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7 IN THE UNITED STATES DISTRICT COURT FOR THE
8 DISTRICT OF COLUMBIA

9 KANSAS HEALTH POLICY
AUTHORITY,

10 *Plaintiff,*

11 v.

12 UNITED STATES DEPARTMENT
13 OF HEALTH AND HUMAN SERVICES,
JUDGMENT
14 et al.,

15 *Defendants.*

CASE NO. 1:09-cv-001587 BJR

ORDER GRANTING DEFENDANTS'
CROSS MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

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17 This matter comes before the court on cross motions for summary judgement. The court
18 has reviewed the relevant documents filed by the parties and, being fully informed, finds and
19 rules as follows:

20 I. INTRODUCTION

21 This case is designated related to *Virginia Dept. of Medical Assistance Services v. U.S.*
22 *Dept. of Health and Human Services*, ___ F.Supp.2d ___, 2011 WL 1585828 (D.D.C. April 27,
23 2011) (No. 1:09-CV-00392 BJR). While the facts of the cases vary, the legal issues are virtually
24 identical. The central issue is how much the federal government, through Medicaid, should share
25 in the cost of medical care for children residing in institutions for mental diseases ("IMDs").

1 Defendants, the United States Department of Health and Human Services (“HHS”) and Kathleen
2 Sebelius as the Secretary HHS, contend that the Medicaid statute is clear—with respect to
3 children residing in IMDs, federal funding is available only for psychiatric services provided in
4 and by the IMDs. Plaintiff, Kansas Health Policy Authority (“KHPA”), claims that the Medicaid
5 statute is ambiguous and Defendants’ interpretation of it is arbitrary and capricious in violation
6 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A).¹ KHPA also alleges that
7 Defendants took agency action without observance of procedure required by law pursuant to
8 APA, 5 U.S.C. § 706(2)(D).

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10 This court ruled in favor of Defendants in *Virginia*. See *Virginia*, ___ F.Supp.2d___,
11 2011 WL 1585828 (holding that the Medicaid statute and implementing regulations
12 unambiguously provide that if a child is an IMD resident, federal funding is only available for
13 inpatient psychiatric services, and substantial evidence existed in the record that the States had
14 timely, actual notice of how HHS interpreted the statute). The court will not revisit its ruling on
15 this issue. Instead, the court will address KHPA’s remaining claim: whether the federal Centers
16 for Medicare and Medicaid Services (“CMS”) approved an amendment to Kansas’ State
17 Medicaid plan permitting “add-on” payments to IMDs (over and above the facilities’ per diem
18 rates) to cover the costs of the health care services at issue.²

19 20 II. PROCEDURAL HISTORY

21 KHPA challenges a determination by CMS disallowing \$3,883,143 in federal funding
22 that KHPA claimed for medical services provided to children residing in Psychiatric Residential
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25 ¹ KHPA is the designated single state agency for medical assistance for the state of Kansas. (AR000038.).

² CMS was the agency within HHS that is tasked with administering the Medicaid program during the relevant time period.

1 Treatment Facilities (“PRTF”).³ See Dkt. No. 23 at 19. CMS based the disallowance on an Office
2 of the Inspector General (“OIG”) audit of KHPA’s claims for services provided to children in
3 PRTFs during the time period September 30, 2007 through June 30, 2008. *Id.* citing AR000101-
4 03. KHPA appealed the disallowance to the HHS Departmental Appeals Board (the “DAB”) on
5 December 18, 2008.⁴ The DAB upheld CMS’s determination in Decision No. 2255, dated June
6 23, 2009. (AR00001-AR00022.). On August 20, 2009, KHPA filed this suit seeking declaratory
7 and injunctive relief and reversal of DAB Decision No. 2255.⁵

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9 The parties agree that discovery is not appropriate and that the case can be resolved on
10 the administrative record by dispositive motions. Accordingly, cross motions for summary
11 judgment have been filed.

