DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Colorado Department of Social Services
Docket No. 80-140-CO-HC
Decision No. 225

DATE: October 30, 1981

DECISION

On August 7, 1980, the Director, Bureau of Program Operations, Health Care Financing Administration (HCFA, Agency), issued a notification of disallowance to the Colorado Department of Social Services (State), denying $60,471 in Federal financial participation (FFP) for skilled nursing facility (SNF) services rendered at the Stovall Care Center (facility) under the Medicaid program after the expiration of the facility's provider agreement on December 1, 1977.

After the State submitted copies of a provider agreement and a HCFA Certification and Transmittal Form (C&T) for the facility, the Agency on May 20, 1981 reduced the disallowance to $32,267 for services rendered at the facility after December 1, 1977 and prior to April 10, 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, including the parties' responses to an Order to Show Cause issued on September 2, 1981.

Applicable Regulations

The Medicaid regulations in effect for the period in question are set forth in 42 CFR Part 449 (1977), Services and Payment in Medical Assistance Programs.

To obtain FFP for payments made to an SNF, a State must comply with the provisions of 42 CFR 449.10(b)(4)(i)(C), 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. The regulations require that, prior to the execution of a provider agreement and the making of payments, the agency designated pursuant to 42 CFR 450.100(c) (the State survey agency) must certify that the facility is in full compliance with standards prescribed in the regulations. 42 CFR 449.33(a)(1).

The term of an agreement may not exceed twelve months and the effective date of the agreement may not be earlier than the date of the provider facility's certification. 42 CFR 449.33(a)(6). Section 449.33(a)(6) also states:

> [T]he single State agency may extend such term for a period not exceeding 2 months where the survey agency has notified 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 thereby, and that such extension is necessary to prevent irreparable harm to such facility or hardship to the individuals being furnished items or services or that it is impracticable within such provider agreement period to determine whether such facility is complying with the provisions and requirements under the program.

Factual Background

The facility's provider agreement was due to expire on December 1, 1977. On November 30, 1977 the State survey agency, the Colorado Department of Health (CDH), notified the single State agency, the Colorado Department of Social Services (CDSS), that it was requesting an extension of the facility's provider agreement for a period of two months pursuant to §249.33(a)(6); the letter contained three alternative paragraphs, with a checkmark next to the paragraph stating it was impracticable within the provider agreement period to determine the facility's compliance with the program requirements. A paragraph stating that the health and safety of the facility's patients would not be jeopardized by the extension and that such extension is necessary to prevent irreparable harm to the facility or hardship to the patients was not checkmarked. (Application for Review, Exhibit 4.) The State claims that a December 16, 1977 letter from CDSS extended the facility's provider agreement to February 1, 1978. (Application for Review, Exhibit 5.)

Based on a September 13, 1977 survey and subsequent revisits in November and December 1977, CDH notified the facility on January 4, 1978 that it was initiating proceedings to delicense the facility and to not renew its Medicaid certification because of uncorrected deficiencies. According to this notification, the facility's certification would remain in effect until final adverse agency action. (Application for Review, Exhibit 6.) On January 16, 1978 the facility initiated an administrative appeal, under Colorado law, of the delicensure and the nonrenewal of its certification.

On February 24, 1978, CDH, CDSS, and the facility signed an agreement which allowed the facility to remain open. In this agreement, termed a Final Agency Order, the facility agreed that all the deficiencies were corrected by the date the Final Agency Order was signed. (Application for Review, Exhibit 10.) The facility was resurveyed on

March 27, 1978. On April 10, 1978 CDH executed a C&T for the period February 25, 1978 through February 23, 1979. The C&T stated that "all Conditions of Compliance were found to be in compliance," that a plan of corrections for cited deficiencies was acceptable to the State's consultants, and that the conditions in the Consent Decree portion of the Final Agency Order had been met. On April 13, 1978 CDSS executed a provider agreement with the facility for the period February 25, 1978 to February 23, 1979, with an automatic cancellation date of July 10, 1978 unless deficiencies were corrected. Subsequent surveys were conducted in April and June 1978, and the facility was found in compliance.

