DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Colorado Department of Social Services DATE: May 31, 1981
Docket Nos. 78-38-CO-HC 80-60-CO-HC
78-103-CO-HC 80-84-CO-HC
79-82-CO-HC 80-114-CO-HC
79-83-CO-HC 80-163-CO-HC
79-118-CO-HC 80-175-CO-HC
79-209-CO-HC 81-32-CO-HC
80-35-CO-HC
Decision No. 187

DECISION

This decision encompasses thirteen appeals totalling $1,465,592. These appeals are being considered together because, while they involve eight different nursing facilities in Colorado, they present common issues of law. 1/ The Colorado Department of Social Services (State) appealed disallowances by the Health Care Financing Administration (HCFA or Agency) of Federal financial participation (FFP) under Title XIX of the Social Security Act claimed for facilities whose provider agreements had been terminated or not renewed. Under the provisions of Colorado law, the facilities had appealed State decisions to delicense or decertify the facilities, and the State continued to reimburse the facilities for services provided during the appeals process. The Agency refused to participate in the costs of these services.

Factual Summary

Below is a summary of the pertinent facts pertaining to disallowances for each facility.

Name	Docket No.	Period of Disallowance 2/	Amount Disallowed
Eventide of Durango	78-38	11/1/73 - 6/18/74	$ 57,620
	79-82	4/1/78 - 6/30/78	75,852
	79-83	7/1/78 - 9/30/78	76,439

1/ An appealed disallowance for a ninth nursing home, the Colorado State Veterans Nursing Home, although involving a different issue, is also included in this decision.

2/ These are the periods for which the State filed claims for FFP. In the absence of evidence to the contrary, we assume that the services on which the claims were based were rendered during these periods.

	79-118	10/1/78 - 12/31/78	81,527
	79-209	1/1/79 - 3/31/79	76,060
	80-35	4/1/79 - 6/30/79	68,355
	80-84	7/1/79 - 9/30/79	73,890
	80-114	10/1/79 - 12/31/79	73,933
	80-163	1/1/80 - 3/31/80	85,405
	80-175	5/1/77 - 6/30/78	226,005
	81-32	4/1/80 - 6/30/80	78,659
Sharmar Nursing Center	78-38	11/1/73 - 8/7/74	33,810
Landing Heights Health Care Center	78-103	1/1/78 - 3/31/78	28,769
Sunset Manor	78-103	1/1/78 - 3/31/78	42,717
	79-82	4/1/78 - 6/30/78	61,933
	79-83	7/1/78 - 9/30/78	50,895
	80-60	10/12/75 - 10/4/76	125,013
Colorado State Veterans Nursing Home	79-82	4/1/78 - 6/30/78	593
Cinderella Nursing Home	79-82	4/1/78 - 6/30/78	20,807
Alpine Meadows	79-83	9/1/78 - 9/30/78	5,230
	79-118	10/1/78 - 12/31/78	18,541
	79-209	11/1/79 - 2/28/79	7,512
McNamara Mercy Hospital	79-209	1/1/79 - 3/31/79	3,847
Harold's Nursing Home	80-60	6/18/75 - 7/31/76	92,180

The Cinderella Nursing Home had also been the subject of disallowances in Docket Nos. 79-83 and 79-118, but on June 20, 1980 the Agency withdrew those disallowances and reduced the disallowance in Docket No. 79-82 from $31,522 to $20,807. Docket Nos. 79-83 and 79-118 also involved disallowances for another facility, the Stovall Care Center, but on May 20, 1981, the Agency withdrew those disallowances.

Issue

These cases concern the circumstances under which FFP is available subsequent to the nonrenewal or termination of a provider agreement. The primary issue before us is whether a provider agreement has continued validity pending a provider appeal under the Colorado Administrative Procedure Act (APA). The Board here decides that FFP is available to reimburse the State for payments made pursuant to the APA during provider appeals relating to Medicaid decertification. The availability of FFP is subject to the limitations set forth in the Board's decision in Ohio Department of Public Welfare, Decision No. 173, April 30, 1981, discussed below.

This decision is based on the appeals; HCFA's responses; the records submitted by HCFA; the Order to Show Cause issued October 16, 1980 for these and related appeals; responses by Colorado and HCFA to that Order; a transcript of an informal conference February 11-12, 1981; and briefs and other materials submitted by HCFA and Colorado following the February 1981 conference (referred to hereinafter as Conference).

Statement of the Case

The nursing facilities in these cases had at one time executed provider agreements with Colorado, based on certification that they met Medicaid standards, including the requirement that they hold a valid State operating license. At various times prior to the periods for which FFP has been disallowed, however, the State took action to revoke, or did not renew, the facilities' Medicaid certifications, operating licenses, or both. Consequently, as Medicaid certification is the basis for a provider agreement, the facilities' provider agreements either expired and were not renewed or were terminated.

Each of the facilities sought review, pursuant to the Colorado APA, of the State's action.

The APA provides, at C.R.S. 1973, 24-4-104(6), that:

> No previously issued license shall be revoked, suspended, annulled, limited, or modified, except as provided in subsection (3) of this section, until after hearing as provided in section 24-4-105.

License is defined, at C.R.S. 1973, 24-4-102(7), as including "the whole or any part of any permit, certificate, approval, registration, charter, membership, statutory exemption, or other form of expression."

The APA further provides, at C.R.S. 1973, 24-4-104(7), that:

> In any case in which the licensee has made timely and sufficient application for the renewal of a license or for a new license for the conduct of a previously licensed activity of a continuing nature, the existing license shall not expire until such application has been finally acted upon by the agency, and if the application is denied, it shall be treated in all respects as a revocation.

