

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Missouri Department of Social Services  
          Carlson Towers Geriatric Center  
          Board Docket Nos. 80-79-MO-HC  
                              80-153-MO-HC  
                              81-8-MO-HC  
                              81-35-MO-HC  
                              81-95-MO-HC  
Decision No. 233

DATE: November 30, 1981

DECISION

These are five appeals by the Missouri Department of Social Services (Missouri, the State) from disallowances by the Health Care Financing Administration (HCFA, the Agency) of Federal financial participation (FFP) in the cost of nursing home services to Medicaid recipients under Title XIX of the Social Security Act. The services were rendered by the Carlson Towers Geriatric Center (Center) as both a skilled nursing facility and an intermediate care facility. FFP claimed in reports for the quarters indicated was disallowed in the following amounts:

<u>Docket No.</u>	<u>Amount</u>	<u>Quarters Ended</u>
80-79	\$222,784	6-30-79 and 9-30-79
80-153	281,532	9-30-79 and 12-31-79
81-8	255,670	3-31-80
81-35	72,940	6-30-80
81-95	64,999	9-30-80
Total	<u>\$897,925</u>	

The issue is whether Missouri law provided for the continued validity of a provider agreement between the State and the Center during the period May 11, 1979 - February 29, 1980, pending the Center's appeal from the State's decision not to renew the provider agreement. We decide here that Missouri law did so provide and thus FFP is available on that basis. Our decision is based on:

- 1) the appeals and Agency responses;
- 2) the Board's Order to Show Cause dated October 16, 1980 in these and appeals from eleven other states;
- 3) the transcript of an informal conference held February 11-12, 1981 between HCFA and Missouri and seven of the eleven states;

- 4) the parties' pre-conference submissions and HCFA's post-conference submission (Missouri did not file a post-conference brief);
- 5) the Board's September 18, 1981 Invitation to Brief the state law question;
- 6) Missouri's response, dated October 26, 1981 (HCFA had briefed the issue in an August 31, 1981 response in 80-95).

#### Background

The Social Security Act and implementing regulations require a state to have an agreement (provider agreement) in effect with a facility serving Medicaid recipients in order for the state to claim FFP in the cost of those services. Section 1902(a)(27) of the Act, 42 USC §1396a(27); 42 CFR §431.107 (1978). The term of a provider agreement is no more than 12 months, but the agreement can be continued in effect for a longer period under certain circumstances. 42 CFR §442.15 (1978), 42 CFR §442.16 (1978), MSA-PRG-11 (1971). 1/

In September 1978 the State re-executed a provider agreement with the Center. Agency response to 80-79 appeal, p. 3. That agreement was due to expire on March 31, 1979, but the State continued the agreement to May 10, 1979. Id. at 4. On April 9, 1979, the Department of Social Services notified the Center that the provider agreement would not be renewed. Notification of Disallowance in 80-79, Exhibit B. By letter dated April 16, 1979, the Center appealed the "decision ... not to renew." Ibid., Exhibit D.

The State heard the appeal in July 1979, but final disposition was delayed by the death of the State employee who transcribed the proceeding. Appeal in 80-79, p. 2. While a decision was still pending, the State executed a new provider agreement with the Center, allegedly effective March 1, 1980. Id. at 2.

The certifications underlying the new provider agreement were for a period commencing March 21, 1980. Attachments to appeal in 81-95. HCFA originally disallowed FFP for a 20-day period prior to March 21, 1980 because it alleged that the new agreement did not become effective before that. Notifications of Disallowance in 81-35 and 81-95. However, when Missouri submitted a copy of a May 29, 1975 letter signed by two HCFA officials permitting the State to use the

1/ PRG-11 is a Program Regulation Guide issued in December 1971 by the Medical Services Administration of the Social and Rehabilitation Service, a predecessor to HCFA. The terms of the program guide are discussed in the text below.

first of the month as the effective beginning date of certification, 2/ the Agency announced it would withdraw the disallowance for the period March 1 - 20, 1980. Missouri's August 7, 1981, Additional Submission in 81-95; HCFA's August 31, 1981, Response in 81-95, p. 10.

