DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Utah Department of Health
Docket No. 80-160-UT-HC
Decision No. 168

DATE: April 30, 1981

DECISION

This decision involves an appeal by the State of Utah Department of Health (State) from a penalty disallowance of $114,789.24, made by the Health Care Financing Administration (Agency) pursuant to Section 1903(g) of the Social Security Act (the Act) for the quarter ending December 31, 1979. The penalty disallowance was made after the Agency conducted a validation survey, as required by Section 1903(g)(2) of the Act, and determined that the State was unable to establish that timely reviews were conducted at four facilities, as required by Section 1903(g)(1)(D) of the Act. The Agency examined the documentation submitted to the Board by the State at the time of its appeal, found it satisfactory for two of the facilities under the utilization control requirements of Section 1903(g), and modified the disallowance to $57,394.62. We conclude that the disallowance, as modified, should be reversed because the State's showing meets the requirements of Section 1903(g)(4)(B), which provides an exception to the requirements of Section 1903(g)(1)(D) for purposes of a satisfactory showing under the Section.

This decision is based on the State's application for review, the Agency's response to the appeal, and the parties' responses to the Board's Order to Show Cause, issued January 27, 1981. We have determined that there are no material facts in dispute which a conference or hearing would help resolve, and the State waived the opportunity for an informal conference, extended by the Board in the Order to Show Cause.

Statement of the Case

Section 1903(g) of the Act requires that the State agency responsible for the administration of the State's Medicaid plan under Title XIX of the Act show to the satisfaction of the Secretary that there is an "effective program of control over utilization of" long-term inpatient services in certain facilities, including intermediate care facilities (ICFs). This showing must be made for each quarter that the federal medical assistance percentage (FMAP) is requested with respect to amounts paid for such services for patients who have received care for 60 days in ICFs, or the FMAP will be decreased according to the formula set out in Section 1903(g)(5). The satisfactory showing "must include evidence that" the State has an effective program of medical review of the care of patients in these facilities (Section 1903(g)(1)(D)). Independent professional review teams must review and evaluate the professional management of each case at least annually, including the care provided to the patients, the adequacy of

available services, the necessity and desirability of the patients' continued placement in the ICF, and the feasibility of meeting the patients' health care needs through alternative services. The teams' findings and recommendations are to be put in full reports (Sections 1903(g)(1)(D) and 1902(a)(31) of the Act).

The State's independent professional review reports normally consist of three separate forms: (1) Form H-12, a listing of Medicaid patients in a facility, with notations concerning the appropriate level of care for each patient, (2) Form 15, "Medical Review Team's Nursing Facility Report," which identifies deficient areas of service in a facility, and (3) Form 5, Patient Care Profile, a 7-page review of individual patients and their care.

During the quarter ending December 31, 1979, a special study was conducted by the State's Division of Aging. The Division was aided in this study by the members of the independent professional review team that conducts the medical reviews. The record does not show the total number of facilities included in that study, but both parties state that the two facilities concerned in this appeal were included in the special study. An experimental form (10-A) was completed during this study for the two facilities, but Forms 5 and 15 were not completed during that quarter. Independent professional reviews were conducted in these two facilities on February 19 and 27, 1980, and the three forms regularly used were completed at that time.

The Agency conducted an onsite survey in March 1980 to verify that independent professional reviews had been performed at least annually in facilities whose reviews were due during the quarter ending December 31, 1979. The Agency determined that the State had not established that timely reviews had been performed in the two facilities with which this decision is concerned.

DISCUSSION

The issues here are whether the studies performed in December 1979 in the two facilities and the resultant reports meet the statutory and regulatory requirements for independent professional reviews and reports, and, if not, whether the State's showing is satisfactory under the provisions of Section 1903(g)(4)(B).

Sufficiency of the December 1979 Review and Report

Both the statute and the regulations require that an inspection be made at least annually. Action Transmittal HCFA-AT-77-106, dated November 11, 1977, notified the states that the Agency's previous policy regarding the timing of annual reviews was changed by the enactment of Pub. L. 95-142 on October 25, 1977. Thus, HCFA-AT-77-106, at pages 3-4, stated:

> P.L. 95-142 relaxes the previous standard of timeliness. Under 1903(g) as modified by P.L. 95-142, effective with quarters beginning on or after January 1, 1977, a MR or PR will be timely if it is conducted by the end of the anniversary quarter of the facility's entry into the program or of the last prior review. 1/

According to the record, the two facilities had last been reviewed on December 4 and 18, 1978. Thus, the reviews were due by the end of December 1979.