Parties' Arguments

In its application for review the State argued that the facility's provider agreement was properly extended for two months, even though the November 30, 1977 letter from CDH to CDSS did not check off the optional paragraph indicating that the health and safety of the patients would not be jeopardized. The State contended that 42 CFR 449.33(a)(6) is vague and can be reasonably interpreted as permitting an extension if the health and safety of the patients were not jeopardized or if it were impracticable to determine the facility's compliance with the Medicaid program requirements within the duration of the agreement. Under the State's interpretation of §449.33(a)(6), the fact that one paragraph in the letter was checked, indicating that it was impracticable to determine within the agreement period if the facility was in compliance with Medicaid requirements, meant that the provider agreement was properly extended.

The State further contended in its application for review that the facility's January 16, 1978 appeal of the State's proposed delicensure action and nonrenewal of its Medicaid certification caused the facility's certification to remain in effect, under Colorado law, pending the outcome of an administrative hearing. Final State agency action, the State argued, was concluded on February 24, 1978, and the facility was subsequently given a new provider agreement effective from that date.

In response the Agency contended that the State's reading of §449.33(a)(6) is patently unreasonable. The Agency argued that the regulation clearly states that in order for an extension to be granted, the health and safety of the patients must not be jeopardized. This, according to the Agency, is an absolute requirement and not an alternative reason for granting an extension. The Agency also argued both that it does not believe that a state law which requires a formal hearing prior to termination of a facility's participation in the Medicaid program requires or authorizes FFP during that appeal period, and that the provider agreement had expired when the facility appealed so that FFP was beyond the scope of even MSA-PRG-11 (a Program

Regulation Guide issued on December 20, 1971 by the Commissioner, Medical Services Administration, Social and Rehabilitation Service, the predecessor to HCFA).

Discussion

In its September 2, 1981 Order to Show Cause the Board essentially divided the disallowance period into three distinct periods: December 2, 1977 to January 3, 1978; January 4, 1978 to February 24, 1978; and February 25, 1978 to April 9, 1978.

December 2, 1977 to January 3, 1978

The issue concerning this period is whether the State properly extended the facility's provider agreement. In its Order the Board tentatively concluded that the Agency's interpretation of §449.33(a)(6) is correct. The Board reasoned that under the State's interpretation of §449.33(a)(6) a two-month extension of a provider agreement could be granted even if the health and safety of the patients were endangered as long as the proposed alternative -- insufficient time to determine provider compliance -- was present. Given the placement of the comma before the two disjunctive clauses, the regulation is reasonably read to require both a determination concerning patient health and a determination concerning either of the other circumstances. The regulation does not appear to be vague as the State suggests, but straightforward in declaring that a provider agreement may be extended only if the health and safety of the patients are not put in jeopardy.

In its Request for an Agency Response, the Board asked the Agency whether the State's Exhibit 4 showed substantial compliance with §449.33(a)(6), notwithstanding the lack of a checkmark for the paragraph indicating that the patients' health and safety would not be jeopardized. The Agency responded in the negative, saying that there was no indication in the record that the checkmark was inadvertently omitted, and, more importantly, without the checkmark there was no written communication from the survey agency to the single State agency, as required by the regulations, that the health and safety of the patients would not be jeopardized.

In the Order the Board stated that there was nothing in the record before the Board to indicate that a finding that the patients' health and safety would not be jeopardized was ever made by the State survey agency and the single State agency so notified. The Order then directed the State to show cause why the Board should not sustain the disallowance for the period December 2, 1977 to January 3, 1978 on the grounds that the facility's provider agreement had been improperly extended and that no appeal of the facility's decertification was then

in progress. The Order further directed the State to produce any documentation that would show that the State survey agency had made a finding that the health and safety of the facility's patients would not be jeopardized by an extension of the provider agreement.

In response to the Order, the State submitted an October 2, 1981 affidavit from the person who signed the November 30, 1977 letter from CDH to CDSS. The affidavit stated that it was CDH policy to request an extension of a provider agreement only when the health and safety of the patients would not be jeopardized. The affidavit further stated that a check in the box next to the "health and safety" paragraph was "inadvertently omitted." The State also submitted a September 24, 1981 letter from another CDH official stating that the failure to mark the "health and safety" paragraph was an inadvertent omission, and that "had the patients' health and safety been in jeopardy, we [CDH] would have acted under our summary and/or receiver powers."

