

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: New Jersey Department of Human Services      DATE: February 2, 1981  
Docket Nos. 78-121-NJ-HC  
              78-106-NJ-HC (only portion of disallowance involving  
                                  the Alps Manor Nursing Home)  
Decision No. 148

DECISION

By letter dated October 25, 1978 the New Jersey Department of Human Services (State) appealed an August 25, 1978 determination by the Administrator of the Health Care Financing Administration (HCFA, Agency) to uphold the disallowance of \$484,430 in Federal financial participation (FFP) claimed for Title XIX skilled nursing and intermediate care services rendered by the Alps Manor Nursing Home (Alps Manor, facility) during the period December 1, 1975 through September 12, 1976. The appeal was assigned Board Docket No. 78-121-NJ-HC.

Alps Manor is the subject of disallowances in two other cases currently before the Board. Alps Manor is one of several nursing homes involved in Board Docket No. 78-16-NJ-HC. In that case, appealed by the State in a letter dated October 20, 1978, FFP in the amount of \$256 was denied for skilled nursing services rendered at Alps Manor during the period November 30, 1975 through September 13, 1976. The Board has determined (see Reconsideration Record [RR], Item 44, attached schedule) that this \$256 disallowance was also included by the Agency in its August 25, 1978 disallowance of \$484,430 in FFP for services rendered at Alps Manor. Accordingly, the Board has decided to delete the \$256 disallowance from Board Docket No. 78-16-NJ-HC.

On August 28, 1978 the State appealed a July 27, 1978 disallowance of \$109,975 in FFP for services performed at seven nursing homes. Included in this amount was a disallowance of \$1,235 for services performed at Alps Manor during the period December 1, 1975 through September 12, 1976. This case was assigned Docket No. 78-106-NJ-HC. The Board has determined that this \$1,235 was not included in the \$484,430 disallowance in Board Docket No. 78-121-NJ-HC. In the interests of expediting these cases and because the disallowances involving Alps Manor apparently concern the same issue of the validity of Alps Manor's provider agreement for an identical period of time, the Board will consider jointly all the disallowances of Alps Manor currently before the Board, in the amount of \$485,665 (\$484,430 + \$1,235).

The record on which this decision is based includes the Reconsideration Record, the applications for review, the Agency's responses thereto, and the State's response to an Order to Show Cause issued on September 12, 1980. The Agency was not required to respond to the Order and did not do so.

## I. Statement of the Case

On December 11, 1975 a provider agreement for skilled nursing and intermediate care services was executed with Alps Manor. The duration of the agreement was from November 30, 1975 to November 30, 1976; the agreement carried a cancellation date of March 31, 1976, if deficiencies, including those relating to the Life Safety Code, were not satisfactorily corrected or if waivers of the deficiencies were not granted.

The provider agreement was executed in the absence of certification of Alps Manor by the State survey agency. A survey of the facility on October 27, 1975 revealed that ten Life Safety Code and numerous physical environment deficiencies had not been corrected that had been noted during a previous survey. On December 11, 1975 the State survey agency issued a Medicaid/Medicare Certification and Transmittal form (C & T, HCFA Form 1539) denying certification to Alps Manor and recommended that a provider agreement not be given, noting that the plan of correction for staffing in nursing was not accepted and that the Agency's Office of Long Term Care (OLTC) had not yet approved requested waivers of the Life Safety Code deficiencies (RR, Item 9). The OLTC had previously denied certain requested waivers on June 2, 1975. On February 23, 1976 the Agency again disapproved the State survey agency's recommendation for Life Safety Code waivers for Alps Manor. On March 1, 1976 the OLTC notified Alps Manor that an Agency on-site inspection on January 29, 1976 had revealed that certain items needed to be corrected before waivers of other provisions would be granted. On February 27, 1976 the State survey agency issued another C & T (RR, Item 16), in which it noted that nursing, dietary, and building conditions were still not met and again recommended that a provider agreement not be given. On March 5, 1976 the State survey agency wrote the facility that it could not make a favorable recommendation for Alps Manor because of a failure to submit an acceptable plan of correction. On March 19, 1976 the State's Division of Medical Assistance and Health Services (DMAHS, the single State agency) informed the facility that because of continued deficiencies it was proceeding to invoke the March 31, 1976 cancellation date in the provider agreement; the letter stressed the seriousness of the situation and stated that no new patients were to be admitted to the facility and that all Medicaid patients would be removed if the questioned deficiencies were not corrected.

