Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
University Towers Medical Pavilion,	)	Date: September 12, 1996
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-242
	)	Decision No. CR436
Health Care Financing Administration.	)	
	)	

DECISION

In this decision, I grant the motion to dismiss filed by the Health Care Financing Administration (HCFA).[1]

HCFA's motion to dismiss is based on the fact that HCFA issued, then rescinded prior to effectuation, a determination to terminate Petitioner's participation in the Medicare and Medicaid programs. HCFA relies primarily upon the regulation which states that there is a right to a hearing only if the determination contested by Petitioner contains:

> . . . the finding of noncompliance [made by HCFA] leading to the imposition of enforcement actions specified in § 488.406 of this chapter . . .

42 C.F.R. § 498.3(b)(12). Even though termination of a provider agreement is subject to review under 42 C.F.R. § 498.3(b)(12) because termination of a provider agreement is among the enforcement actions specified in 42 C.F.R. § 488.406, HCFA notes in its supporting memorandum that the commentaries to these regulations specifically made the

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[1] HCFA has submitted a motion to dismiss with a supporting memorandum (HCFA Br.) and two exhibits (HCFA Ex. 1 - 2). Petitioner submitted a brief in opposition (P. Br.) without any exhibits. HCFA then filed a reply brief (HCFA Reply). In considering the motion to dismiss, I have made all of the foregoing submissions a part of the record.

hearing rights[2] contingent on the actual imposition of the remedy:

> Comment: Several commenters wanted a right to appeal all deficiencies, even if no remedy was imposed.
>
> Response: We are not accepting this suggestion because if no remedy is imposed, the provider has suffered no injury calling for an appeal.

59 Fed. Reg. 56,158 (1994). Based on the foregoing legal authorities, HCFA contends that Petitioner has no right to a hearing because, by rescinding its earlier determination, HCFA did not actually impose the termination remedy against Petitioner.

Petitioner does not specifically contest the fact that HCFA has rescinded its termination determination. Nor does Petitioner specifically contest HCFA's conclusions concerning the absence of hearing rights on the termination issue. Instead, Petitioner quotes from HCFA's earlier notice letter to argue that, prior to the rescission of the termination decision, HCFA has already taken adverse actions against Petitioner. P. Br., 2. The portion of HCFA's letter quoted by Petitioner is as follows:

> Your facility's noncompliance with Quality of Care (483.25) has been determined to constitute substandard quality of care as defined at § 488.301. Sections 1819(g)(5)(C) and 1919(g)(5)(C) of the Social Security Act, as well as implementing regulations at § 488.325(h), require that the attending physician of the resident who was found to have received substandard quality of care as well as the State Board responsible for licensing the facility's administrator, be notified by the survey agency of the substandard quality of care.
>
> Please note that Federal law, as specified in the Social Security Act at sections 1819(f)(2)(B) and 1919(f)(2)(B), prohibits approval of nurse aide training and competence evaluation programs offered by or in a facility which within the last two years has operated under a § 1819(b)(4)(C)(ii)(II) or § 1919(b)(4)(C)(ii)(II) waiver; has been subject to

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[2] As discussed below, only certain determinations are defined as "initial determinations." If a determination is not defined as an initial determination, then it is not subject to a hearing or to any of the other levels of administrative review specified in 42 C.F.R. Part 498.

> an extended or partial extended survey; has been assessed a civil money penalty of not less than $5,000.00; or, has been subject to a denial of payment, the appointment of a temporary manager, termination or, in the case of an emergency, been closed and/or had its residents transferred to other facilities. As a result of the complaint investigation on February 26, 1996, this provision is applicable to your facility. You will receive further notification from the State.

P. Br., 2 (citations omitted). Petitioner opposes the motion to dismiss also because, in issuing the earlier (now rescinded) determination to end Petitioner's participation in the programs, HCFA's letter had informed Petitioner of its right to request a hearing. P. Br., 1 - 2.

For the reasons detailed below, I reject Petitioner's arguments and grant HCFA's motion to dismiss pursuant to 42 C.F.R. § 498.70(b).

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCL)

Background facts

1. At all relevant times, Petitioner has been a provider of services under the Medicare and Medicaid programs. 42 C.F.R. §§ 498.2, 498.4; HCFA letter dated March 20, 1996 attached to Hearing Request.