The regulations required CDH to determine, prior to the extension of the provider agreement, that the health and safety of the patients were not jeopardized and to communicate that decision in writing to the single State agency. The documents submitted by the State were prepared in 1981 and detail only general policies. These documents are insufficient evidence that there was a contemporaneous finding that the patients' health and safety were not endangered and an actual communication of that finding to the single State agency. The mere assertion some four years later of general CDH policies does not satisfy the regulatory requirements for a facility whose provider agreement was extended in 1977. Even if general CDH policy were sufficient to indicate what occurred, we find the form used by the State in the November 30, 1977 letter deficient in complying with the regulations because the form is phrased in the disjunctive. This suggests that an assurance of the patients' health and safety is only one of the alternative reasons for extending a provider agreement, rather than an absolute requirement. The form itself is inconsistent with a stated policy to extend a provider agreement only when the health and safety of the patients would not be jeopardized and diminishes the weight that might otherwise be given to the statements in the documents submitted by the State that the checkmark next to the "health and safety" paragraph was inadvertently omitted.

The State has not supplied us with any evidence that in 1977 a determination was made that the health and safety of Stovall's patients would not be jeopardized by an extension of its provider agreement. Accordingly, we find that the provider agreement had been improperly extended. As discussed further below, we therefore sustain the disallowance for the period December 2, 1977 to January 3, 1978.

January 4, 1978 to February 24, 1978

In its Order the Board tentatively concluded that the action which initiated the facility's appeal of its decertification was the January 4, 1978 notice from CDH that the facility's Medicaid certification would not be renewed. The Agency has not contested this. Thus, the issue for this period is whether, despite the improper extension of the provider agreement, which had an expiration date of December 1, 1977, the facility's provider agreement continued in effect pending appeal of the decertification under Colorado law so that FFP would be available under MSA-PRG-11.

The State argues that under the Colorado State Administrative Procedure Act (APA) the timely appeal by a facility of a proposed delicensure and decertification continues the facility's certification in effect pending outcome of an administrative hearing. The State contends, "[T]he state agency proposed action in refusing to renew the certification was not effective until the entry of the final agency order affirming said action and the certification continued in effect until such time." (Application for Review, p. 6.) The final agency action, the State continues, was concluded on February 24, 1978.

The Agency argues that "the appeal was not filed . . . until almost two months after the agreement had already expired, a period which could have been encompassed by the regulations if the State had acted properly." (Agency's May 20, 1981 submission, p. 3.) The Agency considers that the "Board's application of PRG-11 to a situation when the agreement had already expired, and an appeal had not yet been taken, goes beyond the scope of even PRG-11." (Agency's May 20, 1981 submission, pp. 3-4.)

There are no statutory or regulatory provisions which explicitly address whether FFP is available during administrative review of decisions to terminate or not renew a facility's participation in the Medicaid Program. MSA-PRG-11 sets out two exceptions to the basic rule that FFP is not available without a current effective provider agreement. Relevant here is the first exception in which FFP is available if "State law provides for continued validity of a provider agreement pending appeal".

The Board recently considered the question of the continued validity of a provider agreement pending a provider appeal under state law in Colorado Department of Social Services, Decision No. 187, May 31, 1981. In that decision, involving the same parties as the present appeal, the Board found that the Colorado APA met the requirements of a "state law" under MSA-PRG-11, so that a decertification action and subsequent appeal resulted in the continued validity of the previous provider agreement and certification during the appeals process. The

Board applied Ohio Department of Public Welfare, Decision No. 173, April 30, 1981 and further found that FFP was available during a provider's administrative appeal for a period up to 12 months, subject to certain limitations, from the date of the provider agreement's termination or nonrenewal. The completion of the appeals process during the 12 month period would end the availability of FFP.

The Board tentatively concluded in the Order that it should look to State law to determine whether this facility's certification and provider agreement continued in effect throughout the provider appeals process, even though the provider agreement was not properly extended.

From its review of the State APA, the Board concluded in Colorado that the term "license" included Medicaid certification. The Colorado decision quotes certain provisions from the State APA also relevant here, including Section 24-4-104(6), C.R.S. 1973, which provides for a hearing before revocation of a license, and Section 24-4-104(7), C.R.S. 1973, which provides that a license up for renewal "shall not expire until such application [for renewal] has been finally acted upon by the agency, and if ... denied, it shall be treated in all respects as a revocation".

