With At Least One Parent Should Be Revised

State administrative rules unduly restrict a child's living arrangements. Administrative rule He-W 508.02(b)(1) (expired) requires a child to reside with at least one parent in order to become eligible for Medicaid through the HC-CSD eligibility option. This requirement is also stated in the department's HC-CSD brochure and website.

According to a Center for Medicare and Medicaid Services (CMS) official, living arrangements may not be restricted for optional coverage groups such as New Hampshire's HC-CSD. By placing improper restrictions on children's living arrangements, a child who would otherwise be eligible for Medicaid through HC-CSD may be unjustifiably denied Medicaid. Furthermore, the State may risk losing continued federal funding under the HC-CSD eligibility option due to this unnecessary restriction.

Recommendation:

We recommend DHHS management remove requirements in its administrative rules and HC-CSD brochure and website requiring a child under the HC-CSD eligibility option to live with a least one parent.

Auditee Response:

We Concur.

The agency will revise rules, policy and the program brochure to remove the requirement that a HC-CSD child must live with a parent. The department's website was modified on 4/7/04 to delete this condition from the HC-CSD program description.

Disabled children not living with a parent have not been denied Medicaid, as they would be eligible under other coverage groups with a higher income limit than HC-CSD and no resource test. Eligibility for any child not living with a parent is determined by only counting the child's income. HC-CSD children receive no additional covered services than all other Medicaid recipients.

Observation No. 5:

Amend RSA 167:3-c, VI To Change The Eligibility Age

State law defining age requirements for eligibility under the HC-CSD Medicaid eligibility option is not consistent with federal law. According to 42 USC 1396a (e)(3)(A) states must provide medical assistance to any disabled individual who "is 18 years of age or younger." State administrative rules do not explicitly state an age; instead they incorporate the age by reference to the federal Social Security Act section 1902 (e)(3) that mirrors the language contained in 42 USC 1396a (e)(3)(A). RSA 167:3-c, VI directs the DHHS commissioner to adopt administrative rules for the eligibility option to provide medical assistance for severely disabled children "under the age of 18 years." State law, therefore, excludes children from HC-CSD when they reach the age of 18. In addition, the HC-CSD brochure states the child must be under 18 years of age to be eligible for HC-CSD. DHHS personnel report children are eligible for Medicaid through HC-CSD until the age of 19 but they try to enroll the child in the State's Aid to the Permanently and Totally Disabled program to access Medicaid when they turn 18 years old.

By not following the federal law, federal matching funds for HC-CSD may be jeopardized. By printing the incorrect age in the HC-CSD brochure, some children or their parents may not apply for Medicaid through HC-CSD because they may mistakenly believe they are ineligible for Medicaid due to their age. This may lead to the potential for some children to have a gap in services until they can be found eligible under another pathway for adults.

Recommendation:

We recommend the Legislature consider revising RSA 167:3-c, VI to be consistent with federal law by including children 18 years of age or younger. We also recommend the DHHS revise its HC-CSD brochure to match federal law.

Auditee Response:

We Concur.

The CSD and HC-CSD brochure will be updated to reflect the correct upper age limit for HC-CSD. The brochure has not been reissued since 1994 and will be revised at the next reprinting.

RSA 167:3-c, VI does not reflect the federal HC-CSD age limit of 18 years or younger. The agency intends to seek legislation to clarify paragraph VI.

The cross-reference in RSA 167:3-c to RSA 167:6,VII, allows the commissioner to further define the requirements of such groups in accordance with rules adopted under RSA 541-A. HC-CSD rules at He-W 508.02(b)(3) reference section 1902(e)(3) of the Social Security Act, which specifies the age limit as 18 years or younger. Agency policy and computer programming reflect that children up to age 19 may be eligible for the HC-CSD program. Children have not and are not being denied eligibility for HC-CSD because they are 18 years of age.

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STATE COMPLIANCE

One of the objectives of this performance audit was to determine whether HC-CSD administrative rules meet Legislative intent of State statutes governing the HC-CSD eligibility option. The DHHS identified RSA 167:3-c as the statute authorizing the establishment of the HC-CSD Medicaid eligibility option. RSA 167:3-c states in part:

> The commissioner of the department of health and human services shall adopt rules under RSA 541-A relative to:
>
> …
>
> VI. Establishing an optional state coverage group under RSA 167:6, VII to provide medical assistance for children under the age of 18 years who are severely disabled.

Legislative intent is not clearly articulated in RSA 167:3-c, nor does the statute define key terms such as severely disabled child.