2. On February 26, 1996, the Missouri Division of Aging (the State) completed a survey based on a complaint and found that:

> a. Petitioner was not in substantial compliance with the Medicare participation requirements, and
>
> b. Petitioner's compliance posed immediate jeopardy to patients' health and safety.

HCFA Ex. 1.

3. By letter dated February 29, 1996, the State notified Petitioner of the deficiencies found during the February 26, 1996 survey and informed Petitioner that the State was recommending to HCFA the termination of Petitioner's participation in the Medicare and Medicaid programs based on the immediate jeopardy determination. HCFA Ex. 1.

4. Based on the February 26, 1996 survey results and the State's recommendation, HCFA notified Petitioner that:

> a. HCFA would terminate Petitioner's participation in the Medicare and Medicaid programs on March 20, 1996 unless Petitioner eliminated the immediate jeopardy to resident health or safety;
>
> b. Petitioner had an opportunity to question the findings of deficiencies through the informal dispute resolution (IDR) process under 42 C.F.R. § 488.331;
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> c. Because Petitioner's noncompliance with the Quality of Care requirements (42 C.F.R. § 483.25) had been determined to constitute substandard quality of care, sections 1819(g)(5)(C) and 1919(g)(5)(C) of the Social Security Act (Act) require that the State give notice of said determination to the attending physician of the resident who was found to have received substandard quality of care, as well as to the State Board responsible for licensing Petitioner's administrator; and
>
> d. Petitioner was subject to being prohibited from conducting any nurse aide training and competency evaluation programs for a period of two years, and Petitioner would receive further communication from the State on this matter.

HCFA notice letter (undated) attached to Hearing Request.

5. By letter dated March 20, 1996, HCFA notified Petitioner that:

> a. The State had conducted a revisit survey following Petitioner's submission of a credible allegation of compliance;
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> b. The State found that Petitioner had successfully removed the immediate jeopardy to residents; and
>
> c. "Therefore, the facility's participation in the Medicare program will continue uninterrupted."

HCFA notice letter dated March 20, 1996, attached to Hearing Request.

6. On March 25, 1996, Petitioner met with the State and submitted information under the IDR process to question the February 26, 1996 survey findings. HCFA Ex. 2.

7. On April 26, 1996, Petitioner submitted its request for hearing before an administrative law judge to challenge all determinations contained in:

a. The letter, Statement of Deficiencies, and Plan of Correction HCFA issued by HCFA;

b. The February 29, 1996 letter issued by the State; and

c. The Statement of Deficiencies and Plan of Correction issued by the State.

Hearing Request.

8. By letter dated May 7, 1996, the State notified Petitioner that, pursuant to the IDR process, the State had determined that the deficiencies from the February 26, 1996 survey were correctly cited. HCFA Ex. 2.

The regulatory scheme on administrative review

9. Part 498 of volume 42 of the Code of Federal Regulations specifies the right to and procedures for requesting hearings on determinations by HCFA which affect participation in the Medicare and Medicaid programs. 42 C.F.R. § 498.1.

10. A hearing may be requested only by an "affected party" or its legal representative. 42 C.F.R. § 498.40(a).

11. An "affected party" means a provider or other enumerated entity that is affected by an "initial determination" or subsequent determination issued under 42 C.F.R. Part 498. 42 C.F.R. § 498.2.

12. As relevant to this case, an "initial determination" or subsequent determination must be made by HCFA. 42 C.F.R. §§ 498.3, 498.20(a), 498.30, 498.32.

13. Unless the disputed administrative action taken by HCFA is among those specifically enumerated in the regulations, the action cannot be considered an "initial determination" by HCFA and is not subject to the hearing process of 42 C.F.R. Part 498. 42 C.F.R. § 498.3(d).

Petitioner's request for hearing on HCFA's determinations regarding Petitioner's participation agreement

14. As relevant to this case, a provider dissatisfied with an initial determination to terminate its provider agreement is entitled to a hearing before an administrative law judge. 42 C.F.R. § 498.5(b).