#### Discussion

In Ohio Department of Public Welfare, Decision No. 173, April 30, 1981, the Board concluded that a 1971 Agency issuance (PRG-11) concerning FFP during provider appeals was still in effect. PRG-11 establishes the availability of FFP pending an appeal by a provider from the non-renewal or termination of its agreement with the state, if state law continues the validity of the provider agreement pending appeal. 3/ In Georgia Department of Medical Assistance, Decision No. 192, June 30, 1981, the Board held that a combination of provisions from state statutes and regulations met the state law prerequisite for the application of PRG-11.

#### 1. Missouri law

Missouri asserts that a regulation of the Division of Family Services, a subagency of the Department of Social Services, authorizes the continued validity of the provider agreement here. The regulation is set out in its entirety as Exhibit 10 to the Agency's September 22, 1980 response in 80-79, but the parts pertinent to this case are:

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2/ The letter states that the Agency has defined the date of certification "to be the first day of the month in which the survey agency has certified to the single state agency that the standards for health and safety are met." In the margin of the copy attached to the State's submission there is this hand written note: "used until 7/3/80". The letter describes as "appropriate" the State's procedure for establishing the effective date of provider agreements on the first day of the month in which the facility was certified.

HCFA alleged that this interpretation was intended only for newly-certified facilities and not those which had been decertified for noncompliance with Medicaid standards and were being recertified. HCFA agreed to withdraw the 20-day part of the disallowance on the grounds that the State was not aware of the distinction and relied on the letter for all certifications.

3/ The Board also held in Ohio that the availability of FFP pending a provider appeal was limited to 12 months from the termination or nonrenewal of the provider agreement.

(2) Any provider may within thirty (30) days of the date of notice of the determination by the division, appeal the following determinations for review by the director:

(A) A decision by the division to deny a provider participation in the program, which includes terminations or suspensions from participation.

(B) A determination to deny in whole or in part the claim of a provider for services provided that the amount of the claim exceeds one hundred dollars (\$100.00).

(C) Determination as to the amount which a provider is reimbursable under the provisions of 13 CSR 40-81.080.

(D) A determination by the division to terminate or suspend a provider from participation shall not be effective under thirty days after the date of written notice to the provider. If the provider appeals the divisions's determination, the provider shall continue to participate until a final decision by the director. All other determinations which are appealable to the director shall be in effect until overruled by the director. <sup>4/</sup>

13 CSR 40-81.140.

## 2. The parties' contentions

HCFA contends that while the regulation continued the participation of a provider which is terminated prior to the expiration of its agreement, the regulation did not continue participation in the case of a nonrenewal. The Center was terminated upon the expiration of its agreement, not before. HCFA argues that the regulation did not explicitly provide that a renewal is the same as a termination. In support of its argument, HCFA cites Rockhill Care Center, Inc. v. State of Missouri Department of Social Services, a November 6, 1980 decision by the Missouri Administrative Hearing Commission, and also a comment by the Department of Social Services that 13 CSR 40-81.140

<sup>4/</sup> On September 28, 1979, state legislation created a right of a provider to appeal a denial of participation to the Administrative Hearing Commission. Section 208.156, Vernon's Annotated Missouri Statutes. See also §161.274, which describes the procedure before the Commission. On January 2, 1981, the regulations at 13 CSR 40-81.140 were rescinded. August 31, 1981 HCFA response in 81-95-MO-HC, footnotes 6 and 7, pp. 5, 7.

was being rescinded because it was "no longer necessary." August 31, 1981 response in 81-95-MO-HC, pp. 7-8. 5/

In an Invitation to Brief dated September 18, 1981, the Board called upon the State to comment on the final sentence in 13 CSR 40-81.140(2)(D), the Rockhill decision, and the rescission statement. In its October 26, 1981 reply, Missouri pointed out that HCFA did not deny that Missouri law in effect at the time of the Center's appeal required continued participation where there was a termination or suspension. The State argued that "the meaning, cause, and effect" of termination and a refusal to renew are the same and the State in actual practice continued participation during provider appeals in both instances.

