

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Nebraska Department of Public Welfare      DATE: April 30, 1981  
Docket Nos. 79-79-NB-HC      80-17-NB-HC  
              79-102-NB-HC      80-112-NB-HC  
              79-107-NB-HC      80-133-NB-HC  
              79-133-NB-HC      80-164-NB-HC  
              79-223-NB-HC      80-167-NB-HC  
              79-227-NB-HC      81-42-NB-HC  
              80-16-NB-HC

Decision No. 174

DECISION

This decision encompasses thirteen appeals totalling \$677,994. These appeals are being considered jointly because, while they involve eight different nursing facilities in Nebraska, they present common issues of law. The Health Care Financing Administration (Agency) disallowed Federal financial participation (FFP) claimed by Nebraska (State) under Title XIX of the Social Security Act for facilities which were delicensed under State law and decertified under federal law. Under the provisions of State law, the facilities appealed the delicensing decisions, and the State continued to reimburse the facilities during the appeals process. The Agency refused to participate in the cost of the services provided by facilities after they had been decertified.

Our decision is based on the written records of all thirteen appeals which include the transcript of a conference held February 11-12, 1981 in which Nebraska and eight other states participated, the State's post-conference brief, and a Board decision in a similar appeal, Nebraska Department of Public Welfare, Decision No. 111, July 16, 1980. We conclude that the disallowances should be upheld.

Factual Summary

Below is a summary of the pertinent facts pertaining to each facility's delicensure and appeal.

<u>Name</u>	<u>Docket No.</u>	<u>License Appeal Decision</u>	<u>Post-Revocation Actions</u>
Fowler Manor	79-79	Dept. of Health & District Ct. affirmed revocation	License voluntarily surrendered
Gordon Good Samaritan Center	79-107 79-133 79-227 80-16	Dept. of Health affirmed revocation	License reinstated after corrections made

Maplewood	80-167	Dept. of Health affirmed revocation	License reinstated after corrections made
Mory's Haven	79-102 79-223 80-17 80-112	Dept. of Health affirmed revocation	License reinstated after corrections made
Orchard Hill	79-79	Dept. of Health & District Ct. affirmed revocation	Home closed
Orchard Hill	80-133 80-164 81-42	Dept. of Health affirmed revocation	License reinstated after corrections made
Prairie Park	79-79	No hearing because license voluntarily surrendered and new license issued under name of Fowler Manor	
St. Vincent's	79-79	Dept. of Health affirmed revocation	License reinstated after waivers obtained
Western Nebraska	79-79	After hearing continuances, license reinstated, but facility not recertified	

As can be seen from the summary, each facility's license was revoked, and in five instances, was only reinstated after corrections of deficiencies were made or waivers received.

#### Relevant Statutory and Regulatory Provisions

The Medicaid regulations have been recodified several times in recent years, but have not changed substantively as far as is relevant here. For convenience, we cite to the 1978 codification.

As was stated in our Decision No. 111, pages 3-4, the relevant Medicaid regulations require that FFP in payments to a facility providing skilled nursing and/or intermediate care services is available only if the facility is certified as having met all the requirements for participation in the Medicaid program as evidenced by an agreement (provider agreement) between the single state agency and the facility (42 CFR 440.40(a)(1)(ii) for skilled nursing services, 42 CFR 440.150(a)(2) for intermediate care services). The execution of the provider agreement is contingent upon certification of the facility by an agency designated as responsible for licensing health institutions in the state (state survey agency). 42 CFR 442.12(a).

In addition, 42 CFR 442.201(a) and 42 CFR 440.150(a)(1) require, as one of the conditions for FFP, that skilled nursing and intermediate care services respectively be provided in an institution which "meets fully all requirements for licensure under State law." The State statutory laws governing licensure, in particular, N.R.S. Sections 71-2023 and 71-2027 (1971), state, in pertinent part:

The Department of Health shall issue licenses for the operation of institutions....The Department of Health shall deny, or suspend or revoke licenses....The denial, suspension, or revocation shall become final thirty days after the mailing of the notice, unless the applicant or licensee, within such thirty-day period, shall give written notice of desire for hearing. Thereupon the applicant or licensee shall be given a fair hearing....On the basis of such evidence the determination involved shall be affirmed or set aside....

The decision shall become final thirty days after a copy thereof is mailed, unless the applicant or licensee within such thirty-day period appeals the decision under section 71-2027....