The final agency action is subject to judicial review. C.R.S. 1973, 24-4-106(2).

Colorado argues in these cases that it is entitled to FFP because the facilities' licenses and their Medicaid certifications continued in effect pending appeal under the APA, and it was thus bound to continue payments to the facilities. In certain instances, after final agency action was entered, state courts issued orders directing the State to continue payments pending judicial review.

In support of its contention that it is entitled to FFP during the facilities' appeals, the State cites two Agency documents: a Program Regulation Guide (MSA-PRG-11) issued on December 20, 1971, by the Commissioner, Medical Services Administration, Social and Rehabilitation Service (predecessor to HCFA); and an October 31, 1977 letter (the Weikel letter) from the Acting Director, Medicaid Bureau, HCFA. These documents will be discussed below.

HCFA relies primarily on the absence of any regulation specifically making FFP available during a provider appeal and contends there are regulations which prohibit reimbursement to a state for such payments. As for the effect of any court orders, HCFA argues that where it is not a party to a court proceeding it is not required to pay FFP outside the scope of the Medicaid program. 3/

Discussion

These cases concern whether FFP is available pending a provider appeal. Neither the Social Security Act nor the regulations in effect during the

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3/ At the Conference HCFA argued for the first time that the doctrine of res judicata barred Colorado from asserting certain arguments against the validity of some or all of the disallowances. HCFA cited a January 26, 1981 Tenth Circuit Court of Appeals opinion, Geriatrics, Inc. v. Harris, 640 F.2d 262, in which Colorado was a party and the

periods in question explicitly address the subject of the availability of FFP during the time when providers are seeking to obtain administrative or judicial review of decisions to terminate or not renew their participation in the Medicaid program.

A regulatory scheme of provider agreements, surveys, and certifications under approved state plans has been adopted to implement the statutory Mediciaid requirements. For the time in question the regulations specify that the duration of a provider agreement is coterminous with the period of certification, and a provider agreement could not have an effective date earlier than the date of certification. Under regulations adopted April 29, 1970, provider agreements must be renewed on a frequency of 12 months or less. In 1974, the regulations were amended to permit a two month extension where there is written notice from the state survey agency in advance of the original expiration date that the extension would not jeopardize the patients' health and safety and the extension is needed either 1) to prevent irreparable harm to the facility or hardship to the recipients in the facility; or 2) because it is impracticable to determine, before the expiration date, whether the facility meets certification standards. Federal financial participation would be available for another 30 days after an agreement expires or terminates where the Secretary determines that there have been reasonable efforts to transfer patients to another facility or to alternate care. See 42 CFR §§ 431.107, 444.11, 442.12, 442.15, 442.16 (1978-1980) and previous codifications generally at 45 CFR Part 249 (1973-1976) and 42 CFR Part 449 (1977). 4/

3/ cont.

nonrenewal of a nursing facility's provider agreement was the issue. In Geriatrics the court ruled that a nursing home had no protectable property interest in the renewal of its provider agreement. HCFA argued that because Colorado failed to raise the issue of FFP during a provider appeal when it had the opportunity to do so in Geriatrics, Colorado should be barred from raising a question now before the Board that could have been decided by a federal court. In response Colorado explained that Geriatrics only involved the appeal of a preliminary injunction and not a decision on the substantive issue of continuation of FFP during a provider appeal, where res judicata might apply. Later during the Conference HCFA conceded that it did not have the full record of Geriatrics and said that it might withdraw its assertion of res judicata against Colorado. Conference Transcript, pp. 259-260. We agree with the State and find that the doctrine of res judicata does not apply to the facts of the cases now before us.

The Effect of PRG-11

Colorado argues that FFP should be available indefinitely throughout a provider appeal. State and federal courts have held that in some circumstances a facility may have a due process right to a pretermination hearing and to continued payments pending such review, but, as the Board indicated in Delaware Department of Health and Social Services, Decision No. 87, February 29, 1980, such decisions are not a basis:

> to require HEW to continue to pay FFP for an unlimited amount of time while a facility wends its way through an administrative appeals process that might take years to complete ... (Page 9.)

Colorado contends that MSA-PRG-11, a provision of a Program Regulation Guide issued by the predecessor of HCFA, permits the payment of FFP during provider appeals. PRG-11 sets out the basic rule that FFP is not available during an appeal from the termination of a provider agreement, either during the time the appeal is before State administrative agencies or before the courts. PRG-11, however, notes two exceptions:

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 (Tab F, Order to Show Cause).

The meaning of "State law" was clarified to include "judicial action" in a May 14, 1973 memorandum from Marie Callender, Special Assistant for Nursing Home Affairs, to the Regional Directors for HEW. Ms. Callender communicated a decision by the Secretary of HEW that FFP is available "if State law or judicial action requires that a provider agreement remain in force during the course of an appeal." Tab G, Order to Show Cause.

According to PRG-11, if either of these two conditions is present, the provider agreement is not terminated during the appeal period for purposes of FFP. The State asserts that the provisions of its APA, specifically C.R.S. 24-4-104(6) and (7), place Colorado within the exception of the first part of PRG-11.