12 III. BACKGROUND

13 A. Statutory and Regulatory Background

14 The Medicaid program was established in 1965, under Title XIX of the Social Security
15 Act (“SSA” or “Act”), as a cooperative state-federal program that enables States to provide
16 medical assistance to families with dependent children, the elderly, and disabled individuals
17 whose income and resources are inadequate to pay for necessary medical services. *See* SSA §
18 1901 (42 U.S.C. § 1396). The Medicaid program is administered by each State in accordance
19 with a Medicaid State plan that is reviewed and approved by the Secretary. *See id.* The cost of
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23 ³ PRTFs are non-hospital facilities that, by regulation, may provide inpatient psychiatric treatment to
24 children in Medicaid. *See* Dkt. No. 23 at 16.

25 ⁴ The DAB is an adjudicatory body to whom the Secretary has delegated authority to review disallowances
under the Title XIX of the Social Security Act, or Medicaid. *See* 45 C.F.R. Part 16, Appendix A, ¶ B (a)(1).

⁵ A final disallowance determination is subject to judicial review as a final agency action under 5 U.S.C. §
704. *See New Mexico Dep’t of Information Technology v. U.S. Dep’t of Health & Human Servs.*, 577 F.Supp.2d 347,
351 (D.D.C. Sept. 22, 2008).

1 providing Medicaid services is shared by each State and the federal government. SSA §
2 1903(a)(1) (42 U.S.C. § 1396b(a)(1)).

3 Section 1903(a)(1) of the Act makes federal funding available on a quarterly basis to
4 States for amounts expended “as medical assistance under the State plan” SSA §
5 1903(a)(1). Section 1905(a) defines “medical assistance” as payment for listed covered services,
6 but does not include “any such payments” for any individual under age 65 who is a patient in an
7 IMD “except as otherwise provided in paragraph (16).” SSA § 1905(a). Paragraph (16) states
8 that payment is available only for “inpatient psychiatric hospital services for individuals under
9 age 21, as defined in subsection (h)” of section 1905. SSA § 1906(a)(16).
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11 Subsection 1905(h) states that “‘inpatient psychiatric hospital services for individuals
12 under age 21’ includes only—inpatient services which are provided” in a “psychiatric hospital”
13 or other qualifying “inpatient setting[s]”. *See* SSA § 1905(h)(1). The implementing regulations
14 also state that federal funding is only available for inpatient services provide by a qualifying
15 hospital, hospital program, or facility. *See, e.g.*, 42 C.F.R. §§ 435.1008, 436.1004, 440.160 and
16 441.13(a).
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18 *B. Factual Background*

19 In 2001, the OIG began auditing States’ claims for federal participation in the cost of
20 providing medical assistance to children residing in IMDs. (Dkt. No. 23 at 14-15.). The OIG
21 audited seven States and eventually recommended disallowances for all federal funding that was
22 provided to each State for medical care—other than inpatient psychiatric services—provided to
23 children in IMDs. *Id.* Officials in four of the seven States did not object to the disallowances. *See*
24 DAB Decision No. 2222 (Dec. 31, 2008) 2008 WL 5510324 (H.H.S.), incorporated into DAB
25 Decision No. 2255 at AR000010. However, New York, Virginia and Texas contested the audit

1 results. In 2007, New York appealed the disallowance to the DAB, raising substantially similar
2 legal grounds to those raised here. *In re New York State Department of Health*, DAB Decision
3 No. 2066 (Feb. 8, 2007), 2007 WL 522134 (H.H.S.). The DAB rejected New York’s claim,
4 holding that the plain meaning of the IMD exclusion unambiguously provides that federal
5 funding is available for services provided to children residing in IMDs only if those services are
6 provided in and by the IMD. Virginia also appealed, again on substantially similar grounds, and
7 the DAB again upheld CMS’ interpretation of the IMD exclusion and upheld the disallowance
8 (with the possibility of some modification pending further substantiation of claims from
9 Virginia).⁶ *In re Virginia Department of Medical Assistance*, DAB Decision No. 2222 (Dec. 31,
10 2008), 2008 WL 5510324. In 2009, the DAB rejected Texas’ appeal, and in doing so, affirmed
11 its holdings in *New York* and *Virginia*. *Texas Health & Human Servs. Comm’n*, DAB Decision
12 No. 2237 (2009), 2009 WL 1176322 (H.H.S.).