N.R.S. Section 71-2023 (1971)

and

Any applicant or licensee, who is dissatisfied with the decision of the Department of Health as a result of the hearing provided in section 71-2023 may, after receiving a copy of the decision, appeal to the district court of Lancaster County at any time within thirty days after the mailing of such copy of the order....

N.R.S. Section 71-2027 (1971)

#### Discussion

In order to find for the State, we would have to determine that there were valid certifications of the facilities during the appeals process. The facts involved in these appeals, however, do not differ in any substantive way from those involved in our previous Nebraska decision. A Nebraska Attorney General's opinion, dated July 12, 1979, has held that an appeal of a license revocation pursuant to N.R.S. Section 71-2023 suspends the effective date of license revocation until the revocation is affirmed on appeal. Each facility's license revocation was stayed during pendency of the appeal. The State has not shown,

however, that certification (as opposed to licensing) continued in effect during the appeal. As was stated in our Decision No. 111, page 8, the State law set out above, N.R.S. Section 71-2023, refers only to license revocation procedures. There is no reference in this section to a decertification procedure. State law could have provided for such a procedure, but did not do so. Therefore, during the relevant time periods, there was no State (or federal statutory) provision requiring any sort of hearing procedure when a facility was found not to comply with federal Medicaid standards.\* There was no requirement for a decertification hearing, therefore, there was no statutory provision that the decertification decision be stayed pending appeal. Since the decertifications remained in effect during the license appeals, the State did not meet the conditions for FFP during those periods.

In addition, because the circumstances surrounding the facilities' appeals do not fall under the exceptions in MSA-PRG-11 (which will be described briefly below) as set out and discussed in Ohio Department of Public Welfare, Decision No. 173, April 30, 1981, we conclude that the disallowances should be upheld.

On December 20, 1971, the Commissioner of the Medical Services Administration, Social and Rehabilitation Service (predecessor to HCFA) set out two instances in which FFP would be allowable in payments by a state to a facility even where the provider agreement has not been renewed or has been terminated:

- 1) [If] State law provides for continued validity of the provider agreement pending appeal; or
- 2) [If] the facility is upheld on appeal and State law provides for retroactive reinstatement of the agreement.

PRG-11.

None of the factual circumstances presented here fit into the two PRG-11 exceptions. Nebraska law provides for continued validity of licenses pending appeal but is silent as to certification, and there were no court orders of any kind requiring that the provider agreements remain in effect. Also, since State law is silent as to certification and possible retroactive reinstatement of the provider agreement, even if a facility were upheld in its license appeal, this would not be a basis for payment of FFP.

#### Maplewood

One of the appeals involves a facility providing both skilled nursing and intermediate care services which was delicensed and decertified after the effective date of new federal regulations providing for certain appeal rights. In Docket No. 80-167-NB-HC, the facility appealed both the ICF license revocation and decertification under regulations promulgated

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\* On May 16, 1979, federal regulations went into effect which required the states to provide decertification hearings. These will be discussed below.

by HEW on February 15, 1979 (42 CFR §431 Subpart D (1979)) which requires states to make appeal proceedings available to facilities whose participation in the Medicaid program is being denied, terminated, or not renewed. These regulations are silent as to whether FFP can be claimed during the appeals process, however. PRG-11 might have afforded a basis for providing FFP during the appeals process except that there was no State law providing for the continuation of payments pending the certification appeal.

With regard to the SNF portion of the appeal, the facts show that the SNF license revocation was upheld on appeal, and the SNF recertification was denied on August 30, 1979. The facility was not recertified until November 29, 1979 (when FFP was restored).

The facts presented in 80-167 do not provide any basis for distinguishing it from the rest of the appeals in this decision as to the availability of FFP during an appeals process.

#### Conclusion

The Board has previously found that FFP is not available during the time that a facility appeals a delicensure. Furthermore, the Board has found that PRG-11 is an expression of the only two exceptions to the rule that FFP is not available during the time a facility is appealing its loss of certification. In light of the fact that PRG-11 cannot be applied to these appeals, and, furthermore, that the State has presented no evidence to distinguish these appeals from the one which was the basis of our Decision No. 111, we conclude that payments made by the State to Fowler Manor, Gordon Good Samaritan Center, Maplewood, Mory's Haven, Orchard Hill, Prairie Park, St. Vincent's, and Western Nebraska are not eligible for FFP during the periods at issue because these facilities had been decertified and there were no valid provider agreements in effect.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

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