While the term "provider agreement" is nowhere mentioned in the State's APA, we consider it significant that the APA, at 24-4-102(7), specifically defines "license" as including any certificate issued

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4/ Hereinafter when we refer to the term of a provider agreement, we include per se the possibility of the two month extension and the 30 days additional FFP, where applicable, even though we may not always mention those provisions.

by a State agency. From this we conclude that a Medicaid certification, the basis for a provider agreement, falls within the APA definition of "license." In addition, the APA is used in Colorado for the purposes of appealing a Medicaid decertification. We thus find that, where Medicaid certification is at issue, the Colorado APA meets the requirements of a State law for the purposes of the first part of PRG-11. This case is distinguishable from that decided in Nebraska Department of Public Welfare, Decision No. 174, April 30, 1981. In that case the Board held that the PRG-11 exceptions were not applicable to Nebraska law which provides for the continued validity of licenses pending appeal, but is silent as to certifications. The Nebraska appeals pertained solely to specific state licensing requirements, and were not regarded as appeals of Medicaid decertifications.

HCFA argues that FFP during a provider appeal is limited to the duration of twelve months from the execution of the provider agreement which is terminated or not renewed, plus an additional two months and/or 30 days if qualifying conditions are met. HCFA Post-Conference Memorandum, pp. 14, 29; 42 CFR §§ 442.15, 442.16. HCFA argues that while PRG-11 was never specifically revoked by any Agency action, it nevertheless was repealed by implication through the promulgation of regulations in 1973 (45 CFR § 205.10(b)(3)) and 1974 (42 CFR §§ 442.16 and 442.30).

In addressing the issue of the availability of FFP for payments made by a state pursuant to a court order directing the state to continue payments during a provider appeal, the Board in Ohio, supra, made a thorough analysis of the application of PRG-11. We find that what the Board said in Ohio regarding the relationship between PRG-11 and an appeal, arising from a court order, also applies to an appeal brought pursuant to the Colorado APA:

> [W]e conclude that Part 1 of PRG-11 is limited by statutory and regulatory provisions which make FFP available for no more than a period of 12 months following nonrenewal or termination or until the next survey/certification cycle has been completed, whichever comes first. This limitation was in effect at the time PRG-11 was issued and has remained in effect ever since. We further conclude that the limitation which HCFA wishes to impose on Part 1 of PRG-11 (12 months from execution of the provider agreement) is not a necessary interpretation of its 1974 two-month extension regulations and has never been expressly adopted by the Agency as a limitation affecting FFP during provider appeals. (Page 8.)

The Board in Ohio did not find that FFP is available during an appeals process of indefinite duration. Rather, the Board considered the regulatory requirements of an annual survey and certification as establishing the

limits as to when FFP is available during a provider appeal under a provider agreement whose continued validity is established by State law. The Board stated:

> We find that the purpose of re-executing provider agreements on a frequency of 12 months or less is not to give new life to a perennial record-keeping requirement, but to reinforce the pattern of surveying facilities at least once a year. The survey requirement predates and necessarily limits PRG-11. (Page 8.)

If the appeals process is completed within the twelve month period, the availability of FFP is cut off unless the State surveys and recertifies the facility. Also, if within the twelve month period the State surveys the facility and the survey agency makes a determination on the certifiability of the facility, the determination would cut off the availability of FFP if the only basis for FFP would be the pendency of the appeals process.

The Weikel Letter

The State has also argued that an October 31, 1977 letter from M. Keith Weikel, Acting Director, Medicaid Bureau, to Glenn Johnson, Chairman, State Medicaid Directors Council, supports its contention that FFP is available throughout the appeals process. Attached to this letter were eight pages which "summarize[s] the status of the Medicaid Program in relation to the specific recommendations of the State Directors." On page 6 of this attachment appears the following:

> FFP and Terminated Provider Agreements
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> The 30-day period begins only subsequent to the final termination of a provider agreement, after all appeals have been exhausted. As to the problem of removal of patients, there is no authority in present law for reimbursing providers who are not meeting program standards. The 30-day delay was allowed in recognition of transfer problems and conforms with the Medicare's policy in this matter.

This 30-day period apparently refers to 42 CFR § 441.11 which permits a State to claim FFP for 30 days after the expiration of a provider agreement if the individuals in the facility were admitted before the date of expiration, and if the State agency makes a satisfactory showing that it has made reasonable efforts to facilitate the orderly transfer of the individuals to another facility.

The State terms the cited paragraph from the Weikel letter as the Agency "public position statement" and contends that the paragraph means that a provider agreement remains in effect throughout the exhaustion of all appeals. In response, HCFA argues that the Weikel letter refers to only when the 30-day period could be utilized by a state, and not to whether FFP is available throughout an appeals process. HCFA states that the 30-day transfer period is available to a state, after the termination, expiration or nonrenewal of a provider agreement, when the state is able to begin its efforts to relocate the patients. If the transfer is delayed because of a state law or a court order preventing the state from relocating the patients immediately, HCFA permits FFP for up to 30 days to relocate the patients. HCFA Response to Order, pp. 21-22.

We find HCFA's arguments regarding the Weikel letter persuasive. The focus of the cited paragraph is not on the appeals process, but on the 30-day period and when it begins to run. What the paragraph says is that if a state cannot transfer patients because of an appeals process, it will not lose the 30 days of FFP provided for in 42 CFR § 441.11. There is no reason to deprive the state of that funding when the patients' relocation is delayed because of an appeals proceeding. Rather the state will be eligible for 30 days FFP to transfer patients once the state is legally able to do so.

