DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Texas Department of Human Resources
Board Docket No. 78-129-TX-HC
Decision No. 127

DATE: October 31, 1980

DECISION

I Introduction

This case involves the September 21, 1978 decision by the Administrator of the Health Care Financing Administration (HCFA), to uphold the August 6, 1973 disallowance by the Acting Regional Commissioner, Region VI, of $8,457,423.88 in Federal financial participation (FFP) for Title XIX skilled nursing services provided by the Texas State schools for the mentally retarded (State schools) during the period July 1, 1970 through June 30, 1972. The disallowance was based on the findings that the State had violated 45 CFR 249.10(b)(4)(i)(m) by not applying the same Title XIX skilled nursing home standards and requirements to the State schools as it did to proprietary facilities and that the facilities were not certifiable as Title XIX skilled nursing facilities (SNF's).

An analysis of the arguments presented by the parties was set forth in an Order to Show Cause, and the parties were provided an opportunity to respond. The Order directed Texas to show cause why the $8,457,423.88 disallowance should not be upheld. The State's response questioned HCFA's calculation of the amount disallowed, and subsequently the parties agreed on the amount of $8,356,528.72.

Inasmuch as the State's response raised no additional substantive arguments, the Board has adopted a decision based on the Order to Show Cause. The Order discusses in more detail the arguments set forth below.

II Jurisdiction

Texas submits that the Board has no jurisdiction over this case in that the substance of the dispute involves a "conformity" question which should be dealt with pursuant to the proceedings of 42 USC §1396(c). Under 42 USC §1396(c) the State is entitled to (1) reasonable notice that further payments will not be made, (2) the opportunity for a hearing, and (3) review of the Secretary's final determination, pursuant to 42 USC §1316(a)(3), by the appropriate United States Court of Appeals.

HCFA contends that the Board does have jurisdiction in that the substance of the case involves a disallowance, properly reviewable pursuant to 42 USC §1316(d).

The statutory provision at 42 USC §1316(d) refers to reconsideration of a determination that "any item or class of items on account of which Federal financial participation is claimed...shall be disallowed." No definition of the term "disallow" is given in the statute, and the legislative history of the disallowance provision provides little guidance as to the meaning except in a reference to "audit exceptions" (as distinguished from certain determinations for which a statutory right to judicial review is available). The Board has consistently interpreted the term "disallowance" in Subpart C of 45 CFR Part 16, which confers on the Board the reconsideration function pursuant to Section 1316(d), as basically parallel to a determination under 45 CFR §16.5(a)(5) that an expenditure not allowable under a grant has been charged to the grant. Such a determination generally results from an auditor's exception but may also result from other types of reviews, federal or nonfederal. This interpretation is consistent with the general use of the term "allowable" under cost principles applicable to grant programs, originally promulgated by the U.S. Office of Management and Budget and adopted for HEW (now HHS) grant programs at 45 CFR Part 74, Subpart Q. The determination here is a disallowance because it is a determination that the State has claimed FFP for specific cost items, i.e., services provided at Texas State schools, and that those costs are not allowable as charges to Title XIX funds. Accordingly, the Board has jurisdiction pursuant to 42 USC §1316(d) and 45 CFR Part 16, Subpart C, to review the determination.

III Background

Title XIX was added to the Social Security Act in 1965. The authority for administering the field activities of the Medicaid Program was delegated to the Regional Commissioners of the then Social and Rehabilitation Service (SRS). The Title XIX program was implemented in Texas on September 1, 1967. (Report on Audit of Skilled Nursing Homes under Medicaid--State of Texas, October 17, 1972 (hereafter referred to as Audit Report), page 2.)

Administration of the Title XIX program in Texas was the responsibility of the State Department of Public Welfare (DPW). DPW contracted with the Texas State Department of Health (TSDH) in January 1969 for the survey of all nursing home facilities which were applying for participation in the Medicaid Assistance Program. These surveys were to be conducted using the SNF standards for participation developed by DPW in January 1969, approved by SRS, and incorporated into the State Plan.

On April 29, 1970, SRS published 45 CFR 249.10(b)(4)(i)(m), effective July 1, 1970. The regulation requires that a "facility (including a facility operated by a governmental agency) meet all requirements which are applied for licensure or formal approval as a nursing home to the same type of facility in any other ownership category (i.e. governmental, non-profit or proprietary) within the State."