To determine Legislative intent, we obtained, reviewed, and analyzed documents relative to the origins of RSA 167:3-c, VI and RSA 167:6, VII. These documents included relevant New Hampshire Chapter Laws, the Senate and House Journals, and committee hearing notes and testimony we obtained from State archives. RSA 167:6 requires the DHHS to comply with federal law and regulations, but offers little assistance in understanding HC-CSD and is therefore not discussed here. Passage of Senate Bill 323 established Chapter 272, Laws of 1988 which amended RSA 167:3-c, to add paragraph VI. Appendix B of this report contains the Legislative history of Senate Bill 323. Our analysis and conclusion are based primarily on the plain meaning of the text of RSA 167:3-c, VI and testimony of the bill's sponsors during Legislative hearings.

Our audit work determined the intent of RSA 167:3-c, VI was to provide medical assistance coverage to severely disabled children under the age of 18. It is clear from statute and Legislative history the Legislature intended the DHHS commissioner to adopt administrative rules to effectuate medical assistance coverage for severely disabled children under the Medicaid state plan. However, as previously stated, RSA 167:3-c does not clearly state Legislative intent nor are key definitions such as severely disabled children included.

Our first finding is most HC-CSD administrative rules expired in 2002, meaning the DHHS has been making eligibility determinations without rules required by RSA 167:3-c, VI. Our second finding regards erroneous cross references found in sections of the expired rules.

Observation No. 6:

Administrative Rules Needed

RSA 167:3-c, which authorizes the HC-CSD Medicaid eligibility option, requires the DHHS commissioner to adopt administrative rules establishing an optional state coverage group to

provide medical assistance for severely disabled children under 18 years of age. However, administrative rules governing Medicaid eligibility requirements through HC-CSD have expired. All rules expired on December 22, 2002 except He-W 508.02(b)(3) which expired on February 28, 2004. It should be noted the DHHS has drafted new rules but the Legislative rulemaking process has not yet begun.

Administrative rules formalize and communicate agency policies and procedures. They are adopted to comply with statutes and to have policies, procedures, and practices legally enforceable on those outside the agency. By not having rules, the DHHS may not have authority to apply HC-CSD criteria in determining Medicaid eligibility, is not in compliance with State statutes including the Administrative Procedure Act (RSA 541-A), and is vulnerable to challenges to its eligibility determinations.

Recommendation:

We recommend the DHHS comply with RSAs 167:3-c and 541-A immediately by initiating the interim rulemaking process for the HC-CSD Medicaid eligibility option. By initiating the interim process, the DHHS will have 180 days to continue making eligibility determinations under interim rules, while finalizing its proposed rules under regular rulemaking procedures.

Auditee Response:

We Concur.

DHHS anticipates adoption of administrative rules that will govern the eligibility decisions for HC-CSD, however, the timeline for rule adoption is affected by legislation currently pending. If HB 1428 is adopted, this legislation will require DHHS to readopt the currently expired rules. However, if the legislation does not pass, DHHS would have the option of pursuing the new proposed rule. It is important for the Legislature to provide legislative direction and intent to the program and DHHS is hopeful that the Legislature will clearly define the parameters for the program, including eligibility.

Observation No. 7:

References In Administrative Rules Need To Be Accurate

Several references cited in HC-CSD administrative rules are incorrect. Administrative rule He-W 508.02 (b)(4) (expired) states in part: "…the criteria of He-W 641.04 (c)-(g) shall not apply." The rule cited does not contain subsection (f) or (g). In addition, administrative rule He-W 508.03 (c)(1) (expired) states "The child meets the criteria in He-M 401.06 (a)(2), He-M 401.06 (a)(3) and He-M 401.06(b)." Administrative rule He-M 401.06 relates to eligibility criteria for adults with severe mental illness and does not appear to be appropriate for children. Finally, State administrative rule He-W 508.02(b)(5) (expired), requires a child to "meet the medical criteria as outlined in He-W 507.03" to be eligible for medical assistance through HC-CSD. However, He-W 507.03 does not outline any medical criteria. Instead He-W 507.03 concerns

continued Medicaid eligibility through Children With Severe Disabilities (CSD), a coverage group similar to but distinct from HC-CSD.

Administrative rules formalize and communicate agency policies and procedures. They are adopted to comply with statutes and to have policies, procedures, and practices legally enforceable on those outside the agency. Incorrect references make it difficult to understand the requirements a child must meet to be found Medicaid eligible through HC-CSD and may make HC-CSD determinations difficult to legally defend.

Recommendation:

We recommend DHHS management ensure references contained in administrative rules are accurate at the time of adoption and revise the rules when references change.