We believe that this interpretation comports with the Board's Ohio analysis of PRG-11 and its interaction with the Medicaid regulations. The State's interpretation of the Weikel letter would conflict with the Board's emphasis in Ohio on the annual survey/certification process by ignoring those requirements imposed by the regulations and continuing FFP through an appeals process of indefinite duration.

We therefore hold that the Weikel letter merely confirms the already existing policy set forth in 42 CFR § 441.11, and that once the decertification of a facility is upheld upon appeal, the State is then entitled to FFP for up to 30 days from the date of the end of the appeals process to relocate the facility's patients.

* * * * *

For the parties' guidance, we will now apply the principles set forth in Ohio and this decision to the particular facts of each nursing facility now before us. Our findings depend on the facts as shown in the records for these cases. If the parties mutually agree on different facts for any facility, they may of course independently agree on how to apply the Board's conclusions to the facilities involved.

Eventide of Durango

This facility had its Medicaid provider status questioned during two distinct time periods. For the sake of clarity, we will discuss each period separately.

I.

In Docket No. 78-38 the State's claim for FFP for the facility during the period November 1, 1973 through June 18, 1974 was disallowed. There has been a misconception on the State's part that the disallowance also encompasses an earlier period of time because the May 16, 1978 notification of disallowance states that the facility did not have a Medicaid provider agreement during the period December 30, 1972 through June 18, 1974. The notification of disallowance, however, further states that the disallowance is only for the time period from November 1, 1973 to June 18, 1974. The Agency had decided not to issue a disallowance for the period December 30, 1972 to October 31, 1973. Reconsideration Record (RR), Agency File No. ME-C07401, Items 16 and 42.

The facility's provider agreement expired on December 30, 1972. After a January 16, 1973 survey of the facility the Colorado Department of Health (CDH), the State survey agency, notified the facility of its intent to take decertification action. The facility appealed CDH's decision under the APA. The State recently informed the Board that a Hearing Officer issued a decision on the appeal in June 1973, which led to a stipulation by the parties and a final agency order in September 1973.

An examination of the Reconsideration Record provides additional information that we consider relevant. A September 5, 1973 letter from CDH to the Colorado Department of Social Services (CDSS), the single State agency, declares that complete surveys were conducted at the facility on March 13, 1973 and June 11, 1973; on the basis of these surveys certification of the facility as of March 13, 1973 was recommended on September 5, 1973. RR, Item 14. An additional Medicaid survey was conducted on December 19, 1973; with the exception of a Life Safety Code waiver request all standards were found to be in compliance. RR, Item 36. The facility submitted a plan of correction on January 28, 1974. RR, Item 36. On April 29, 1974 the State submitted a waiver request for the lack of a sprinkling system to the Agency's Regional Office. The waiver was approved on May 6, 1974. RR, Item 36. A provider agreement was then executed on June 27, 1974 for the period June 18, 1974 to June 17, 1975. RR, Item 36.

Because the State was confused as to the period of disallowance, it argued that FFP was available on the basis of the facility's appeal. As noted above, however, this disallowance is for the period November 1, 1973 through June 18, 1974. There was no appeal pending during this period.

We find that the appeals process was completed in September 1973 with the issuance of the final agency order. Since the appeals process was completed, Ohio does not govern. If, once a final action on the appeal is reached, the State fails to act expeditiously in recertifying the facility and executing a new provider agreement, it does so at its own risk. Here the record indicates that a new survey was conducted on December 19, 1973; a Life Safety Code waiver was found to be needed; and not until April 27, 1974 did the State submit that waiver. HCFA acted quickly on the waiver, approving it on May 6, 1974. But the State did not then execute a provider agreement until June 27, 1974. We find no rationale for granting FFP once the appeals process is complete and the State then delays in executing a new agreement. We therefore sustain the disallowance in full because of the lack of a valid provider agreement during the period of the disallowance.

II.

FFP for Eventide of Durango was also disallowed for the period May 1, 1977 through June 30, 1980. A provider agreement had been executed with the facility for January 22, 1977 to June 30, 1977, with an automatic cancellation date of March 31, 1977, subject to a plan of correction of deficiencies documented by a prior survey. On March 3, 1977 CDH initiated a proposed action to cancel the facility's Medicaid certification effective March 31, 1977. Based on this proposed action, CDSS informed the facility on March 15, 1977 that its provider agreement would be cancelled effective March 31, 1977. The facility made a timely appeal of both these actions, and also timely requested a renewal of its certification and provider agreement. Hearings on the facility's appeal commenced in June 1977, and concluded in October 1977. Final agency action was entered in September 1978, effective December 1, 1978. This action was appealed to State court, with the facility originally filing in the District Court in and for the County of La Plata, Colorado. Prior to an order changing venue of the matter to the District for Denver, the La Plata County District Court, in December of 1978, entered an order finding that this facility would suffer irreparable injury if a stay of the agency order terminating its provider agreement and Medicaid certification was not entered. On May 30, 1978, the District Court in and for the City and County of Denver entered such an order.

With its April 6, 1981 postconference brief the State submitted an "Agreement and Stipulation" executed between the facility and the State in May 1980. This document states, inter alia, that CDH, based on surveys of the facility, has determined that the facility has been eligible for Medicaid certification since June 22, 1978. CDH agreed to prepare the appropriate documentation to establish this eligibility

and to provide this documentation to CDSS. Based on the survey agency's certification, the stipulation continues, CDSS has determined the facility has met the requisite conditions for a provider agreement since June 22, 1978. Under the terms of this stipulation, a provider agreement would be prepared and executed by the parties.