After Alps Manor had indicated in a March 24, 1976 letter that the deficiencies had been corrected, DMAHS on April 5, 1976 wrote the facility that it would not invoke the cancellation clause and that it was requesting an immediate resurvey of the facility. On April 14, 1976 the State survey agency informed DMAHS that it could not immediately resurvey Alps Manor because of a manpower shortage. On that same day the OLTC approved Life Safety Code waivers for Alps Manor, contingent upon the continued sealing off of the facility's third floor. On September 13, 1976 the State survey agency confirmed the correction of the previously noted deficiencies, and the Agency has provided FFP starting on that date.

Based upon a September 15, 1976 letter from the State survey agency, the OLTC in a January 12, 1977 memorandum recommended that FFP for Alps Manor be reinstated as of September 17, 1976; in a February 18, 1977 memorandum that date was corrected to September 13, 1976 by the Regional OLTC Director.

On October 5, 1976 the Agency's Acting Regional Commissioner notified the State that pursuant to 45 CFR 249.10(b) the OLTC had determined that the State had claimed FFP for Alps Manor despite the absence of a valid provided agreement after November 30, 1975. The terms of Alps Manor's provider agreement were alleged not to have met the requirements of 45 CFR 249.33(a)(6) and (10). The Regional Commissioner's disallowance was upheld by the HCFA Administrator in a letter dated August 25, 1978; the basis for the decision was the absence of Title XIX certification of Alps Manor by the State survey agency before the execution of the provider agreement.

## II. Applicable Regulations

The Medicaid regulations have been recodified several times in recent years, but for the period in question (December 1975 through September 1976) the applicable regulations are set forth in 45 CFR Part 249 (1975), "Services and Payment in Medical Assistance Programs."

FFP in payments to a facility providing skilled nursing and 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. (45 CFR 249.10(b)(4)(i)(C) for skilled nursing services, 45 CFR 249.10(b)(15)(i)(E) 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). 45 CFR 249.33(a)(6).

The single state agency is required to certify that the facility is in compliance with each condition of participation, § 249.33(a)(4)(i). In order for the state to obtain FFP the execution of the provider agreement must be in accordance with the federal regulations, § 249.33(a)(6). A provider agreement between the state agency and a facility is not necessarily valid evidence that the facility meets all requirements for certification under federal regulations. The provider agreement may be determined to be invalid if the Secretary establishes that any of the five provisions listed in § 249.10(b)(4)(i)(C)(1)-(5) for a skilled nursing facility or in 249.10(b)(15)(vi)(A)-(E) for an intermediate care facility were violated in the certification of the facility. A facility which does not qualify under § 249.33 is not recognized as a skilled nursing facility or an intermediate care facility for purposes of payment under the Medicaid program. 45 CFR 249.33(a)(10).

### III. Discussion

In a September 12, 1980 Order the Board asked the State to show cause in writing why the disallowances for Alps Manor should not be sustained on the basis that 45 CFR 249.10(b)(4)(i)(c) and 45 CFR 249.33(a)(6) preclude the payment of FFP for a provider agreement that has been executed without the certification of a facility by the State survey agency.

In an October 2, 1980 response the State has contended that Alps Manor was in fact certified by the State survey agency, and the issuance of a provider agreement was thus entirely proper under the Medicaid regulations. The State has argued that the uncorrected deficiencies at Alps Manor were apparently not so numerous as to prevent certification since the State survey agency prepared a C & T and recommended a 12 month provider agreement by filling in block 11 of the form, contingent upon receipt of a new nurse staffing plan and OLTC approval of waivers for the Life Safety Code deficiencies. The State has contended that the C & T did not direct DMAHS to withhold a provider agreement but "provided unequivocal authority for the single State agency to issue a provider agreement." (State's submission of October 2, 1980, p. 10.)

Contrary to the State's assertions, we find that Alps Manor was not certified by the State survey agency prior to the issuance of a provider agreement as required by the Medicaid regulations. The State apparently considers that the mere issuance of a C & T by the State survey agency is tantamount to the certification of a facility. This is not true. In both the December 11, 1975 and the February 27, 1976 C & T's executed by the State survey agency during the period of the disallowance, the survey agency checked off block 10(b), indicating Alps Manor was not in compliance with Medicaid program requirements. The State survey agency had the option of checking off block 10(a), indicating compliance based on an accepted plan of correction or on approved waivers of deficiencies, which would have resulted in a certification, but it did not elect to do so. We direct the State's attention to the Agency's Exhibit N in its February 23, 1979 submission, an April 14, 1976 memorandum from the Acting Director of the State survey agency to the single State agency, in which it is stated that both C and T's recommended that a provider agreement for Alps Manor be denied. We see no way of construing such unambiguous language as being a certification of Alps Manor that satisfies the Medicaid regulations.

