

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Maryland Department of Health
and Mental Hygiene
Docket No. 79-30-MD-HC
Decision No. 113

DATE: July 31, 1980

DECISION

The Maryland Department of Health and Mental Hygiene (State), by letter dated February 22, 1979, sought review of a January 23, 1979 determination by the Director of the Medicaid Bureau, Health Care Financing Administration (Agency), to disallow \$55,571 in Federal financial participation (FFP) claimed by the State under Title XIX of the Social Security Act. The notification of disallowance stated that FFP was being denied for intermediate care facility (ICF) services provided by the Mount Sinai Nursing Home (facility) for the quarter ended June 30, 1978 because the facility's provider agreement had expired on March 31, 1978.

There are no material issues of fact in dispute. We have, therefore, determined to proceed to decision based on the written record and briefs and the State's response to an Order to Show Cause issued by the Board Chairman; the Agency was not requested to respond to the Order and did not do so. We conclude that, for the reasons stated below, the disallowance should be upheld.

I. Statement of the Case

The State has not disputed the fact that a valid provider agreement for Mount Sinai was not in effect during the period in question. In its appeal to the Board, the State, however, has argued that it was not responsible for the failure of Mount Sinai to have a provider agreement; rather, the dilatory actions of the Agency's Health Standards and Quality Bureau (HSQB) prevented the State from executing a new provider agreement with the facility.

The State claims that on January 26, 1978 its Division of Licensing and Certification sent the results of a survey of Mount Sinai recommending approval of the facility with requested waivers of several deficiencies to the Agency's Regional HSQB. Not until February 13, 1979 was notification of certification by the HSQB for Mount Sinai for the period April 1, 1978 through March 31, 1979 received by the State. Therefore, the State argues, it was impossible for it to execute a provider agreement with Mount Sinai prior to February 13, 1979. The State reasons, "In view of the foregoing facts, i. e., that the Federal government was solely responsible for the absence of an executed con-

tract covering the period in question, and that the Maryland Program has acted as expeditiously as possible to execute an agreement covering that period, we feel that the State is entitled to FFP for the cost of care rendered in the Mount Sinai Nursing Home from April 1, 1978 through June 30, 1978." (State's letter of February 22, 1979, page 2.)

The Agency in its April 20, 1979 response to the State's appeal replied that any delays by the HSQB in approving the requested waivers of deficiencies at the facility were immaterial to the facts of this appeal, as the disallowance concerned FFP for ICF services, and the State, not the HSQB, had sole responsibility for the certification of facilities providing ICF services.

In a June 17, 1980 Order the State was asked to show cause why the disallowance should not be sustained on the grounds that the State's claim that its failure to have executed an ICF provider agreement with the facility was attributable to the Agency's HSQB was without merit. In its July 14, 1980 response to the Order, the State, citing 42 CFR 449.33(a)(2), declared that its survey agency withheld certification of the ICF portion of the facility pending HSQB approval of the skilled nursing facility (SNF) beds in the facility because questions of Life Safety Code violations existed. The State explained that, since the Life Safety Code requirements for ICFs and SNFs are identical, it was reasonable for the State survey agency to delay certifying the ICF portion of the facility until the HSQB had reached a determination on the SNF portion.

II. Regulations

The Medicaid regulations have been recodified several times in recent years, but for the period in question (April through June 1978) the applicable regulations are set forth in 42 CFR Part 449 (1977), "Services and Payment in Medical Service Programs."

FFP was denied for ICF services provided by Mount Sinai during this period. To obtain FFP for payments made to an ICF, the State must comply with the provisions of 42 CFR 449.10(b)(15)(i)(E) requiring the single State agency and the provider facility to execute an agreement which the single State agency determines is in accordance with 42 CFR 449.33 and meets all of the conditions of 42 CFR 449.10(b)(15)(i). The regulations require that prior to the execution of the provider agreement and the making of payments, the agency designated pursuant to § 450.100 (the survey agency) must certify that the facility meets the definition in § 449.10(b)(15) and is in full compliance with standards prescribed in the regulations (see 42 CFR 449.12 and 449.33(a)(2)).

Upon certification by the survey agency, the single State agency then executes a provider agreement with the facility in accordance with the Federal regulations. 42 CFR 449.33(a)(6).

III. Discussion

The central issue in this appeal is whether the State's claim that the Agency's HSQB, by taking more than a year to issue its certification of the facility, was responsible for the failure to have an ICF provider agreement in effect with Mount Sinai during the period in question is valid and provides a basis for the Board to reverse the disallowance.

In addition to participating in the Medicaid program as a provider of ICF services, the Mount Sinai Nursing Home also provided Medicaid SNF services and participated in the Medicare program. This is relevant because the Agency's HSQB only becomes involved in the Medicaid program through its role in the Medicare program.

The HSQB was established by the Health Care Financing Administration to monitor the quality of care provided to Medicare beneficiaries. The HSQB requires that facilities providing care to Medicare beneficiaries are structurally safe, provide for a sanitary environment, are well staffed, and have needed services available. The HSQB also requires that the actual care provided to beneficiaries is of high quality and ensures that medical services are necessary and are provided in the most appropriate setting. The HSQB's Office of Standards and Certification monitors standards enforcement and the State's survey and certification of health care facilities.