In accord with the stipulation, CDH on April 28, 1980, executed a HCFA Form 1539 Certification and Transmittal (C & T), certifying the facility for the period July 1, 1978 to June 30, 1979. This certification was based on a survey of the facility on October 23-24, 1977. The survey found some deficiencies and a deficiency list was sent to the facility on November 25, 1977. Ultimately the facility submitted a revised plan of correction on June 22, 1978, which was reviewed and deemed to be acceptable on July 1, 1978. In addition, a survey on June 26, 1978 disclosed the facility was operating in compliance with State and federal regulations.

Also on April 28, 1980, CDH executed a C & T for the period July 1, 1979 to August 29, 1979, a 60 day extension under the provisions of 45 CFR § 249.33(a)(6).

On June 4, 1980 another C & T was executed for the period August 30, 1979 to August 29, 1980, based on an August 28, 1979 survey and an acceptable plan of correction.

Also in its April 6, 1981 submission the State reported that on April 1, 1981 the Denver District Court overturned the decision of the agency and determined that CDH and CDSS had improperly revoked the facility's license and certification and had improperly terminated the provider agreement. The State indicated it is considering an appeal of this decision.

On the basis of Ohio we conclude that this facility is eligible for FFP during the first twelve months of its appeals process as measured from the cancellation of its provider agreement on March 31, 1977. The record indicates that although there was an intervening survey during this period, there was no certification determination which would cause the twelve month period to be curtailed.

As for the facility's eligibility for FFP after March 31, 1978 throughout the remainder of the appeals process, we are directing HCFA to further consider the disallowances concerning this facility. In Ohio the effect of the second part of PRG-11, i.e., FFP eligibility if the facility prevails upon appeal and State law provides for retroactive reinstatement of the agreement, was not raised. We do not believe this issue--which we consider relevant due to the State's recent claim that on April 1, 1981 a State court overturned the facility's delicensing

and decertification—has been adequately briefed by the parties for us to reach an informed decision. We note that HCFA has stated that under the second part of PRG-11 FFP is available for the twelve month period following the nonrenewal or termination of a provider agreement or until there is a determination on the findings of the next survey, whichever comes first, and that the availability of FFP beyond twelve months appears to be conditioned on the performance of annual surveys and on certification decisions. HCFA Post-Conference Memorandum, pp. 18-19; Conference Transcript, pp. 334-335.

We direct HCFA to examine the documents submitted by the State in its April 6, 1981 letter, indicating that the facility was surveyed throughout the appeals process and that certification decisions were made, to determine if the facility, having won its appeal, qualifies for FFP for any period beyond March 31, 1978. HCFA should modify, reverse, or reaffirm the disallowance accordingly. If the State should disagree with any determination made by HCFA pursuant to these instructions, the State should appeal that determination to the Board within thirty days after receipt of that determination.

Sharmar Nursing Center

As with the first Eventide of Durango disallowance, there has been confusion on the State's part as to the period of this facility's disallowance. The disallowance is for the period November 1, 1973 to August 7, 1974.

The facility's provider agreement expired on December 27, 1972. The State notified the facility that it would not be certified or given a provider agreement. The facility then requested a hearing (presumably under the Colorado APA). On March 27, 1974 the final agency decision was rendered.

Under the Ohio decision, PRG-11 authorizes FFP for a period of no more than twelve months from the expiration of a provider agreement, during the pendency of a provider appeal. Of the time covered by the disallowance, then, FFP would be available under PRG-11 only from November 1, 1973 until December 27, 1973. We sustain the disallowance for the period December 28, 1973 to August 4, 1974.

Landing Heights Health Care Center

The parties have not provided us with a detailed factual history of this facility. The facility's provider agreement had an expiration date of July 4, 1977. It is inferred from the record that the facility was

notified prior to this date that its Medicaid certification and provider agreement would not be renewed effective July 4, 1977. The facility sought judicial relief. On June 8, 1977 the facility obtained a Temporary Restraining Order from the Mesa County District Court prohibiting the State from removing patients from the facility. On June 23, 1977 the same court issued a preliminary injunction which restrained the State from:

> ... interfering with (the) operation of Landing Heights Health Care Center Nursing Home or from failure to certify the same for Medicaid payments for persons residing therein who otherwise qualify therefore until and only until such time as all applicable administrative procedure provided by Colorado and Federal statutes and is provided by applicable Colorado and Federal regulations made and provided for revocation of license by the Colorado Department of Health for operation of an intermediate nursing home and decertification by the Colorado Department of Health for Medicaid payments are exhausted as well as judicial review thereof where properly invoked.

On October 31, 1977, the State and the facility entered into a stipulation which became the final agency order on December 2, 1977. One term of the stipulation and final agency order provided that, subject to the facility being in substantial compliance with State statutory and regulatory licensure requirements, a Medicaid participation agreement would be issued. In February and March 1978, the State conducted investigations as to whether the facility was abiding by the terms of the stipulation. In April 1978 CDH informed that facility that it was going to bring a decertification action. The State had begun preparations to relocate the patients when, in May 1978, the facility was sold. The new owners promised to remedy all existing deficiencies, and the State consequently reversed its decision to transfer the patients.