Auditee Response:

We Concur In Part.

The expired administrative rules, He-W 508, contained accurate references to other administrative rules at the time they were promulgated. Over time, there have been some changes to the referenced rules. He-W 508.02 (b)(4) (now expired) stated that He-W 601.04 (c)-(g) did not apply. Thus the fact that subparagraphs (f)-(g) have been deleted from 601.04 does not alter the meaning or intent of He-W 508. The drafted proposed rules clearly identify the most accurate references. DHHS also notes that it is standard practice when rules are entered into rulemaking that all citations are checked for accuracy and has undertaken this review regarding the proposed rules.

With regard to the content of He-W 507.03, please see responses to Observation No. 2.

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OTHER ISSUES AND CONCERNS

In this section, we present issues and concerns we encountered during our audit not developed into formal observations, yet we consider noteworthy. The DHHS and the Legislature may consider these issues and concerns deserving of further study or action.

Differing Interpretations Of Federal Law

Federal approval of New Hampshire's Medicaid state plan in 1989 and again 1992 allowed it to implement the HC-CSD eligibility option, also known as Katie Beckett. However, there are questions regarding whether New Hampshire can offer the Katie Beckett Medicaid pathway due to differing interpretations of federal laws and regulations.

In 1972 the Social Security Act was amended creating the Supplemental Security Income (SSI) program, which was implemented in 1974. SSI is a federal cash assistance program providing monthly cash payments to low-income elderly and disabled individuals in accordance with uniform, nationwide eligibility requirements. Prior to SSI, federal matching funds were offered to states enabling them to give cash relief to eligible individuals deemed needy by the state in accordance with the state's eligibility criteria.

Since SSI recipients are automatically eligible for Medicaid under the Social Security Act of 1972, it was expected Medicaid enrollment and costs would increase. Section 209(b) of the Social Security Act was also enacted in order to reduce the financial burden to the states. Section 209(b) allows states the *option* to impose Medicaid eligibility criteria that are more restrictive than SSI criteria, as long as the criteria used are not more restrictive than the state's approved Medicaid state plan in place in January 1972. Therefore, states electing to use the 209(b) option do not extend Medicaid coverage to all individuals who qualify for SSI benefits. New Hampshire is one of 11 states electing to use the 209(b) option.

Some 209(b) states, including New Hampshire, do not recognize children under the age of 18 in their definitions as disabled. New Hampshire's state plan defines its criteria for disability as: "Individuals between the ages of 18 and 64 inclusive will be eligible for Medicaid if they are disabled as defined in Title XVI of US Social Security Act except that the required minimum duration of the impairment shall be 48 months." Since New Hampshire's criteria specifies an age range of 18 to 64, it appears New Hampshire does not specifically recognize children under the age of 18 as disabled. Therefore, a disability pathway to Medicaid, such as Katie Beckett, may not be recognized.

The Omnibus Reconciliation Act of 1987 amended a portion of 1902(e)(3) of the Social Security Act (the Katie Beckett provision) pertaining to the eligibility requirements for severely disabled children. The paragraph changed from:

> "if the individual were in a medical institution, would be eligible to have a supplemental security income (or State supplemental) payment made with respect to him under title XVI,…"

to

> "if the individual were in a medical institution, would be eligible for medical assistance under the State plan under this title,…"

The 1987 changes in federal law led New Hampshire to consider offering the HC-CSD optional eligibility pathway. As a result of this change, Chapter 272, Laws of 1988 was enacted to expand Medicaid coverage to severely disabled children living at home. On April 20, 1989 the supplemental amendment to the State's Medicaid plan received federal approval to offer HC-CSD.

Section 1902(e)(3) states the criteria for the Katie Beckett option as:

> (3) At the option of the State, any individual who –
> (A) is 18 years of age or younger and qualifies as a disabled individual under section 1614(a);
> (B) with respect to whom there has been a determination by the State that –
> (i) the individual requires a level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded,
> (ii) it is appropriate to provide such care for the individual outside such an institution, and
> (iii) the estimated amount which would be expended for medical assistance for the individual for such care outside an institution is not greater than the estimated amount which would otherwise be expended for medical assistance for the individual within an appropriate institution; and
> (C) if the individual were in a medical institution, would be eligible for medical assistance under the State plan under this title,
>
> shall be deemed, for purposes of this title only, to be an individual with respect to whom a supplemental security income payment, or State supplemental payment, respectively, is being paid under title XVI.

