DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: New Jersey Department of Human Services
DATE: June 9, 1980

Docket Nos. 78-41-NJ-HC
78-124-NJ-HC
78-16-NJ-HC (only portion of disallowance with respect to Emerson Convalescent Center)
78-106-NJ-HC (only portion of disallowance with respect to Emerson Convalescent Center)

Decision No. 104

DECISION

These are cases that are being considered jointly because they involve the common issue of the validity of the provider agreement for the Emerson Convalescent Center under Title XIX of the Social Security Act.

Docket No. 78-41-NJ-HC

The New Jersey Department of Human Services, by letter dated June 2, 1978, filed an application for review of a portion of the May 4, 1978 disallowance of Federal financial participation (FFP) claimed on the Quarterly Statement of Medical Assistance Expenditures for the quarter ended December 31, 1977 under Title XIX of the Social Security Act. The disallowance was made by the Acting Assistant Director for Financial Management, Health Care Financing Administration (HCFA). Of the $81,012 disallowed, the State appealed only $1,079 for services provided by the Emerson Convalescent Center (Emerson), a skilled nursing facility (SNF), claimed for the period November 24, 1975 to July 1, 1976. No appeal was taken with respect to the disallowances of $62,238 for the Woodbine State School and $12,695 for the Magda Eriksen Nursing Home. The Board Chairman noted in an Order sent to both parties that the $5,000 discrepancy between the $81,012 disallowed and the sum of the amounts disallowed for each facility ($76,012) appeared to be the result of an arithmetical error. Neither party has commented further on this matter.

Docket No. 78-124-NJ-HC

On October 13, 1978, the Administrator of HCFA upheld the disallowance by the Regional Commissioner, Social and Rehabilitation Service (SRS) of $87,496 of FFP claimed for the costs incurred by the Emerson Convalescent Center from November 24, 1975 to July 1, 1976. The State requested review of the decision on November 13, 1978.

It is not clear from the Administrator's letter exactly which disallowance of the Regional Commissioner's is being upheld, which Quarterly Statements of Medical Assistance Expenditures were involved, and how the $87,496 figure was arrived at. The Administrator's figure appears to include disallowances for claims made by the State on all the Quarterly Statements on which reimbursement was claimed for services rendered by Emerson between November 24, 1975 and July 1, 1976. In response to an inquiry by the Board's Executive Secretary as to the total amount of disallowances for all of the claims pertaining to Emerson (involving four different Board docket numbers), the attorney for the Agency stated that the Administrator's figure was incorrect.

Board Docket Numbers 78-16-NJ-HC and 78-106-NJ-HC involve, in part, other facilities and issues. Our decision below does not reach those issues involving facilities other than Emerson with respect to these cases.

The record on which this decision is based includes the applications for review in Docket Nos. 78-41-NJ-HC and 78-124-NJ-HC, the record of reconsideration in SRS Docket No. ME-NJ7701, Agency responses, an Order to Show Cause issued by the Board Chairman dated August 8, 1979, and the State's response to that Order.

Statement of the Case

The State claimed FFP for payments made to the Emerson Convalescent Center for the period November 24, 1975 to July 1, 1976 for services rendered by the facility to Medicaid recipients. The costs were disallowed on the ground that the State did not have a valid provider agreement with Emerson during the period in question.

FFP in payments to a SNF is available only if the facility is certified as having met all of the requirements for participation in the Medicaid program as evidenced by an agreement (provider agreement) between the single state agency and the SNF. 42 CFR 449.10(b)(4)(i)(C)(1977). (Although the relevant time period includes 1975 and 1976, we cite, for convenience, the 1977 edition of the Code of Federal Regulations, which recodified but did not appear to make any material change in substance in the regulations effective during the period in question.) The execution of the provider agreement is contingent upon certification of the SNF by an agency designated as responsible for licensing health institutions in the state (state survey agency), in this case, the Department of Health. 42 CFR 449.33(a)(6).

The Medicaid survey conducted by the Department of Health to determine if the facility met all the requirements for participation was not completed until April 1, 1976, according to HCFA, although pages 2 through 20 of the Statement of Deficiencies and Plan of Correction indicates the date to be March 22, 1976. HCFA states that on June 16, 1976, the survey agency indicated on a Certification and Transmittal form that, based upon an acceptable plan of correction, "Emerson was in compliance with applicable Medicaid requirements." The survey agency then certified Emerson for the period July 1, 1976 to December 31, 1976. The single state agency, however, on

November 24, 1975, had issued a provider agreement for the period from November 24, 1975 to April 30, 1976. On April 30, 1976, the agreement was extended to June 30, 1976 "in the absence of a survey report and recommendation from the State Department of Health and/or the Federal Office of Long Term Care concerning the status of your facility meeting Title 19 Medicaid requirements." (Letter dated April 30, 1976 from Chief, Medical Care Administration to Emerson.) Thus, the provider agreement was issued prior to the date of certification of the facility by the state survey agency and for a period that was, in part, not covered by the certification.

Issues Raised by the State

The State contends that the provider agreement was issued only after the single state agency received oral assurance from the survey agency that, based on observations made during a survey which resulted in the licensing of the facility by the State, it appeared that Medicaid certification would follow without difficulty. The State argues that the single state agency's decision to issue a provider agreement at that point was reasonable because the licensing survey incorporated Medicaid standards.