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15 Against this backdrop, in 2006, Kansas sought to convert some of its residential treatment
16 facilities for foster children and children in the juvenile justice system with behavioral and
17 mental health needs into PRTFs available to serve all Medicaid children with mental health
18 needs. (Dkt. No. 23 at 16.). KHPA claims that most of its PRTFs do not have on-site facilities or
19 staff who can provide all of the screening and subsequent treatment deemed medically necessary
20 in accordance with Medicaid requirements.⁷ *Id.* at 17. Instead, the PRTFs typically arrange for,
21 and incur the cost of, additional health care service (such as laboratory tests and
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25 ⁶ Virginia sought relief in federal court; this court affirmed the DAB’s decision and granted summary judgment in favor of CMS. *See Virginia*, ___ F.Supp.2d ___, 2011 WL 1585828. Virginia has filed a notice of appeal. *See Virginia*, No. 1:09-cv-00392 at Dkt. No. 30.

⁷ Specifically, KHPA is referring to the comprehensive array of services mandated by the 1967 amendment, Early and Periodic Screening, Diagnostic, and Treatment (“EPSDT”), to Title XIX.

1 pharmaceuticals) by outside medical providers. *Id.* Based on the OIG's previous audits, KHPA
2 was concerned that federal funding would not be available for these additional costs. *Id.*

3 KHPA claims that it approached CMS with its concern. KHPA claims, and CMS does not
4 dispute, that there were extensive discussions between the parties during 2006 and 2007
5 regarding this issue. KHPA states that it sought an amendment to its state Medicaid plan that
6 would allow for federal funding for not only inpatient psychiatric services provided by the
7 PRTFs but also for other non-psychiatric and/or outpatient medical services provided to PRTF
8 residents under age 21. *Id.* at 17. KHPA proposed that the amendment authorize an add-on per
9 diem component to the PRTF reimbursement base rate for the additional health care services. *Id.*

11 Thereafter, KHPA submitted to CMS proposed amendment to Attachment 4.19-A of
12 Kansas' Medicaid State plan ("Transmittal No. 06-09"). (AR000005-AR000006.). Transmittal
13 No. 06-09 was meant to implement the reimbursement methodology for the PRTFs.
14 (AR000096.). The actual language proposed by KHPA is not in the record. (AR000005.).

16 However, a letter to KHPA dated September 27, 2006 from CMS reflects that the
17 proposed reimbursement formula included a component for "a per diem add-on intended to
18 reimburse facilities for the cost of 'health care services' which must be incurred by facilities for
19 their residents." (AR000005 citing AR000092.). The proposal defined "health care services" as
20 "all medically necessary health care services covered by Medicaid excluding mental health and
21 substance abuse treatment services (which are already included in the base reimbursement rate)."
22 *Id.* The CMS letter stated that CMS was still evaluating the proposal and needed further
23 information to assist in that evaluation, specifically, information "describing the nature of these
24 'health care services', the expected frequency/cost of these services, who the provider of the
25 services will be, and how the facilities will arrange and pay for the services." *Id.* The record does

1 not contain evidence of what information, if any, KHPA provided in response to CMS' request
2 for more information. (AR000006.).

3 A final version of Transmittal No. 06-09 was approved by CMS in March 2007 with an
4 effective date of July 1, 2007. *Id.* The approved amendment discussed the requirements for
5 PRTFs and set forth the following limitation:

6 All Medicaid services furnished to individuals residing in a PRTF are considered
7 content of the service. Federal financial participation is not available in
8 expenditures for any other service to a PRTF resident. An individual under age 22
9 who has been receiving this service is considered a resident of the PRTF until he
10 is unconditionally released or, if earlier, the date he reaches age 22.
(Dkt. No. 23 at 18 quoting AR000098.).