The Board stated in the Order:

> It appears that under State law a facility's certification could not expire without final agency action and that if a facility is decertified, as here, the State must treat its decision as a revocation. Accordingly, the Board's preliminary conclusion is that the facility's certification and provider agreement were continued in effect by State law during the administrative appeal process. (page 7.)

The Order noted that while the decertification action and subsequent appeal occurred after the expiration date in the provider agreement, both the State and the facility believed at the time that the provider agreement had been extended to February 1, 1978, and both parties acted within that time frame. The Board stated, "[I]t does not appear warranted to conclude that either the facility or the State was dilatory so that the appeals process should not be treated as occurring under the State APA and within the PRG-11 exception." (page 7.)

The Order tentatively concluded on page 7 that:

> [S]tate payments to the facility from December 1, 1977 until proceedings were initiated by the State under the APA on January 4, 1978 were unrelated to the

> appeals process and were made solely because of the improper extension of the provider agreement. . . . [T]he State's improper extension of the facility's provider agreement precludes payment of FFP from December 2, 1977 through January 3, 1978, so that FFP is only available during the actual administrative appeal process. . . .

The Order then directed the Agency to show cause why the Board should not reverse the disallowance for the period January 4, 1978 to February 24, 1978, the duration of the appeals process, on the basis of the Board's Ohio and Colorado decisions. In its September 17, 1981 response to the Order, the Agency stated that, in view of the analysis in the Order and prior Board decisions, it had nothing further to offer in argument. Accordingly, we reverse the disallowance for the period January 4, 1978 to February 24, 1978.

February 25, 1978 to April 9, 1978

The appeals process was completed on February 24, 1978, so there still remains the question of the availability of FFP for the period from February 25, 1978 to April 9, 1978. The State contends that a provider agreement executed on April 13, 1978 for the period February 25, 1978 to February 23, 1979 effectively covers this time. The Agency contends that a provider agreement cannot be effective prior to certification as shown by a completed C&T; the C&T for this facility was not executed until April 10, 1978.

In its application for review, the State in essence argued that the C&T executed on April 10, 1978 was effective February 25, 1978.

The Board recently decided a case involving a similar issue, Washington Department of Social and Health Services, Decision No. 176, May 26, 1981. The analysis that follows is adopted from that decision. (While Washington concerned intermediate care facilities for the mentally retarded and the other decisions discussed below concerned intermediate care facilities (ICFs), the regulations discussed in these decisions are also applicable to Medicaid-only SNFs.)

The Board in Maryland Department of Health and Mental Hygiene, Decision No. 107, July 2, 1980, considered the applicability of 42 CFR 442.12 (42 CFR 449.33(a)(6) during the period of Stovall's disallowance) to the requirement for certification of an ICF prior to the existence of a valid provider agreement for FFP purposes, and the use of the C&T form for certification. The actual holding in Maryland is that the Agency was not arbitrary in interpreting 42 CFR 442.12(a) and (b) as meaning that a provider agreement can be effective only from the date of a facility's certification as meeting

certain requirements, in view of the Medicaid program's aim to ensure quality care in sanitary and safe conditions. The decision also states that it is the Agency's interpretation that this certification "becomes effective on the date the survey agency indicates its approval by completing a HCFA Form 1539 [C&T]." It was not necessary for the Board to decide whether certification could be effective prior to execution of the C&T form in Maryland, which involved recertification of a facility. Maryland was there contending that when the survey agency signed the C&T forms it could backdate them to the date the prior provider agreements expired. The decision did not reach the issue of whether the date of certification had to be the date the C&T was signed, or whether it could be some earlier date, if all the requirements for certification were then met and certification was manifested in some other manner.

The Board has also said in New Jersey Department of Human Services, Decision No. 137, December 1, 1980, that there was no requirement that a particular form be used by a state survey agency in certifying a facility for Medicaid participation. Thus, the Board concluded in New Jersey that it is possible to certify a facility without having the C&T signed. In order to do so, 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" (p. 5). If the C&T is used, the Agency has not required that there be an actual communication to the single state agency, or to anyone else, to make certification effective. When the form is signed, certification is complete, before anything else is done.

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 find 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 were met, and the survey agency not only so determined, but committed its determination in writing in the form of notification to either the single state agency or the facility. (Washington, p. 5.)