FFP claimed for the period January 1, 1978 through March 31, 1978 was disallowed. Under the Board's Ohio holding, the State would be entitled to FFP for a maximum of twelve months after the expiration of the facility's provider agreement on July 4, 1977 if the appeals process took that long and no certification determination noting new deficiencies was made. The appeals process for this facility was completed within twelve months with the December 2, 1977 stipulation and final agency order. We do not know from the record whether a new provider agreement was then executed. If a provider agreement was executed, FFP would be available for the period January 1, 1978 through

March 31, 1978, as a valid provider agreement was in effect. The fact that the State later determined in April 1978 that the facility was not living up to the stipulation would have no bearing on the State's claim for FFP for January through March 1978. If it can be shown, however, that the State and the facility failed to execute a provider agreement following the December 2, 1977 stipulation and order, then the disallowance would be sustained. We direct HCFA to determine if a provider agreement was ever executed. If the State disagrees with HCFA's determination, it may appeal that decision to the Board within thirty days after receipt of that determination.

Sunset Manor

This facility had its Medicaid provider status questioned during two distinct time periods. For the sake of clarity, we will discuss each period separately.

I.

In Docket No. 80-60 the State's claim for FFP for the facility during the period October 12, 1975 through October 4, 1976 was disallowed. The facility's provider agreement was due to expire on August 12, 1975. On July 2, 1975 CDH notified the facility that, based on an April 10, 1975 survey, its certification would expire on August 12, 1975 and that CDH would recommend that the facility's provider agreement not be renewed. On July 9, 1975, the facility appealed this decision. On July 14, 1975 CDH requested in writing that CDSS grant a 60 day extension of the facility's provider agreement for administrative purposes. That request was granted and the provider agreement was extended until October 11, 1975. No disallowance was issued for the period of the extension.

On October 12, 1975 CDH notified the facility that it was instituting proceedings to revoke the facility's license and to terminate its Medicaid certification. On October 30, 1975 the facility was informed that agency hearings on its delicensing would soon commence. Prior to the holding of any hearings, the State and the facility entered into negotiations. The negotiations ultimately resulted in the facility being recertified on October 5, 1976.

Under the guidelines set forth in Ohio, we find that the State is entitled to FFP throughout the questioned period. The prior provider agreement was properly extended sixty days to October 11, 1975. The twelve month time limitation for a provider appeal set forth in Ohio therefore commenced to run October 12, 1975 when CDH informed the facility of the license revocation and decertification actions. The

facilty's recertification on October 5, 1976 concluded the appeals process. The appeals process was thus completed within the time limit specified in Ohio.

II.

FFP for Sunset Manor was also disallowed for the period January 1, 1978 through September 30, 1978. A provider agreement had been executed with the facility for July 5, 1977 to July 4, 1978, with an automatic cancellation date of November 10, 1977. On November 17, 1977 CDH notified the facility of its proposed action to revoke the facility's Medicaid certification effective November 10, 1977. Based on this action, CDSS proposed to cancel the facility's provider agreement also effective November 10, 1977. On December 1, 1977 the facility appealed these decisions and filed a motion for an order staying the cancellation until final action on the appeal was taken. Negotiations ensued, and final agency action was entered on April 28, 1978. Under the terms of a stipulation, CDH rescinded the automatic cancellation date, thereby allowing the facility's certification to continue through July 4, 1978. At the same time the provider agreement was extended 60 days to September 4, 1978 to allow time for another full survey. On July 5, 1978 the facility was resurveyed. While noting the presence of some deficiencies, CDH in a September 1, 1978 C & T stated the deficiencies were not serious enough to preclude continued certification and certified the facility for the period September 5, 1978 through July 4, 1979 with an automatic cancellation date of January 20, 1979.

We find, under the guidelines set forth in Ohio, that the facility's appeal of its decertification and provider agreement cancellation constructively extended the original provider agreement during the appeals process. Final State agency action occurred within the twelve month limitation set forth in Ohio with the April 28, 1978 stipulation that resulted in the recision of the automatic cancellation clause and the restoration of the original provider agreement to July 4, 1978. The State then followed proper procedures, in accord with 42 CFR § 442.16, in extending the provider agreement to September 4, 1978. Based on the July 5, 1978 survey the facility was recertified for September 5, 1978 through July 4, 1979. We assume, since the Agency has not contended otherwise and did not issue a disallowance for any quarter after September 30, 1978, that a corresponding provider agreement was also executed.

We therefore find that at no time was this facility without a valid provider agreement. Accordingly, we find that the State is entitled to FFP throughout the questioned period.

Cinderella Nursing Home

This facility's provider agreement was due to expire on February 24, 1978. A September 21, 1977 survey discovered numerous deficiencies at the facility. On January 20, 1978 CDH informed the facility of its intent not to renew the facility's Medicaid certification effective February 24, 1978. On January 24, 1978 CDSS initiated a proposed action refusing to renew the facility's provider agreement effective February 24, 1978. The facility filed a timely appeal of these actions and made a timely request to renew its certification. On January 31, 1978 CDH revisited the facility and found that it was in compliance, based on an acceptable plan of correction, with all the prerequisites for certification. On April 28, 1978, after negotiations between the facility and the State, a stipulation was reached and a final agency order was issued. Pursuant to the terms of the stipulation and the January 31, 1978 survey, CDH issued a C & T on May 2, 1978, certifying the facility for the period February 25, 1978 through February 24, 1979; the C & T had an automatic cancellation date of July 15, 1978. A provider agreement was consequently executed for the period February 25, 1978 through February 24, 1979. A post-certification revisit was conducted on June 30, 1978. Substantial progress in correcting deficiencies was noted and the automatic cancellation date was rescinded.