11 Even after Transmittal No. 06-09 was approved, KHPA and CMS continued to have
12 discussions regarding reimbursement for the additional health care services. (Dkt. No. 23 at 18.).
13 There are no documents in the record reflecting these discussions. *Id.* However, in May 2007, a
14 new amendment to the Kansas Medicaid State plan, Transmittal No. 07-04, was approved. *Id.* It
15 superseded Transmittal No. 06-09 and had the same effective date of July 1, 2007. *Id.*
16 Accordingly, Transmittal No. 06-09 never went into effect. (DAB Decision No. 2255 at
17 AR000019.). Transmittal No. 07-04 largely duplicated Transmittal No. 06-09, but deleted the
18 first two sentences of the above-quoted limiting language, so that the Limitations Section now
19 reads: "An individual under age 22 who has been receiving this service is considered a resident
20 of the PRTF until he is unconditionally released or, if earlier, the date he reaches 22."
21 (AR000081, AR000100.).
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IV. LEGAL ANALYSIS

A. *Standard of Review*

Under Federal Rule of Civil Procedure 56, summary judgment must be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C.Cir.1995). “Summary judgment is an appropriate procedure for resolving a challenge to a federal agency’s administrative decision when review is based upon the administrative record.” *Fund for Animals v. Babbitt*, 903 F.Supp. 96, 105 (D.D.C.1995) (citing *Richards v. Immigration & Naturalization Serv.*, 554 F.2d 1173, 1177 (D.C.Cir.1977)). Because this case involves a challenge to a final agency action, the court’s review is limited to the administrative record. *Fund for Animals*, 903 F.Supp. at 105 (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). Therefore, this case may be appropriately resolved on cross-motions for summary judgment.

Under the APA, the court is to set aside an agency action that is “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2). “The party challenging an agency’s action as arbitrary and capricious bears the burden of proof.” *City of Olmsted Falls v. F.A.A.*, 292 F.3d 261, 271 (D.C.Cir.2002) (quoting *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1198 (D.C.Cir.2000)). To survive the “arbitrary and capricious” standard, an agency must “examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” *PPL Wallingford Energy LLC v. Federal Energy Regulatory Comm’n*, 419 F.3d 1194, 1198 (D.C.Cir.2005) (quoting *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut.*

1 *Auto. Ins. Co.*, 463 U.S. 29, 43, (1983) (internal punctuation omitted)). This standard of review is
2 highly deferential to the agency, so that a court need not find that the agency's decision is “the
3 only reasonable one, or even that it is the result [the Court] would have reached had the question
4 arisen in the first instance in judicial proceedings.” *Am. Paper Inst., Inc. v. Am. Elec. Power*
5 *Serv. Corp.*, 461 U.S. 402, 422, (1983). The court is not entitled to substitute its judgment for
6 that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)
7 *overruled on unrelated grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Finally, an agency
8 decision must generally be affirmed on the grounds stated therein, and a reviewing court may not
9 attempt to supply “a reasoned basis for the agency's action that the agency itself has not given.”
10 *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Consistent with this review standard, judicial review
11 is confined to the full administrative record before the agency at the time the decision was made.
12 *Env'tl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C.Cir.1981).

14 *B. Kansas' Medicaid State Plan Does Not Permit Comprehensive Reimbursement*
15 *for Children Residing in PRTFs*

16 KHPA argues that its negotiations with CMS over the Kansas Medicaid plan amendment
17 in 2006-2007 resulted in an understanding between the parties that the disallowed payments were
18 permitted. (Dkt. No. 27 at 16.). KHPA asserts that “there were extensive discussions between the
19 parties during 2006 and 2007” in which they “tr[ie]d to craft [an amendment] that would allow
20 for” federal funding for health care services provided to children residing in IMDs, in addition to
21 inpatient psychiatric services. (AR000080.).

23 KHPA claims that the very reason it requested authorization for an add-on per diem
24 component to the proposed PRTF rates is because it was concerned about the costs PRTFs were
25 incurring for necessary acute care services provided outside the facilities. KHPA points out that
CMS acknowledged these concerns in its September 27, 2006 letter to KHPA, and asked several

1 questions about the proposed add-on per diem rate. (AR000090-95.). Based on this, KHPA
2 claims it “understood its proposed [add on] per diem component to the PRTF rate to have been
3 authorized by [Transmittal No. 06-09] and then later amended [by Transmittal No. 07-04]...”
4 (Dkt. No. 23 at 42.).