The State has additionally argued that an understanding, expressed in an April 1, 1975 letter from the Regional OLTC Director, existed between the Agency and DMAHS that permitted the issuance of a day-to-day provider agreement under extenuating circumstances. That letter, apparently a review of discussions on several matters between the Agency and DMAHS, details how in circumstances where a two-month extension of a provider agreement (permitted under 45 CFR 249.33(a)(6)) has been insufficient to complete the certification process, a day-to-day provider agreement may be issued if the reason for the delay is well-documented and appropriate action is in progress; once the new provider agreement is issued, it would be retroactive to the expiration date of the

two month administrative extension. The State has claimed that on the basis of this letter, beginning April 1, 1976, DMHAS issued a day-to-day provider agreement to Alps Manor as the March 24, 1976 letter from Alps Manor indicated that the deficiencies had been corrected or were in the process of being corrected. Manpower shortages in the State survey agency are cited as the extenuating circumstances preventing the actual certification of Alps Manor. The Agency is now estopped, the State has argued, from issuing a disallowance for services performed at Alps Manor after April 1, 1976 because DMAHS had relied on the April 1, 1975 letter from the OLTC Director in executing a day-to-day provider agreement with Alps Manor.

We do not believe it is necessary to examine the theory of whether estoppel can be asserted against the federal government to dispose of this argument by the State. The April 1, 1975 letter states that a day-to-day provider agreement may be executed only after the two month administrative extension proves insufficient to allow certification action. This presupposes that the requirements set forth in 45 CFR 249.33(a)(6) for a two-month extension will also be met throughout the duration of the day-to-day provider agreement. In order that such an extension be granted a survey agency must notify the single State agency in writing prior to the expiration of a provider agreement that the health and safety of the patients will not be jeopardized by the extension. There is nothing in the record to indicate that such an extension was ever recommended by the State survey agency or granted by DMHAS. As the procedure set forth in the OLTC Director's letter for the issuance of a day-to-day provider agreement was never followed by DMHAS, the State cannot now assert reliance upon that letter as a defense against the disallowance.

Furthermore, as was discussed in the Board's September 12, 1980 Order, the State's reliance on Alps Manor's own March 24, 1976 assertion that the deficiencies were corrected is an action without basis in the regulations. Mere assertions by a facility that it has corrected deficiencies cannot be accepted as evidence that Title XIX standards have been met without actual substantiation by the State survey agency. The Medicaid regulations require that a certification be based on on-site surveys, not unsupported assertions by a facility. In this case the on-site survey did not occur until September 13, 1976.

One final point remains to be discussed. The State has argued that the amount of the disallowance is significantly out of proportion to the deficiencies that may have existed at Alps Manor. The State has declared:

[S]ervices of some quality were provided for the entire period of this disallowance, and some reimbursement for such services could properly be expected from Title XIX funds. The appropriate level of disallowance, if one exists, should bear some relationship to actual harm suffered by the intended beneficiaries of the program, Title XIX recipients. It is suggested that the harm caused by these deficiencies was minimal, but certainly cannot exceed the value

of the actual corrections made... The "all-or-nothing" approach to FFP adopted by [the Agency] works a serious injustice upon [state medicaid] agencies and upon local taxpayers who must bear the entire burden of medicaid administrative decisions. (State's submission of October 2, 1980, pp. 20-21.)

The State had earlier argued, "[T]here is no question of quality of care to patients at Alps Manor raised by this disallowance, except for a purely conjectural relationship between quality of care and the deficiencies noted." (State's submission of December 29, 1978, p. 2.)

We do not agree with these contentions. The Board has stated on several occasions that the denial of FFP is the Agency's main weapon to ensure that facilities meet minimal statutory and regulatory requirements for Medicaid participation. See Nebraska Department of Public Welfare, Decision No. 111, July 16, 1980, p. 9, and Maryland Department of Health and Mental Hygiene, Decision No. 124, October 2, 1980, p. 4. The Agency could reasonably determine that there is nothing "conjectural" about the quality of care in a facility where Life Safety Code violations existed and where nursing staffing deficiencies prevented the State survey agency from certifying the facility. The Agency could reasonably conclude that the Title XIX recipients in Alps Manor were not receiving the protection or the services they were entitled to under the Medicaid regulations. To receive FFP the State must ensure that a facility meets all the standards and requirements set forth in the regulations, not an amount of FFP proportional to the standards actually met. The disallowance resulted not because the Agency imposed unreasonable conditions upon the State, but because the single State agency chose not to follow the recommendations of the State survey agency. We further note that the amount of the disallowances could have been significantly reduced if the State survey agency had immediately conducted an on-site survey of Alps Manor after receiving OLTC approval of the Life Safety Code waivers on April 14, 1976 instead of waiting to September 13, 1976.

#### IV. Conclusion

For the reasons stated we sustain the disallowance of FFP for services rendered at the Alps Manor Nursing Home in the full amount of \$485,665.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

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