The State distinguished Rockhill on the basis that the decision, denying the provider's request for a stay of its nonrenewal, did not define any differences between termination and nonrenewal. The State's reply did not mention the final sentence in 13 CSR 40-81.140(2)(D) or the rescission statement.

#### Our analysis

We find that the Agency's reliance on Rockhill and the rescission statement is misplaced. As the Agency's brief shows, the Missouri law in effect at the time of Rockhill did not mention continued participation, even for appeals from terminations and suspensions. Similarly, the reference to the appeal regulation as being "no longer necessary" in light of section 208.156 would apply to continued participation for appeals from terminations and suspensions as well as other determinations.

Moreover, the Agency does not deny that continued participation previously was required pending appeals from terminations and suspensions and has not shown that either Rockhill or the rescission statement distinguish nonrenewals from terminations and suspensions. Accordingly, these authorities do not support the Agency's contention that under Missouri law nonrenewals are treated differently from terminations or suspensions.

Although the State failed to show us any support for its proposition that nonrenewals and terminations are the same under 13 CSR 40-81.140, the Agency submitted a copy of an April 27, 1979 letter from a Special Assistant (Nursing Homes - Aging) to the Director, Department of Social

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5/ Neither of the provisions governing provider appeals at the time of Rockhill refer to a right to continued participation pending appeal.

Services, to the St. Louis City Family Services Office in which the writer states that the Center is appealing its "termination" and "in accordance with 13 CSR 40-81.140 ... is entitled to continue participation until a final decision is rendered by the Director ...." Agency response in 80-79, Exhibit 9. <sup>6/</sup> The State did not comment on the letter or refer to it but the letter speaks for itself in supporting the State's claim that its practice was to continue participation pending provider appeals from nonrenewals. That the subject of the letter was the Center's appeal from the nonrenewal involved here makes the State's claim even more convincing.

The State regulation at issue here provides that all determinations go into effect immediately except in two instances, denials of participation in the program by either termination or suspension. A decision to terminate or suspend is stayed pending an appeal to the Director of the Department.

The reference to "all other determinations" being in effect until overruled in 13 CSR 81-140(2)(D) certainly included the determinations listed in (B) and (C), and arguably might have included a nonrenewal, as a decision to deny a provider participation in the program. However, the State urges that a nonrenewal was considered a "termination." Since the regulation contains an ambiguous reference to "terminations," we are compelled, in the absence of a convincing argument by HCFA to the contrary, to give that term as broad a meaning as the State does. Where the language of the regulation reasonably encompasses the meaning the State attributes to it, the Board will not substitute its interpretation for that of the State, absent substantial evidence that the State's interpretation is unsupported. California Department of Health Services, Decision No. 182, May 29, 1981, p. 12. In the Board's previous decisions holding that state laws did meet the PRG-11 requisite for FFP during provider appeals, the nonrenewals have been treated like other terminations. See Colorado Department of Social Services, Decision No. 187, May 31, 1981 and Decision No. 225, October 30, 1981; Georgia Department of Medical Assistance, Decision No. 192, June 30, 1981; Minnesota Department of Public Welfare, Decision No. 215, September 24, 1981; and Pennsylvania Department of Public Welfare, Decision No. 217, September 30, 1981. Our decision here, like those of other cases, is based on the narrow circumstances

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<sup>6/</sup> As explained in the response, Exhibit 9 was included primarily to show that the State had accepted the Center's appeal. Response, p. 5. In that same response, dated September 22, 1980, the Agency appeared to agree that under 13 CSR 40-81.140 the Center was entitled to continue to participate. The Agency relied on its pre-Ohio argument that the State was not entitled to FFP. Response, p. 9.

of the language in the pertinent State (Missouri) law governing provider appeals.

Conclusion

Based on the foregoing, we reverse the disallowance. If HCFA has already made a partial withdrawal as it had indicated, this reversal applies only to the balance remaining.

/s/ Cecilia Sparks Ford

/s/ Norval D. (John) Settle

/s/ Donald F. Garrett, Panel Chair