It should be pointed out that neither under Maryland nor under Washington may the "date of certification" of an ICF or Medicaid SNF be backdated. Washington permits the "date of certification" to be earlier than the date the C&T is signed, under certain prescribed conditions. Both Maryland and Washington state that an ICF or Medicaid SNF provider agreement may be backdated to be effective from the date of certification, but not any earlier. Since FFP is dependent upon a valid provider agreement being in in effect, FFP is not available in any case prior to the "date of certification," whatever that may turn out to be for a particular facility.

In its Order the Board stated that it would appear that unless the State can show by clear and convincing evidence that the facility met all the requirements for Medicaid participation and that CDH communicated that finding in writing to either CDSS or the facility prior to April 10, 1978, the earliest date when FFP would be available is when CDH executed the C&T.

The Order directed the State to show cause why the Board should not sustain the disallowance for the period February 25, 1978 to April 9, 1978 on the grounds that the facility was not properly certified as required by the Medicaid regulations. The State was directed to produce documentation that would show that the facility was certified by means other than a C&T as provided for in the Board's Washington decision.

In its response to the Order the State argues that the Consent Decree portion of the February 24, 1978 Final Agency Order complies with the criteria expressed in the Washington decision. The State refers to Paragraph 1 at page 3 of this document as evidence that the facility had corrected all the deficiencies which had been discovered at the facility during prior surveys. This paragraph states in part:

> The facility shall have corrected every deficiency in the deficiency lists of September 13, 1977 and November 11, 1977, by the date of the signature of this stipulation by the parties.

The State contends that the February 24, 1978 signature of the CDH Executive Director on this document is an acknowledgement that as of that date the facility was in compliance with certification requirements. The State adds that if the facility had not been in compliance, the CDH director, by the terms of the paragraph 1 of the consent decree, could not have signed the stipulation for entry of agency order.

As previously stated, the Board in New Jersey said that no specific form must be used for the certification of a facility, but, according to Washington, this certification determination must be established by clear evidence that convincingly shows that all the requirements for certification are met. The document submitted by the State is essentially a recognition by the State that an agreement has been reached that all the deficiencies at the facility are corrected.

It is not, however, a determination by CDH that the corrections have actually been made. The paragraph cited by the State in the Consent Decree continues:

> Validation of correction shall be made by the Department of Health. The validation shall be done on survey document Form SSA-2567 ....

This indicates that, at the time the Consent Decree was signed, there was a future determination to be made that the facility was in compliance with the Medicaid regulations. The Board has previously held that certification cannot be based on mere assertions by a facility that it has corrected deficiencies; the State survey agency must have actual substantiation that Medicaid standards have been met before a facility can be certified. New Jersey Department of Human Services, Decision No. 148, February 2, 1981, p. 5.

In its application for review the State provided a copy of the survey form SSA-2567, dated April 3, 1978. This survey form included a Summary Statement of Deficiencies and a Provider's Plan of Correction. We have no record of this plan of correction being accepted by CDH prior to the execution of the C&T on April 10, 1978. Item 15 of the C&T states in part:

> The plan of correction for deficiencies cited is acceptable to our consultants. The conditions stated in the consent decree portion of the Final Agency Order have been met. The facility <u>now</u> qualifies for participation in the Title XIX program and is recertified for the period indicated in Item 11. (emphasis added)

The provision in the Consent Decree that the deficiencies will have been corrected by the date of the signature of the Consent Decree (February 24, 1978) is not persuasive that the facility was free of deficiencies and in fact certified by CDH by that date, in light of the later acceptance of a plan of correction. The best evidence before us of when the State survey agency actually made a determination that the facility qualified, with an acceptable plan of correction, for Medicaid participation is the completed C&T. We, therefore, sustain the disallowance for the period February 25, 1978 to April 9, 1978.

Conclusion

For the reasons stated above, we sustain the disallowance for the period December 2, 1977 to January 3, 1978, reverse the disallowance for the period January 4, 1978 to February 24, 1978, and sustain the disallowance for the period February 25, 1978 to April 9, 1978. The Agency is directed to calculate the amount of the sustained disallowances. If the State should disagree with that

calculation, it should appeal to the Board within thirty days after receipt of that calculation.

/s/ Norval D. (John) Settle

/s/ Alexander G. Teitz

/s/ Cecilia Sparks Ford, Panel Chair