The State argues in its response to the Order to Show Cause that due to a severe shortage of nursing home beds in the State, the single state agency inquired as to Medicaid certification as soon as it became aware that Emerson, a new facility, had been licensed. It asserts that since both state licensure and Medicaid surveys are conducted by the survey agency, the single state agency reasonably relied upon the assurance of the survey agency that, based upon observations made during a licensure survey, Medicaid certification would follow without difficulty and a provider agreement could be issued. The State has provided a copy of a letter dated November 4, 1976 from the Director of the New Jersey Division of Medical Assistance and Health Services to the Director, Office of Long Term Care, Region III, HEW, stating that "the licensing inspection survey utilized the standards required for Medicaid program participation." This letter also indicates that certification was delayed in order to process the facility's request for Title XVIII Medicare certification. That request (which also included a formal request for Medicaid certification) was submitted several months after issuance of the Title XIX provider agreement.

Discussion

The State would not be entitled to FFP during the period November 24, 1975 to June 16, 1976 (see the discussion of HCFA policy regarding the effective date of a provider agreement, below) if the November 24, 1975 provider agreement is determined to be invalid. The definition of a SNF in Section 1861(j) of the Social Security Act (made applicable to the Medicaid program by Section 1902(a)(28) of the Act) requires that, in the case where state law provides for licensing of an institution, the institution be licensed pursuant to state law or be approved by the agency of the state responsible for licensing institutions as meeting the licensing standards as well as certain other standards, e.g. Section 1861(j)(13), (15). The regulations (42 CFR 449.33(a)(1))

also require that, prior to the execution of a provider agreement, the single state agency certify that the facility is in full compliance with the Federal standards prescribed in the regulations. There was no such certification at the time the provider agreement in question was issued. Indeed, at that time, there were numerous instances of non-compliance with Federal standards and no acceptable plan of correction in effect.

The State contends that because of the severe shortage of nursing home beds, the single state agency acted reasonably in issuing a provider agreement to the facility based on the verbal assurances by the state survey agency. The State asserts that certification was not based upon licensure alone, but upon evidence supported by the licensure survey which incorporated Medicaid standards.

The regulations require that the state plan for medical assistance under Title XIX of the Social Security Act must provide that the state survey agency will, in accordance with a written agreement with the single state agency, determine whether a facility meets the requirements for participation in the Medicaid program. The written agreement must specify, among other things, that inspections are to be completed by inspectors surveying the premises and that completed reports are to include notations indicating whether each requirement for which inspection is made, is, or is not satisfied, with documentation of deficiencies. 42 CFR 450.100(c)(2). The State's description of the survey agency's actions establishes that such a procedure was not followed before the provider agreement was executed in November 1975.

The verbal assurance made by the survey agency that a provider agreement could be issued cannot be considered a certification that the facility was in full compliance with the regulations because there is no evidence that the survey agency applied Federal standards for certification as set forth under 42 CFR 449.33(a)(1)(i), 449.33(a) (4)(i)-(iv), 449.33(a)(5),(6),(9) and (10) except for the unsupported assertion to that effect in the November 4, 1976 letter from the State to HEW cited on page 3. Indeed, a survey was not completed until the end of March or April 1, 1976, and when it was completed, many violations of the standards were found. These violations included, among others, a lack of a number of written policies, certain qualified staff members, social services and certain record-keeping procedures. State licensing standards were applied, but Federal standards which must also be applied under the Federal regulations, were not met. In this case, the survey agency could not and did not state that the facility met Federal requirements as of November, 1975. Even if the requirements were met, verbal approvals are not sufficient under the regulations. While the regulations do not explicitly state that certification by the survey agency has to be in writing, a requirement for a writing is implied by the procedures set forth in the regulations. Moreover, the fact that

written documents were later employed by the State in the course of its normal certification process indicates that the State understood a writing to be required.

The State argues that since the Medicaid statute entrusts administration of the Medicaid program to the states, FFP should not be withdrawn without a hearing before the Board on the propriety of the state administrative decision. The State requests a hearing to prove by testimony that, among other things, during the time the provider agreement was in effect there was a severe shortage of nursing home beds, and the single state agency was seeking new facilities to accept Medicaid patients. The State contends that it would present evidence which would tend to show that the single state agency acted reasonably under the circumstances in issuing a provider agreement. The State further contends that it would show at a hearing before the Board that none of the deficient conditions had a serious effect upon the quality of the facility's patient care. The nature of the deficiencies as noted above do not tend to support these statements. Even if the State were to be successful in proving these statements at a hearing, the Board's decision would remain the same. The extenuating circumstances cited by the State do not excuse its failure to comply with the clear terms of a validly promulgated regulation. The Panel therefore denies the State's request for a hearing.

The regulations provide that certification must precede issuance of a provider agreement. According to the Certification and Transmittal form (Form 1539), however, the state survey agency determined that Emerson complied with Medicaid requirements on June 16, 1976, several weeks before the effective date of the certification (Item 19--Date of State Survey Agency Approval). In a recent Federal Register publication pertaining to changes in regulations regarding provider agreements, HCFA stated that "Medicaid's practice was to make participation effective on the date on which it was determined that the provider met all requirements." 45 FR 22933, April 4, 1980. Therefore, based on Agency policy, FFP should be allowed for the cost of services rendered between June 16, 1976 and July 1, 1976.

Conclusion

In view of the foregoing discussion, we conclude that the payments by the State to the Emerson Convalescent Center during the period November 24, 1975 to June 16, 1976 are not eligible for FFP because the provider agreement entered into by the facility and the State for that period was not valid under Federal regulations. Because of the uncertainty created by the record as to the amount that has been disallowed for this facility and because of

our determination that FFP should be made for the cost of services rendered between June 16, 1976 and July 1, 1976, we leave to the parties the determination of the amount of the disallowance which is appropriately sustained in accordance with our stated conclusion.

/s/ Donald G. Przybylinski

/s/ Robert R. Woodruff

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