5 KHPA raised this same argument before the DAB. (AR000018.). The Board found that
6 “while there is evidence that the reimbursement method originally *proposed* by Kansas included
7 an “add-on” payment for other health care services, that evidence also shows that CMS raised
8 questions about the proposal. More important, Kansas points to nothing in the plan language *as*
9 *approved* that could reasonably be interpreted as providing for such an “add-on” payment.” *Id.*
10 (emphasis in original).

12 The DAB further noted that KHPA’s reliance on the language in the “Limitations”
13 section of the amendment as originally proposed is misplaced. (AR000019.). This is because, the
14 DAB states, the language in question—*All Medicaid services furnished to individuals residing in*
15 *a PRTF are considered content of the service. Federal financial funding is not available in*
16 *expenditures for any other service to a PRTF resident*—is ambiguous. *Id.* “[S]tating that ‘all
17 Medicaid services’ are part of the ‘content of service’ does not necessarily imply that an add-on
18 payment will be made for services not covered by the facility’s per diem rate. Instead, it could
19 mean that PRTFs were required to provide any medically necessary services as part of the
20 resident-related treatment reimbursed through the per diem rate.” *Id.* In addition, the Board
21 noted, to the extent that health care services are provided to a child in an IMD by a provider
22 other than the IMD, the services would not be Medicaid covered services. *Id.*

23 The DAB concluded its decision by stating: “while Kansas makes assertions regarding its
24 belief that it had CMS approval for making ‘add-on’ payments to cover the costs of the services
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1 at issue, Kansas provides absolutely no evidence to show that it in fact had such a belief, much
2 less to show that such a belief would be reasonable in light of the discussions between Kansas
3 and CMS and the plan language ultimately approved.” (AR000020.). Accordingly, the DAB
4 found that KHPA had not met its burden to demonstrate that its State Medicaid plan permitted
5 comprehensive reimbursement for services to children in IMDs. *Id.*

6 In accordance with *Robinson v. NTSB*, 28 F.3d 210 (D.C.Cir. 1994), this court must defer
7 to the DAB’s decision if there is evidence that “a reasonable mind might accept as adequate to
8 support the conclusion.” *Id.* at 215 quoting *Throckmorton v. National Transp. Safety Bd.*, 963
9 F.2d 441 (D.C.Cir. 1992). This court finds that the DAB’s decision is entirely reasonable and
10 cannot be characterized as arbitrary or capricious. Upon review of the administrative record, it is
11 clear that the parties did not have a meeting of the minds with regard to KHPA’s proposed add-
12 on per diem rate. KHPA admits as much, stating that it “seemed” to have received authority for
13 including the additional costs, but admitting that the amendment is “ambiguous.” (Dkt. No. 27 at
14 17; AR000080.). The DAB generally gives deference to a state’s interpretation of its own state
15 plan. *See Missouri Dept. of Social Services*, DAB Decision No. 1412 (1993), 1993 WL 742589
16 (H.H.S.). However, the interpretation must be reasonable in light of the language of the plan as a
17 whole. *Id.* Such is not the case here. To the contrary, KHPA can point to no language in the State
18 plan that clearly supports its position.

21 In addition, KHPA did not present any evidence to show that the disallowed health care
22 expenses could reasonably be considered part of the “inpatient psychiatric facility services”
23 provided in and by the PRTFs. (AR000020.). KHPA has the burden of demonstrating that such
24 expenses were allowable. *See, e.g., New York State Dept. of Social Services*, DAB Decision No.
25 204 (1981) 1981 WL 158321 (H.H.S.). KHPA failed to meet this burden.

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2 V. CONCLUSION

3 Based on the foregoing, it is HEREBY ORDERED that Plaintiff's Motion for Summary
4 Judgment is DENIED, and Defendants' Cross Motion for Summary Judgment is GRANTED.
5 Plaintiff's request for declaratory and injunctive relief is DENIED. This case shall be
6 DISMISSED in its entirety.

7 DATED this 22nd day of July, 2011.
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10 A
11 Barbara Jacobs Rothstein
12 U.S. District Court Judge
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