Federal concerns regarding the validity of New Hampshire offering HC-CSD centers on paragraph (A) of the Act. Section 1614(a) defines, for the purposes of SSI, disability for an individual under 18 years of age. Since New Hampshire elected, under the 209(b) option, not to provide Medicaid to disabled SSI recipients under the age of 18; being deemed an SSI recipient does not automatically confer Medicaid. During our conversations with federal personnel, New Hampshire's use of the Katie Beckett option was questioned since the State does not recognize children under the age of 18 as disabled in its Medicaid state plan. We note the DHHS has in its files documented federal approvals of this optional coverage from its inception to the present.

We suggest DHHS management discuss this issue of differing interpretation of federal law with federal authorities.

CONCLUSION

This audit was requested by the DHHS commissioner and based on a recommendation by the Legislative Performance Audit and Oversight Committee, approved by the Fiscal Committee of the General Court, to determine whether administrative rules governing the HC-CSD Medicaid eligibility option aligned with the intent of RSA 167:3-c, VI which provides medical assistance to children with severe disabilities. The commissioner was concerned the Legislature had not clearly articulated the parameters of the Medicaid eligibility option the department named Home Care For Children With Severe Disabilities (HC-CSD).

We found Legislative intent is clear from RSA 167:3-c, VI in that it seeks to provide medical assistance to children with severe disabilities, but it does not go far enough in providing the DHHS clear direction. The statute provides the commissioner broad discretion in adopting rules that would enable the State to provide Medicaid to children with severe disabilities, but does not include critical definitions such as what constitutes a severely disabled child. The Legislature may wish to provide the department with more specific direction in this area.

Similar to this performance audit of the HC-CSD Medicaid eligibility option, our audits of the department over the last several years have usually found expired administrative rules and weaknesses with program reporting. The department should move more aggressively to ensure comprehensive administrative rules are adopted upon program implementation, revised as the program evolves, and readopted before they expire. The department should ensure its program information is accurate and reliable so management and policymakers may make informed decisions.

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APPENDIX A

DEPARTMENT RESPONSE TO AUDIT

State of New Hampshire
DEPARTMENT OF HEALTH AND HUMAN SERVICES
129 PLEASANT STREET, CONCORD, NH 03301-3857
603-271-4688 FAX: 603-271-4912 TDD ACCESS: 1-800-735-2964

JOHN A. STEPHEN
COMMISSIONER

April 12, 2004

Catherine A. Provencher, CPA
Director of Audits
Audit Division
Office of Legislative Budget Assistant
State House, Room 102
107 North Main Street
Concord, NH 03301-4951

Dear Ms. Provencher:

The Department of Health and Human Services (DHHS) would like to take this opportunity to thank the LBA Audit Team for their efforts to examine the Home Care for Children with Severe Disabilities (HC-CSD) program in New Hampshire, often called the Katie Beckett option. LBA staff has been thorough, diligent and professional. Members of the Legislature should be proud to have the services of individuals who are so capable.

While DHHS does not concur entirely with the findings of the audit, the Department believes they substantially reflect an accurate assessment of HC-CSD. Most important, LBA observations confirmed the determinations of DHHS staff that the expired rules for this program do not conform to federal statute or regulation and that the Legislature should define the term "severely disabled child," and, thus, give the Department clear policy guidelines in implementing this very important program. Also, this would provide the families of children with disabilities unambiguous direction for seeking care. At present, there could be three or more changes to administrative rules during a child's eligibility age for this program. The Department feels that these are critical action areas for the future of HC-CSD in New Hampshire, as it continues to assist so many children in need of services.

DHHS has proposed administrative rules that address many of the issues for which this audit recommends changes. In developing these rules, the Department reviewed federal law and regulation in an effort to ensure conformity and investigated other rules to dispel any confusion and check for accuracy. Additionally, DHHS held public forums across the state to seek public input before starting the formal rulemaking process. The forums allowed the Department to hear the concerns of the families who utilize HC-CSD and identify possible causes for large costs increases in the program, most notably the role of private health insurers and their coverage of these children. These proposed rules have been submitted to the Legislature as required by the Administrative Procedure Act (RSA 541-A).

DHHS certainly did not prefer to reduce eligibility through new rules, but felt it was critical to move these rules into compliance with federal guidelines, so as not to risk losing federal matching funds for the entire HC-CSD program. DHHS remains committed, however, to finding ways to enhance the service delivery for children in need of services who are at the "institutional level of care." DHHS will also work with the Legislature to find solutions that offer assistance to families of disabled children who do not meet the "institutional level of care" threshold, but who are otherwise in need of services, such as early intervention and treatment.