15. As relevant to this case, HCFA makes an initial determination subject to the hearing procedures of 42 C.F.R. Part 498 if it makes a finding of "noncompliance leading to the imposition of enforcement actions specified in § 488.406 . . . ." 42 C.F.R. § 498.3(b)(12).

16. "[L]eading to the imposition of enforcement actions specified in § 488.406" (42 C.F.R. § 498.3(b)(12)) means that an enforcement action or remedy specified in 42 C.F.R. § 488.406 was imposed by HCFA. 59 Fed. Reg. 56,158 (1994); Arcadia Acres, Inc., DAB CR424 (1996); Fort Tryon Nursing Home, DAB CR425 (1996).

17. The other regulatory definitions of "initial determination" are not relevant to the facts of this case. See FFCL 1 - 7.

18. Termination of a provider agreement is a remedy or enforcement action specified in 42 C.F.R. § 488.406.

19. Prior to the issuance of its March 20, 1996 notice letter, HCFA had made a finding of noncompliance which was leading to the imposition of an enforcement action specified in 42 C.F.R. § 488.406 against Petitioner. FFCL 4, 15, 16.

20. Prior to HCFA's issuance of its March 20, 1996 notice letter, Petitioner was in receipt of an initial determination within the meaning of 42 C.F.R. § 498.3(b)(12). FFCL 19.

21. HCFA has the authority to reopen and revise any initial determination on its own initiative within 12 months after the notice date of the initial determination. 42 C.F.R. § 498.30, 498.32.

22. An initial determination issued by HCFA is not binding if it has been revised in accordance with 42 C.F.R. § 498.32. 42 C.F.R. § 498.20(b)(3).

23. HCFA's March 20, 1996 letter constituted notice of HCFA's reopening and revision of its earlier determination to end Petitioner's program participation on March 20, 1996. FFCL 5, 20.

24. HCFA's earlier determination to end Petitioner's participation in the Medicare and Medicaid programs by March 20, 1996 had no force or legal effect after HCFA revised said determination in the March 20, 1996 notice letter. FFCL 20 - 23.

25. Petitioner does not have a right to a hearing on the merits of HCFA's prior (now rescinded) determination that Petitioner's participation in the Medicare and Medicaid programs should end on March 20, 1996. FFCL 24.

26. HCFA's March 20, 1996 letter contains no initial determination. FFCL 5, 15, 16; 42 C.F.R. § 498.3(d)(1).

27. The hearing procedures of 42 C.F.R. Part 498 do not apply to any finding by HCFA that a provider has deficiencies but is in compliance with the conditions of participation for the Medicare and Medicaid programs. 42 C.F.R. § 498.3(d)(1).

Petitioner's request for hearing on HCFA's notice on the need to inform the patient's physicians and the State licensure board of the survey results

28. Notifications to physicians or licensure boards are not initial determinations within the meaning of the regulations. See 42 C.F.R. § 498.3(b), (d).

29. Petitioner has no right to a hearing on the merits of whether, due to the survey findings of substandard care given to a patient, the State should provide notice of the findings to the patient's physician and to the State board licensing Petitioner's administrator. FFCL 4c, 28.

Petitioner's request for hearing on HCFA's notice that a ban might be imposed on the provision of nurse aide training and competency evaluations

30. The language of HCFA's notice letter does not support Petitioner's contention that it has suffered actual injury with respect to nurse aide training and competency evaluations. See P. Br., 2 (quoting HCFA's letter).

31. There is no evidence in the record showing whether Petitioner was conducting nurse aide training and competency evaluation programs when HCFA notified Petitioner that it was subject to being prohibited from conducting such programs.

32. There is no evidence in the record showing whether a ban has ever been imposed against Petitioner's conducting nurse aide training and competency evaluations.

33. Even if HCFA had imposed a ban against Petitioner's conducting nurse aide training and competency evaluations, such a ban is not included in the definitions of an "initial determination" and has been expressly designated unreviewable by the regulations. 42 C.F.R. § 498.3(b), 498.3(d)(11).

34. Petitioner has no right to a hearing on the issue of any ban on nurse aide training and competency evaluation HCFA has imposed or might impose. FFCL 33.

Petitioner's request for hearing on the State's letter dated February 29, 1996

35. As relevant to the facts of this case, only an initial or subsequent determination made by HCFA is subject to the hearing procedures of 42 C.F.R. Part 498. 42 C.F.R. §§ 498.3(a), 498.2 (definition of "affected party").