The record does not reflect the exact amount or nature of the input that the independent professional review team had into the special study. The Agency phrases the issue of whether the study performed in the two facilities in December 1979 constituted an independent professional review as two questions - the intent of the State that the study be an independent professional review, and the sufficiency of the forms constituting the alleged independent professional review report (Response to the Appeal, January 9, 1981, page 11). Neither the statutory provision nor the regulations refer to the intent of the State in conducting reviews; however, the key elements of a review appear to be the composition of the review team, as set out in 42 CFR 456.602 and 456.614, and the findings and recommendations of the team, as reflected in their report. Thus, the issue here is whether the team's report, which consists solely of the experimental Form 10-A, sufficiently reflects the findings and recommendations of the team, and, therefore, establishes that timely reviews of the facilities were made.

The requirements of Sections 1903(g)(1)(D) and 1902(a)(31) have been discussed above. Among the specific findings the team must make are whether the services are adequate to (1) meet the health, rehabilitative and social needs of each recipient, and (2) promote his maximum physical, mental and psychosocial functioning (42 CFR 456.609, 456.610). The team must report its observations, conclusions and recommendations concerning the adequacy, appropriateness, and quality of all services provided in the facility or through other arrangements, including physician services to recipients, and must also report specific findings about individual recipients in the facility (42 CFR 456.611). There are no written requirements pertaining to the use of particular forms or to the modification of forms. Whatever forms are used, it is their content that is important. The question is whether Form 10-A provides the requisite information.

It is the Agency's position that Form 10-A does not contain information necessary to determine the adequacy of individual patient care nor the facility's success in providing the necessary care. We agree. Form 10-A contains almost no information about the adequacy of individual patients'

1/ This policy was codified at 42 CFR 456.652(b), effective December 31, 1979.

care. The form (unlabelled) completed by the Division of Aging (Exhibit A) contains information about the patient's functional and mental status, but not about the care received. Although the State maintains that Form 10-A, "when read along with the attachments referred to ... as Exhibits C through F, [of the State's Response to the Order to Show Cause] demonstrates that services available to each patient were adequately inspected" (Response to the Order to Show Cause, March 2, 1981, page 9), there is little specific information about individual patients in those attachments. Exhibits C and F are general guidelines developed in the special study referred to above and concern services provided at various levels of care; they do not provide any information about specific patients or facilities. Exhibits D and E are Forms H-12 completed for the two facilities. Form H-12 merely lists the Medicaid patients in a facility, with a notation of the appropriate level of care for each patient. There is no other information on the form regarding individual patients or individual facilities. Therefore, we conclude that the report made by the review team in December 1979, consisting only of Form 10-A, does not meet the statutory and regulatory requirements for a report of an independent professional review, and therefore, that timely and satisfactory independent professional reviews of the facilities were not made.

Sufficiency of State's Showing Under the Statutory Exception Provided in Section 1903(g)(4)(B)

Section 1903(g)(4)(B) says:

> The Secretary shall find a showing of a State with respect to a calendar quarter under paragraph (1), to be satisfactory under such paragraph with respect to the requirement that the State conduct annual onsite inspections in mental hospitals, skilled nursing facilities, and intermediate care facilities under paragraph (26) and (31) of section 1902(a), if the showing demonstrates that the State has conducted such an onsite inspection during the 12-month period ending on the last date of the calendar quarter --
>
> (i) in each of not less than 98 per centum of the number of such hospitals and facilities requiring such inspection, and
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> (ii) in every such hospital or facility which has 200 or more beds,
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> and that, with respect to such hospitals and facilities not inspected within such period, the State has exercised good faith and due diligence in attempting to conduct such inspection, or if the State demonstrates to the satisfaction of the Secretary that it would have made such a showing but for failings of a technical nature only. 2/

2/ The Agency published its final regulation implementing this provision at 44 FR 56338, October 1, 1979. The regulation became effective December 31, 1979 and is codified at 42 CFR 456.653. The regulation states:

Under Section 1903(g)(4)(B), if the State shows that it conducted a timely inspection in 98% of the facilities requiring inspection and in every facility having 200 or more beds, its showing is satisfactory if it shows with respect to the facilities not inspected that it exercised "good faith and due diligence in attempting to conduct such inspection(s)." The Agency's interpretation of the "good faith and due diligence" exception, expressed in HCFA-AT-77-106, dated November 11, 1977, pages 6-7, referred to situations "clearly beyond the State's control." This interpretation was codified at 42 CFR 456.653(a)(3), effective December 31, 1979. In the preamble to this, published at 44 FR 56336, October 1, 1979, the Agency notes that such an exception would be available where a state failed to review some facilities "because of circumstances beyond the State agency's control which could not have been anticipated." Under such a construction of "good faith", the circumstances of this appeal do not meet the good faith exception.

On the other hand, the State's action does fall within the "technical failings" exception. Ohio Department of Public Welfare, Decision No. 66, October 10, 1979, interprets the statute so that a state need not meet the 98% requirement in order to be excused by a technical failing. The Agency's statement of the exception, as expressed in the preamble to the final regulation, 44 FR 56336, October 1, 1979, also makes this interpretation of the provision, although it further confines that interpretation by requiring that the 98% standard be met within 30 days after the close of the quarter.

