DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: New Jersey Department of Human Services DATE: December 1, 1980
Docket Nos. 78-126-NJ-HC
78-106-NJ-HC (only portion of disallowance involving the Springview Nursing Home)
Decision No. 137

DECISION

By letter dated November 13, 1978 the New Jersey Department of Human Services (State) appealed an October 12, 1978 determination by the Administrator of the Health Care Financing Administration (HCFA, Agency) to uphold the disallowance of $218,471 in Federal financial participation (FFP) claimed for Title XIX skilled nursing and intermediate care services rendered by the Springview Nursing Home (Springview, facility) during the period October 21, 1975 through March 22, 1976. The appeal was assigned Board Docket No. 78-126-NJ-HC.

Springview is the subject of disallowances in two other cases currently before the Board. Springview is one of several nursing homes which were the subjects of disallowances 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 $428 was denied for skilled nursing services rendered at Springview during the period October 21, 1975 through March 22, 1976. The Board has determined that this $428 disallowance was also included by the Agency in its October 12, 1978 disallowance of $218,471 in FFP for services rendered by Springview. (See schedule accompanying July 11, 1978 letter from Ms. Klein to Mr. Martz, Reconsideration Record [RR], Item 54.) Accordingly the Board has therefore decided to delete the $428 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 $3,353 for services performed at Springview prior to March 22, 1976. This case was assigned Docket No. 78-106-NJ-HC. The Board has determined that this $3,353 was not included in the $218,471 disallowance in Board Docket No. 78-126-NJ-HC. In the interests of expediting these cases and because the disallowances involving Springview concern the same issue of the validity of Springview's provider agreement for an identical period of time, the Board will consider jointly all the disallowances of Springview currently before the Board, in the amount of $221,824 ($218,471 + $3,353).

The record on which this decision is based includes the Reconsideration Record concerning Springview, the applications for review, the Agency's responses thereto, the State's response to an Order to Show Cause communicated by a telephone conference on August 13, 1980, and the parties' responses to additional questions communicated by the Board in another telephone conference on October 22, 1980.

I. Statement of the Case

On October 21, 1975 the State Department of Health, on the basis of a "licensure walk-through," issued to Springview a temporary permit to operate a nursing home. On that same day the State executed a Title XIX provider agreement with Springview for the period October 21, 1975 to April 30, 1976. A survey of the facility for Medicare and Medicaid compliance was conducted on January 12 and 13, 1976. That survey revealed numerous deficiencies in the the operation of Springview, with five conditions out of compliance. A plan of correction was submitted, and a revisit to the facility was conducted on March 22, 1976 that demonstrated the facility had made progress in correcting its deficiencies. The facility was certified on March 22, 1976.

In disallowing $222,824 in FFP claimed for services rendered by Springview during the period October 21, 1975 through March 22, 1976, the Administrator of HCFA held that the provider agreement executed by the State on October 21, 1975 was invalid in that it had been executed without a prior Title XIX survey and certification of the facility by the State survey agency.

The State maintains that its Division of Medical Assistance and Health Services received a handwritten note, consisting of one sentence, on October 28, 1975 from the Acting Director of the State survey agency that Springview "now meets the standards for Medicaid participation" (RR, Item 3). The State argues that this communication was an effective certification under the Medicaid regulations, and that, therefore, the provider agreement executed with Springview was valid.

The central issue presented is whether or not the State properly surveyed and certified Springview, meeting all the requirements of the Medicaid regulations, so that the provider agreement executed on October 21, 1975 was valid for the period October 21, 1975 through March 22, 1976.

II. Applicable Regulations

The Medicaid regulations have been recodified several times in recent years, but for the period in question (October 1975 through March 1976) the applicable regulations are set forth in 45 CFR Part 249 (1975), "Services and Payment in Medicaid 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 survey agency is required to certify that the facility is in compliance with each condition of participation. 45 CFR 249.33(a)(4)(i). The survey agency is also required to perform at least one on-site inspection of a facility during the term of the facility's certification. 45 CFR 249.33(a)(4)(iv). In order for a state to obtain FFP the execution of the provider agreement must be in accordance with the federal regulations. 45 CFR 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 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).

In determining provider eligibility and certification under the Medicaid program the state survey agency is required to use whatever forms, methods and procedures may be designated by the Agency. 45 CFR 250.100(c)(1).

III. Discussion

In an August 13, 1980 telephone conference with the parties, the Board asked the State to show cause in writing why the disallowances for Springview should not be sustained on the basis of a prior Board decision, New Jersey Department of Human Services, DGAB Docket Nos. 78-41-NJ-HC and 78-124-NJ-HC, Decision No. 104, June 9, 1980. In that decision, involving the same parties as this appeal, the Board determined that when the State of New Jersey executed a provider agreement with a nursing facility, the Emerson Convalescent Center, the State survey agency had not certified the facility for Medicaid participation, but, on the basis of a licensing survey, only had orally assured the single State agency that Medicaid certification would follow without difficulty. In sustaining the disallowance of FFP for services provided by the facility and finding that no valid provider agreement was in effect, the Board held, "The regulations provide that certification must precede issuance of a provider agreement." (page 5.)