FFP claimed for April 1, 1978 through June 30, 1978 was disallowed. In line with the Board's holding in Ohio, we find that the State is entitled to FFP throughout the questioned period. We find that the provider appeal ended with the issuance of the May 2, 1978 C & T, pursuant to the final agency order. The appeals process was completed within the twelve month time limitation stipulated in Ohio, and the facility was timely surveyed and recertified for participation in the Medicaid program.

Alpine Meadows

This facility's provider agreement was due to expire on August 11, 1978. On July 12, 1978 CDH issued a C & T stating the facility would not have its Medicaid certification renewed effective August 11, 1978. Based on this action, CDSS initiated a proposed action refusing to renew the facility's provider agreement, also effective August 11, 1978. The facility contested the decertification and requested a hearing under the Colorado APA. On August 10, 1978 a State Hearing Officer granted an order staying the decertification pending final agency action pursuant to the APA; a hearing was set for December 4, 1978. On August 14, 1978 the facility filed an action in a county district court seeking an order restraining the State from refusing to provide Medicaid payments to the facility. On August 29, 1978 the district judge issued a preliminary

injunction to the facility. The State's request for reconsideration of this decision was denied.

On October 10, 1978 the district judge issued an order to the State asking the State to show cause why it should not be held in contempt for refusing to provide Medicaid payments to the facility. Following an October 19, 1978 hearing on the order, the matter was settled by stipulation for final agency action. The stipulation, dated December 8, 1978, required the facility's owner to sell the facility by July 19, 1979, to a buyer approved by CDH.

As a result of the August 29, 1978 court injunction, CDH issued, on October 27, 1978, a C & T for the facility for the period August 12, 1978 through December 4, 1978. On November 2, 1978 the facility was resurveyed and found in compliance, pending the submission of an acceptable plan of correction. On December 4, 1978 CDH requested, pursuant to 42 CFR § 442.16, an extension of 30 days to January 3, 1979 of the provider agreement issued pursuant to the October 27, 1978 C & T. On January 10, 1979 another C & T was issued for the period January 4, 1979 through July 18, 1979. The C & T stated that the facility was found to be in compliance with an acceptable plan of correction for deficiencies. The plan of correction was not received by CDH until January 8, 1979, although the contents of the plan were reviewed by telephone Janaury 3, 1979 and deemed to be acceptable at that time. We presume, since HCFA has not contended otherwise, that a new provider agreement was then executed.

FFP was disallowed for the period September 1, 1978 through February 28, 1979. In line with the Board's reasoning in Ohio, we find that the State is entitled to FFP throughout the questioned period, except for the period January 4, 1979 through January 9, 1979. The provider appeals process was completed within twelve months and the facility was timely surveyed and recertified for participation in the Medicaid program.

Concerning the period January 4 to January 9, 1979, we conclude that the facility was not then certified for Medicaid participation. The provider agreement extension expired January 3, and a new C & T was not executed until January 10. HCFA's interpretation of the regulations then in effect was that the date of certification could not be prior to the date of execution of the C & T, as shown by the signature on line 19 of that form. In a recent decision, Washington Department of Social and Health Services, Decision No. 176, May 26, 1981, the Board stated:

> While the date of the signature on line 19 of the C & T is presumptively the best evidence of the date a certification determination was in fact made, the Board will accept that

> the certification determination was made on an earlier date, if established by other clear evidence. This evidence must show convincingly that all the requirements for certification are met, and the survey agency not only so determines, but commits its determination in writing in the form of notification to either the single state agency of the facility. (Page 5.)

Under this standard, the January 3, 1979 telephone conversation concerning the plan of correction was not a sufficient communication by CDH as to the facility's certification. There was no written evidence of the facility's certifcation until the C & T was executed by the survey agency on January 10, 1979. Consequently, the State is not entitled to FFP for this period.

McNamara Mercy Hospital

This facility's provider agreement was due to expire December 31, 1978. On December 28, 1978 CDH notified the facility of its intent to refuse to renew the facility's Medicaid certification. On January 9, 1979 the facility was informed that its provider agreement would not be renewed. On January 19, 1979 the facility appealed these actions. The State has asserted in its application for review that the facility was resurveyed on February 20, 1979 by CDH and found to be in compliance with all pertinent regulations, and that on February 22, 1979, a stipulation for final agency order was signed by the parties, pursuant to which the facility's Medicaid certification and provider agreement were continued in full force and effect.

The documents submitted by the State with its postconference brief, however, provide additional information. The submission includes a February 16, 1979 letter from the Director, Division of Survey and Certification Operations, HCFA, Region VIII, to CDH, which stated that "the documents submitted with your recommendation [to terminate the facility from Medicaid participation] neither adequately reflect the conditions in the hospital nor support a termination action." The letter went on to recommend that CDH conduct a resurvey as soon as possible. The February 20, 1979 survey was apparently conducted in response to this letter.

From a review of these facts it is evident that a resurvey and recertification indicating the facility's eligibility for Medicaid participation occurred shortly after the facility's January 19, 1979 appeal of its original decertification. We presume, since HCFA has not contended otherwise, that a new provider agreement was then executed.

FFP was disallowed for the period January 1, 1979 through March 31, 1979. In line with the Board's reasoning in Ohio, we find that the State is entitled to FFP throughout the questioned period. The provider appeals process was completed within twelve months and the facility was timely surveyed and recertified for participation in the Medicaid program.