36. To the extent any portions of the State's February 29, 1996 letter were adopted by HCFA, they were adopted in formulating HCFA's now rescinded determination to terminate Petitioner's provider agreement. FFCL 3 - 5.

37. Since HCFA's rescission of the termination decision on March 20, 1996, Petitioner has had no right to a hearing even on those portions of the State's letter dated February 29, 1996 which were adopted by HCFA. FFCL 25, 27, 35, 36.

Dismissal

38. Petitioner has received no initial determination or subsequent determination which is subject to the hearing procedures of 42 C.F.R. Part 498. FFCL 25 - 28, 33 - 37.

39. At present, Petitioner is not an affected party within the meaning of the regulations. 42 C.F.R. § 498.2; FFCL 38.

40. Petitioner is not a proper party and does not otherwise have a right to a hearing. 42 C.F.R. § 498.70(b); FFCL 38, 39.

DISCUSSION

As outlined in the FFCL, there are several related legal principles which control the disposition of HCFA's motion to dismiss.

A hearing before an administrative law judge is part of the administrative review process set forth at 42 C.F.R. Part 498. A provider's right to appeal under 42 C.F.R. Part 498 depends on whether it is an "affected party" within the meaning of the regulations. 42 C.F.R. §§ 498.20, 498.40. An "affected party" means a provider or other entity affected by an "initial determination or by any subsequent determination or decision issued under this part . . . ." 42 C.F.R. § 498.2. Under this definition, a provider's status as an affected party depends in the first instance on whether it has received an "initial determination" within the meaning of the regulations. 42 C.F.R. §§ 498.3, 498.5(b).

At 42 C.F.R. §§ 498.3(b) and 498.5(b), the regulations define with great specificity which determinations issued to providers are "initial determinations" subject to the hearing

process. As relevant to this action, an initial determination must be issued by HCFA. 42 C.F.R. §§ 498.3(a), 498.5(b). Those decisions by HCFA which are not specifically defined to be initial determinations cannot give rise to any hearing rights. 42 C.F.R. § 498.3(d). If a provider receives an initial determination, it becomes an affected party (42 C.F.R. § 498.2) and has a right to a hearing on the initial determination to the forum and in the manner specified by the regulations (42 C.F.R. Part 498, subparts B and D).

However, whether or not a hearing is requested, HCFA has the right to reopen and revise its initial determinations within 12 months. 42 C.F.R. §§ 498.30, 498.32.[3] HCFA has the discretion to reopen and revise its determinations pursuant to an entity's request or on HCFA's own initiative. Id. When HCFA revises its own earlier issued initial determination in accordance with the regulations, the initial determination loses all legal effect. 42 C.F.R. § 498.20(b)(3). HCFA's revised determination becomes binding on the provider, unless HCFA further revises the revised determination or the "affected party requests a hearing before an ALJ. . . ." 42 C.F.R. § 498.32(b)(1). Again, the regulation has specified that a provider's right to a hearing on a revised determination by HCFA depends on whether it is an affected party. Id. Therefore, for the provider to have a hearing right under 42 C.F.R. Part 498, the revised determination issued by HCFA to the provider must meet the same substantive requirements as those specified by the regulations for initial determinations. See 42 C.F.R. §§ 498.3(b), 498.5(b).

In listing which actions taken by HCFA constitute initial determinations, the regulations authorize a provider to request a hearing on the "finding of noncompliance leading to the imposition of enforcement actions specified in § 488.406 of this chapter . . ." 42 C.F.R. § 498.3(b)(12). As explained in the commentaries to the regulations, the Secretary of Health and Human Services rejected the suggestion that there should be a right to a hearing on all findings of deficiencies even if no remedy is imposed because, as she reasoned, "[i]f no remedy is imposed, the provider has suffered no injury calling for an appeal." 59 Fed. Reg. 56,158 (1994). Thus, the regulation codified at 42 C.F.R. § 498.3(b)(12) does not mean that a provider may request a hearing on the findings of deficiencies or noncompliance from surveys when HCFA has not imposed a remedy listed in 42 C.F.R. § 488.406 but has the legal right to

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[3] The prohibitions against issuing revised determinations do not apply to the facts of this case. 42 C.F.R. § 498.30.

impose such a remedy someday in the future.[4] The commentaries to 42 C.F.R. § 498.3(b)(12) are consistent with another subsection of the same regulation, 42 C.F.R. § 498.3(d)(1), which prohibits a hearing when a provider has been found to have deficiencies but has been found also to be in compliance with the conditions of program participation.