The Department strongly supports the Legislative Action recommendations within the audit. DHHS believes that legislation, not administrative rule, should direct eligibility through a definition of the term "severely disabled child." Also, the Department agrees that the eligibility age limit for HC-CSD should be changed in statute from "under 18" to "under 19" to reflect federal law.

DHHS affirms the recommendation that the Department must improve the availability and reliability of information systems to allow better oversight of program data. DHHS has taken significant steps to improve management reporting. This involves implementing a new system, the Medicaid Decision Support Systems (MDSS), which will allow better access to information such as was requested by the LBA for this audit.

While DHHS understands the audit's concern of whether the State can offer HC-CSD as a Medicaid 209(b) option state, the Department maintains written documentation from appropriate federal agencies authorizing the State to enact this program. DHHS does understand that, in the future, this could cause difficulty based upon differing interpretations of federal statute and regulation, and is committed to working with the Legislature in any effort to seek more clarity for this program.

Again, DHHS wishes to thank the LBA Audit Division for its tremendous efforts to produce an informative and considerable examination of HC-CSD. The Department feels this will help instruct policy makers in crafting the future of this program that is so vital to the families of the many children who utilize it.

Sincerely,

John A. Stephen
Commissioner

APPENDIX B

Table 1: Legislative History Of Senate Bill 323-FN (1988) With Text Changes

Date	Chamber	Action	Pertinent Text
1/6/1988	Senate	Introduction, 1st, 2nd Reading and Referral	Amends RSA 167:6, VI by extending eligibility for aid to the permanently and totally disabled, to include children under the age of 18. Referred to Public Institutions, Health and Human Services Committees.
1/26/1988	Senate	Amendment	Amends **title** to read: "An act relative to providing medical assistance to children who are disabled or victims of catastrophic illness." Amends the **bill** by replacing text amending RSA 167:3-c by inserting the following paragraph: "VI. Establishing an optional state coverage group under RSA 167:6, VII to provide medical assistance for children under the age of 18 years who are disabled or who are victims of catastrophic illness."[1]
1/26/1988	Senate	3rd Reading and Final Passage	
2/4/1988	House	Senate Message Requests Concurrence; Introduction, 1st, 2nd Reading and Referral	Relative to providing medical assistance to children who are disabled or victims of catastrophic illness. Referred to Health and Human Services Committee.
3/29/1988	House	Amendment Adopted and Referred to Appropriations	Amends **title** to read: "An act relative to providing medical assistance to children who are severely disabled, ~~or victims of catastrophic illness~~ establishing an oversight committee, and making an appropriation therefor."[2] Amends the **bill** by replacing text amending RSA 167:3-c by inserting the following paragraph: "VI. Establishing an optional state coverage group under RSA 167:6, VII to provide medical assistance for children under the age of 18 years who are ~~disabled or who are victims of catastrophic illness~~ severely disabled." The amended bill also adds three additional sections to establish an oversight committee, makes an appropriation in the sum of $1 for the state fiscal year ending June 30, 1989, and makes the law effective July 1, 1988.
3/29/1988	House	Rules Suspended	
4/12/1988	House	Amendment	Amendment increases appropriation to $700,000.
4/12/1988	House	3rd Reading and Final Passage	
4/14/1988	Senate	Senate moved nonconcurrence and requested a Committee of Conference. Adopted.	

Date	Chamber	Action	Pertinent Text
4/14/1988	House	Senate Messages: Non concurs with amendments requests Committee of Conference. Appointments made to conference committee. Motion to accede. Adopted.	
4/21/1988	Senate & House	Conference Report Adopted	Conference report recommends the Senate concur with the House amendment and further recommends the Senate and House amend the bill by making an appropriation in the amount of $362,000 for SFY 1989 and making the law effective January 1, 1989.
4/21/1988	Senate	House Message: House adopts Committee of Conference Reports	
4/21/1988	House	Senate Message: Senate adopts Committee of Conference Reports	
4/21/1988	Senate & House	Enrolled Bills	

Note: ~~Struck through~~ text is language removed from bill. Underlined text is language added.
Source: LBA analysis of Senate and House Journals.

[1]Testimony (in part) from bill sponsor: "SB 323-FN extends medical assistance to children under the age of 18 who are eligible for federal supplemental security income program, and the state aid to the permanently and totally disabled program. Currently, the program mandates medical assistance coverage to eligible children under five and dependent children in AFDC households. SSI and APTD children in intact families are not categorically eligible for medical assistance until they reach the age of 18 when they would qualify as individual applicants."

[2]Health and Human Services Committee report states "SB 323 attempts to close a gap in coverage provided to children with severe disabilities who are too young to receive assistance from Social Security."