In its response to the Order the State has attempted to distinguish Decision No. 104 from the facts of the present appeal by noting that, unlike the circumstances of the Emerson Convalescent Center case, the handwritten communication from the State survey agency was a written document and a statement that Springview currently met, not would meet, the standards for Medicaid participation. The State further contended that since the handwritten note was from the Acting Director of the survey agency, the agency responsible for performing both licensing and Medicaid surveys for nursing facilities, it was a "certification" of Springview's ability to participate in the Medicaid program.

These arguments led the Board to seek further information from the parties. In an October 22, 1980 telephone conference the State was asked to explain the inspection process of a licensure walk-through and what standards were applied in such a walk-through. The Agency was asked whether a particular form (Medicare/Medicaid Certification and Transmittal Form 1539) was required to be used by a state survey agency as evidence of certification of a facility for Medicaid participation, or whether any other type of document could be used to evidence certification and what type of information had to be included in that document. The Agency was also asked to provide authority for the proposition that a state survey agency is required to survey a facility before issuing a certification for the facility.

The State replied in the form of an affidavit by the Director of the State survey agency, the author of the handwritten note. The Director stated that, at the time in question, licensure and Medicare/Medicaid certification were separate functions in his agency. The Director also stated that his note purporting to certify Springview was based on information supplied to his office by the licensure inspectors. He further explained the licensure walk-through process, noting that the standards for the areas actually inspected do not differ significantly between licensure and Medicaid certification, but that the areas observed in licensure walk-throughs are fewer.

To the Board's questions the Agency responded that 45 CFR 250.100 gives the Agency's Administrator the authority to designate the use of certain forms to determine Medicaid certification and that a State Survey Agency Manual, in effect during the period in question and sent to the State, instructed the State survey agency to use the Form 1539 as the means of certifying a facility's eligibility to participate in the Medicaid program. As to the necessity of a survey prior to certification, the Agency referred to 45 CFR 249.33(a)(4)(iv) and other regulations requiring a state survey agency to conduct surveys of nursing facilities.

We believe that this case turns on the question of whether the handwritten note was an effective certification for Medicaid purposes. We conclude that it was not. The State has argued that no particular form for denoting the certification of a facility is mandated by regulation, though it has admitted

that it has used Form 1539 as a matter of practice (RR, Item 21). It is apparent from other cases that have been brought before the Board that the accepted and customary method of certifying a facility for Medicaid participation is for a state survey agency to execute a Form 1539. Yet we agree with the State that the use of Form 1539 is not mandated by regulation and that other forms or documents might be employed to certify a facility. Section 250.100 does authorize the Agency's Administrator to designate the use of certain forms, but the State Survey Agency Manual, referred to by the Agency, only states, "Certification and Transmittal Form SSA-1539 is used by the State survey agency to certify its findings . . ." (p. 59.) There are no words placing a mandatory responsibility upon the State to use that particular form to convey certification.

Regardless of whether or not the State Survey Agency Manual is read as mandating the use of Form 1539, it is clear that a state survey agency must communicate certain information in order that a facility be certified for Medicaid participation and that other requirements of the Medicaid regulations are met. The duration of the certification period, the type of facility involved, whether the facility is in compliance with program requirements, and the existence of special conditions are typical of the type of information that should be included on a document evidencing certification of a facility. Such information is routinely furnished on a completed Form 1539. If the State elects not to use the Form 1539, then the State must assume the risk that the means it uses to certify a facility may be questioned by the Agency. A handwritten document by the State survey agency supplying the information described above might be expected to satisfy the demands of the Agency and the requirements of the regulations. A one-line note saying, "Now meets the standards for Medicaid participation" and nothing else, however, is not a reasonable and adequate means of compliance with the regulations on the State survey agency's part. Such a note cannot be held to be an effective certification of Springview.

We do not therefore reach the question of whether the State survey agency's failure to survey Springview for Medicaid compliance before a provider agreement was executed would have nullified that agreement or whether the licensure walk-through could have satisfied the requirements of a Medicaid survey. We do note, however, that the regulations cited by the Agency in support of its position, specifically 45 CFR 249.33(a)(4)(iv), only require that a facility be surveyed at least once during the term of its certification, and not necessarily before the facility is certified for the first time by a state survey agency.

IV. Conclusion

For the reasons stated above we sustain the disallowance of FFP for services rendered at the Springview Nursing Home in the full amount of $221,824.

/s/ Cecilia S. Ford

/s/ Donald G. Przybylinski

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