Medicare is a federally administered program, while Medicaid is a cooperative federal-state program administered by the individual states.

The two major types of services provided by nursing facilities participating in the Medicaid program are intermediate care facility (ICF) services and skilled nursing facility (SNF) services. Different standards are imposed for each type of facility, reflecting the different services provided in each type of facility. Section 1902(a)(28) of the Social Security Act provides that the requirements and standards for a SNF participating in the Medicare program set forth in § 1861(j) of the Social Security Act shall also be applied to a SNF participating in the Medicaid program. Similarly, § 1910(a)(i) of the Act provides that any SNF certified to be qualified for Medicare shall also be deemed to meet the standards for certification as a Medicaid SNF.

It is through this common standard for SNFs participating in both the Medicare and Medicaid programs that the HSQB becomes involved in the Medicaid program. A SNF participating in Medicare must receive HSQB approval. Since the SNF standards for Medicare and Medicaid participation are identical, if the same SNF wishes to participate as a SNF in the Medicaid program, the HSQB has the responsibility for approving the state survey agency's certification of the facility as a Medicare-Medicaid SNF provider. Under such circumstances, a state may not execute a provider agreement with that SNF for Medicaid unless the facility is approved by the HSQB for participation in Medicare. Thus a delay, for example, by the HSQB in approving requests for waivers may well prevent a State from executing a SNF provider agreement with a facility.

The subject disallowance for Mount Sinai, however, was for ICF services, not SNF services. ICF services are not available under Medicare, but only under the Medicaid program. In its arguments to the Board the State has overlooked a central characteristic of the Medicaid program, namely that it is a cooperative federal-state program that gives the states considerable independence. As an example of this independent authority, the responsibility for certifying an ICF for Medicaid participation lies solely with the states. 42 CFR 449.33(a)(2). See Maryland Department of Health and Mental Hygiene, DGAB Docket No. 79-157, Decision No. 107, July 2, 1980, page 5.

The HSQB has no responsibility in the process of the certification of a facility for ICF services. Thus, if a facility wished to participate as a SNF in the Medicare and Medicaid programs and as an ICF in the Medicaid program, the HSQB would have to approve the SNF certification. The state, however, would not have to await any HSQB action before it could enter into an ICF provider agreement with the facility.

The State has maintained that because waivers of the Life Safety Code for the facility were involved, it was reasonable to defer certifying the ICF portion of the facility until the HSQB had made its decision on the SNF portion of the facility. The State has cited 42 CFR 449.33(a)(2), which states that a Title XIX State Plan must "[p]rovide that the single State agency will, prior to the execution of an agreement with any facility (including hospitals and skilled nursing facilities) for provisions of intermediate care facility services and making payments under the plan, obtain certification from the agency designated pursuant to § 450.100(c) of this chapter that the facility meets the definition set forth under § 449.10(b)(15). . ." (Emphasis supplied by the State.) The State argues that its survey agency, noting the reference to an institution that provides both ICF and SNF services, withheld approval of the ICF portion pending HSQB approval of the SNF portion.

The State has overlooked the fact that 42 CFR 449.33(a)(2) immediately goes on to state, "However, (i) An intermediate care facility . . . deficient under . . . the Life Safety Code (§ 449.12(a)(5)) may be certified in accordance with paragraph (a)(4)(iii) of this section for a period not exceeding 2 years following the date of certification . . ." This indicates that there was no requirement for the State to defer certification until the HSQB acted. In a similar vein, 42 CFR 449.12(a)(5)(ii) also gives the states unilateral authority to grant waivers of the Life Safety Code for an ICF facility:

In accordance with criteria issued by the Secretary, the State survey agency may waive the application to any such facility of specific provisions of such Code, for such periods as it deems appropriate, which provisions if rigidly applied would result in unreasonable hardship upon a facility, but only if such waiver will not adversely affect the health and safety of the residents.

While it is true that the Agency has reserved the authority (42 CFR 449.10(b)(15)(vi)) to invalidate a provider agreement if it determines that on the basis of

an on-site validation survey or other reports that the criteria for certification in 42 CFR 449.33 have not been met, the sole responsibility for surveying an ICF, granting waivers if needed, and certifying the ICF for Medicaid participation lies with the states. Here the State took no action with respect to the ICF certification of Mount Sinai after March 31, 1978. The facility's provider agreement had expired on March 31, 1978. The Board has previously held that FFP is not available for a facility with an expired provider agreement. Delaware Department of Health and Social Services, DGAB Docket No. 78-108, Decision No. 87, February 29, 1980, page 9. During the period of the disallowance, no provider agreement existed between the State and the Mount Sinai Nursing Home.

IV. Conclusion

For the reasons stated above, we sustain the disallowance in the amount of \$55,571.

/s/ Donald G. Przybylinski

/s/ Robert R. Woodruff

/s/ Frank L. Dell'Acqua, Panel Chairman