My decision to dismiss this case is based on my application of the foregoing regulations and principles to the facts of this case. There is no doubt in this case that, until HCFA issued its revised determination on March 20, 1996, HCFA had determined that Petitioner's provider agreement should be terminated on March 20, 1996. Therefore, Petitioner was, prior to March 20, 1996, in possession of an initial determination under the relevant regulations. Petitioner was entitled to file a request for hearing within 60 days from its receipt of said determination. 42 C.F.R. § 498.40(a)(2). However, on March 20, 1996, HCFA exercised its discretion to revise its initial determinations sua sponte by rescinding its prior termination decision.

I decide in this case, as I did in _____ Acres, that Petitioner's right to a hearing on the termination issue and the underlying survey results was extinguished by HCFA's rescission of its earlier determination to impose the termination action, as well as by the fact that the threatened termination had never gone into effect prior to HCFA's revising its initial determination. That is to say, due to the contents of the March 20, 1996 notice, Petitioner no longer had an initial determination within the meaning of the regulations, and, therefore, Petitioner was no longer an affected party entitled to request a hearing as of March 20, 1996. Since no remedy or enforcement action within the meaning of 42 C.F.R. § 488.406 was ever effectuated by HCFA, Petitioner cannot be viewed as having suffered the harm or injury contemplated by 42 C.F.R. § 498.3(b)(12). See FFCL 15, 16.

As indicated in FFCL 28 - 33, I have rejected Petitioner's arguments concerning the alleged harms caused by the notification requirements of the statute and the possibility that a ban might be imposed against Petitioner's conducting nurse aide training and competency evaluations. Petitioner appears to have interposed these allegations of harm in response to HCFA's citation to the commentaries for 42 C.F.R. § 498.3(b)(12). However, as explained above, the

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[4] As in _____ Acres, DAB CR424, at 2, n.2, my legal interpretations would permit Petitioner to obtain a hearing in the future if HCFA actually imposes a remedy listed in 42 C.F.R. § 488.406 based on the unadjudicated findings of noncompliance which underlie Petitioner's present action.

commentaries referred to harm or injury in order to clarify the phrase "finding of noncompliance leading to the imposition of enforcement actions specified in § 488.406 of this chapter," which is contained in 42 C.F.R. § 498.3(b)(12). The existence of harm or injury to Petitioner, standing alone, does not give rise to hearing rights in this forum. The notification requirements and possible ban on nurse aide training and competency evaluations are not listed as initial determinations in the regulations. 42 C.F.R. §§ 498.3(b), 498.3(d)(11). Therefore, they cannot be adjudicated at hearing or otherwise contested by Petitioner under 42 C.F.R. Part 498, even if HCFA has acted or caused injury to Petitioner.

With respect to the portion of Petitioner's hearing request which seeks to contest the contents of the State's letter dated February 29, 1996, I note that a State's determination does not generally give rise to hearing rights under 42 C.F.R. Part 498. To the extent HCFA has adopted the State's findings from its February 29, 1996 letter, HCFA did so in deciding to terminate Petitioner's provider agreement on March 20, 1996. FFCL 3, 4. Since HCFA has decided not to terminate Petitioner's provider agreement, there is no initial determination or subsequent determination which would permit Petitioner to challenge the contents of the February 29, 1996 letter adopted by HCFA. FFCL 36.

CONCLUSION

I conclude that Petitioner has not received any initial determination or subsequent determination that gave rise to hearing rights in this case. Therefore, Petitioner is not an affected party within the meaning of the regulations.

Accordingly, I dismiss the hearing request with prejudice on the basis that "[t]he party requesting a hearing is not a proper party or does not otherwise have a right to a hearing." 42 C.F.R. § 498.70(b).

/s/

Mimi Hwang Leahy

Administrative Law Judge