In September 1970, TSDH and the Texas State Department of Mental Health and Mental Retardation (MH-MR), the organization responsible for administering the nursing care sections in the State schools, agreed that TSDH would make surveys of several State schools. The surveys, conducted in October and December of 1970, used the standards adopted in January 1969, and disclosed between 60 and 66 deficiencies at each school. (Audit Report, page 3 and 16; Record for Reconsideration, Tab 4.)

Subsequently DPW, TSDH, and MH-MR jointly developed proposed standards which they believed were more appropriate for the skilled nursing care requirements of the State schools and submitted the proposal to SRS for approval as an amendment to the State plan. (Audit Report, page 17.) Beginning in September 1971, surveys of the State schools using those standards were conducted. Deficiencies were documented. (Record for Reconsideration, Tab 2.) By letter dated September 24, 1971, the Director, Division of Policy and Standards, SRS, advised the Associate Regional Commissioner, Medical Services, that the proposed standards were not acceptable since they "set up different and lesser requirements for public institutions, particularly professional nursing services, than were applied to private skilled nursing homes" and, therefore, were contrary to 45 CFR 249.10(b)(4)(i)(m). On October 4, 1971 this information was furnished to the Commissioner, DPW.

Following notification that its State plan amendment had not been approved, the State began phasing out payment for skilled nursing home care to the State schools. (Notification of Disallowance, page 2.) As of July 1, 1972, after certain adjustments were made, all but two of the facilities began participating as ICF's. (Record for Reconsideration, Tab 4.)

IV Discussion

45 CFR 249.10(b)(4)(i)(m)

HCFA contends that during the period in question the State violated subsection (m) by applying different skilled nursing facility (SNF) certification standards to the State schools than to all other SNF's in the State participating in the Medicaid program. HCFA contends that while SNF's may differ in terms of focus (e.g. mentally retarded vs. the aged) all must meet the same certification criteria. The State contends that there was no violation of 45 CFR 249.10(b)(4)(i)(m) since

the same standards were applied to all facilities for the mentally retarded. In effect, the State is arguing that the regulation does not require SNF's for the mentally retarded to meet the same standards as, for example, SNF's for the aged. Under the State's interpretation, the regulation would require all SNF's for the mentally retarded to meet the same standards, but would not require those facilities to meet the same standards as SNF's treating other types of disorders. Under HCFA's interpretation, SNF's for the mentally retarded would have to meet the same standards as SNF's treating any other type of disorder.

As discussed in more detail in the Order to Show Cause, insofar as neither the Social Security Act nor the regulations contained provisions creating SNF's for the mentally retarded as a separate category of facility, the State is unpersuasive in arguing that 45 CFR 249.10(b)(4)(i)(m) should be interpreted as requiring only that all SNF's for the mentally retarded meet the same standards. The more reasonable interpretation of the regulation is that the same standards had to be applied to all SNF's. The record clearly shows and the State has not denied that State operated skilled nursing homes for the mentally retarded did not meet SNF standards. Accordingly, FFP for the period was properly denied.

Agency Acquiescence

The State has argued that the Agency "tacitly approved, if not actually encouraged," its actions. However, the State does seem to admit, in a letter dated May 27, 1977 (Record, item 11, p. 3), that during a series of meetings conducted shortly after implementation of 45 CFR 249.10(b)(4)(i)(m) "legitimate disagreement" arose over the interpretation of that section. Inasmuch as the State has presented no facts in support of its contention and the record indicates that the State was aware of the Agency's interpretation of the regulation from a point early in the period in question, the Board has no basis for concluding that the disallowance should be reversed on grounds that the Agency in some way encouraged the State's action.

V Conclusion

For the reasons discussed above, the decision of the Administrator of HCFA is sustained with respect to the disallowance of FFP claimed for Title XIX skilled nursing services provided by Texas State schools for the mentally retarded during the period July 1, 1970 through June 30, 1972. HCFA should recover $8,356,528.72 from the State.

/s/ Clarence M. Coster

/s/ Donald G. Przybylinski

/s/ Norval D. (John) Settle, Panel Chair