Harold's Nursing Home

This facility was issued a provider agreement for the period March 18 to December 17, 1975, with an automatic cancellation clause effective June 18, 1975, unless certain specified information was supplied to the State. On June 17, 1975, CDH notified the facility it was invoking the cancellation clause. On June 18, 1975 the facility was notified of its right to a hearing under the Colorado APA. On June 27, 1975, the facility obtained a Temporary Restraining Order from the Denver District Court to block its decertification and departicipation in the Medicaid program. The Court dismissed the action on July 2, 1975, because the facility had failed to exhaust its administrative appeals. The facility then appealed administratively, and hearings commenced on July 23, 1975. Final agency action occurred on February 4, 1976.

Harold's then sought judicial review of that agency action and was issued another Temporary Restraining Order staying this adverse decision on March 30, 1976. The case was dismissed with the State prevailing, on June 16, 1976. On June 29, 1976 the State informed the facility that all payments would cease as of July 31, 1976. During July the patients were relocated to other nursing facilities.

FFP was disallowed for the period June 18, 1975 through July 31, 1976. Under the guidelines set forth in Ohio, we find that the State is entitled to FFP from June 18, 1975 to June 16, 1976. The dismissal of the appeal in the State's favor completed the appeals process. In Ohio the Board held that FFP is available during a provider appeal for a period of twelve months or until a final decision is reached decertifying the facility, whichever period is shorter. In addition, we find that the State is entitled to another 30 days of FFP to July 16, 1976, in accord with 42 CFR § 441.11 and the Weikel letter, for the relocation of patients from the facility. HCFA is directed to calculate the amount of any remaining disallowance for the period July 17-31, 1976. If the State should disagree with that calculation, it should appeal to the Board within thirty days after receipt of that calculation.

Colorado State Veterans Nursing Home

Unlike the other nursing facilities involved in these appeals, the Colorado State Veterans Nursing Home did not have its license revoked and then appeal that revocation. The stated reason for the disallowance was the failure to have a valid provider agreement in effect during the period in question, April through June, 1978. The State has claimed a valid provider agreement with this facility was in effect, and has submitted the following documents to support that claim: a provider agreement executed July 24, 1978 for the period April 12, 1978 through April 11, 1979; and a C & T executed by CDH on July 13, 1978, certifying the facility's eligibility for Medicaid participation for the period April 12, 1978 through April 11, 1979. The C & T stated that the facility had been surveyed on April 12-13, 1978, and some deficiencies were noted. The facility submitted a plan of correction on June 13, 1978. The plan of correction was accepted on June 14, 1978, by the stamping of "approved" on the plan. The State has not submitted any evidence as to whether this approval was then communicated to either the facility or CDSS.

The State is arguing in essence that the provider agreement executed on July 13, 1978 should be given retroactive effect to cover the period of the disallowance. The Board has previously dealt with the question of when a provider agreement comes into effect and to what extent an agreement can be retroactive.

In an earlier Board decision, Maryland Department of Health and Mental Hygiene, Decision No. 107, July 2, 1980, the Board found that HCFA's interpretation of the regulations then in effect that a provider agreement with a facility providing Title XIX services only could not be effective prior to the facility's certification by a state, as evidenced by the execution of a C & T by a state survey agency was a valid exercise of its administrative responsibilities and not arbitrary.

While noting that HCFA had promulgated new regulations on April 4, 1980 (45 FR 22933) to become effective July 3, 1980, to the effect that a provider agreement could be in force from the date of the onsite health and safety survey, the Board stated that the fact that the Agency decided to change its policy did not invalidate its prior actions.

In its Washington decision, supra, the Board held that not only must the final certification determination be in writing, but also that the survey agency must commit that determination in writing in the form of notification to either the facility or the single state agency.

The State has failed to provide the Board with any documentation to the effect that CDH had made a final determination on the facility's certification prior to the execution of the C & T. Therefore we find that the provider agreement with the Colorado State Veterans Nursing Home did not become effective until the C & T was executed by CDH on July 13, 1978. Accordingly, we sustain the disallowance in the full amount of $593.

Conclusion

For the reasons stated above, we conclude the following:

Eventide of Durango - The disallowance for the period November 1, 1973 through June 18, 1974 is upheld. The disallowance for the period May 1, 1977 through March 31, 1978 is overturned. For the period April 1, 1978 through June 30, 1980, the Agency should determine whether FFP is available based on documents submitted by the State.

Sharmar Nursing Center - The disallowance is overturned for the period November 1, 1973 to December 27, 1973, but the disallowance for the period December 28, 1973 to August 7, 1974 is upheld.

Landing Heights Health Care Center - The Agency should determine if there was a valid provider agreement executed after the December 2, 1977 stipulation and final agency order. If there was, then the disallowance for the period January 1, 1978 through March 31, 1978 is overturned. If there was no valid provider agreement, then the disallowance for that period is upheld.

Sunset Manor - The disallowances for the periods October 12, 1975 through October 4, 1976 and January 1, 1978 through September 30, 1978 are overturned.

Cinderella Nursing Home - The disallowance for the period April 1, 1978 through June 30, 1978 is overturned.

Alpine Meadows - The disallowance is overturned for the periods September 1, 1978 through January 3, 1979 and January 10, 1979 through February 28, 1979, but the disallowance is upheld for the period January 4, 1979 through January 9, 1979.

McNamara Mercy Hospital - The disallowance for the period January 1, 1979 through March 31, 1979 is overturned.

Harold's Nursing Home - The disallowance is overturned for the period June 18, 1975 through July 16, 1976, but the disallowance is upheld for the period July 17, 1976 through July 31, 1976.

Colorado State Veterans Nursing Home - The disallowance for the period April 1, 1978 through June 30, 1978 is upheld.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

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