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2 cont./

The Administrator will find an agency's showing satisfactory, even if it failed to meet the annual review requirements of §456.652(a)(4), if --

(a) The agency demonstrates that --

(1) It completed reviews by the end of the quarter in at least 98 percent of all facilities requiring review by the end of the quarter;

(2) It completed reviews by the end of the quarter in all facilities with 200 or more certified Medicaid beds requiring review by the end of the quarter;

and

(3) With respect to all unreviewed facilities, the agency exercised good faith and due diligence by attempting to review those facilities and would have succeeded but for events beyond its control which it could not have reasonably anticipated; or

(b) The agency demonstrates that it failed to meet the standard in paragraph (a)(1) and (2) of this section by the close of the quarter for technical reasons, but met the standard within 30 days after the close of the quarter. Technical reasons are circumstances within the agency's control.

For the quarter in question here, however, it was possible for the State to make a satisfactory showing even though it did not meet the 98% standard by the end of the quarter if it were excused by a technical failing because the Agency's regulation was not yet in effect (see the discussion below). Neither party has pointed to a statutory or Agency definition of technical failings. HCFA-AT-77-106 cited the only pertinent legislative history, which stated that technical noncompliance would include instances where a state reviewed patients in most facilities on time with the remaining facilities reviewed "several weeks after the deadline for completion of all reviews" (S. Rep. 95-453, September 26, 1977, p. 41). The Action Transmittal went on to say:

> This provision thus gives the Secretary some limited discretion to find satisfactory a showing that indicates that all facilities have been reviewed since the beginning of the annual period ending on the last date of the showing quarter, although some facilities were not reviewed until after the end of the showing quarter.

Here the State actually performed a review but was unsuccessful in complying with some aspects of the reporting requirements. There was a follow-up review that met all requirements several weeks after the end of the quarter in which a review was due. We conclude that these circumstances can be construed as a "technical failing." Within several weeks of the close of the quarter, the State had not only met the 98% standard, it had performed 100% of the required reviews.

The Agency invokes its regulation, 42 CFR 456.653(b), which provides that where a state does not meet the 98% standard due to technical failings, its showing will be considered satisfactory if it meets the standard "within 30 days after the close of the quarter." This regulation did not become effective until December 31, 1979, however, and did not apply during the quarter for which the reduction was made. The Agency argues that it had previously expressed this policy concerning the thirty-day limit in its Notice of Proposed Rulemaking (43 FR 50925, November 1, 1978) and in HCFA-AT-77-106. We do not find this argument persuasive. HCFA-AT-77-106 simply says "For example, the Secretary could find satisfactory a showing for the quarter ending December 31, 1977 which showed that all facilities had been reviewed since January 1, 1977, although some reviews had not been completed until January 1978." This statement is, by its own words, merely exemplary. It can hardly be taken as a statement of the maximum amount of time allowable to complete a missed or unsuccessful review under the exception. As for the Notice of Proposed Rulemaking, the language in the paragraph concerning the technical failings exception, which is phrased in terms of proposals and future application, shows that the thirty-day limit was simply a proposal of future policy until finally promulgated. There is no basis for concluding that such a restriction would be effective prior to final promulgation of the rule, particularly because the statutory language does not mention a time limit by which the 98% standard must be met. The preambles to both the NPRM and the

Notice of a Final Regulation (44 FR 56335, October 1, 1979) quote the legislative history's phrase "several weeks." The word "several" is, of course, indefinite. Webster's Third New International Dictionary defines it as "being more than two but fewer than many." This does not mean, of course, that the State could meet the "technical failings" exception by completing a review any time it wished. Clearly it was bound to a reasonable standard. In the absence of an effective regulation or other definitive statement of currently applicable policy by the Agency, this Board will look to Congressional intent and reason to determine the standard. Where the State conducted a review within the quarter but was technically unsuccessful in its attempt to meet the reporting requirements, satisfactory review of the facilities, within several weeks of the end of the anniversary quarter, should be deemed a compliance with the statute, in the absence of a promulgated regulation or other requirement binding on the State during the period in question. Thus, we conclude that the State has met the requirements of the exception provided in Section 1903(g)(4)(B).

Further support for this conclusion is provided by the possibility of a finding that the State actually met the 98% standard within the required time period, since the percentage of reviews made was 97.6% (Agency's Response to the Order to Show Cause, March 2, 1981, page 7). It is standard practice in a variety of contexts to round off a fraction to the nearest whole number. See e.g., M. R. Spiegel, Schaum's Outline of Theory and Problems of Statistics, page 2. The Agency admits that the State's rate of success was very close to 98% (Response to the Order to Show Cause, March 2, 1981, page 7). Where the Agency has not articulated a policy on whether a fractional variance of 98% may qualify a state for the exception, and because a penalty statute should be construed in favor of the party against whom the penalty is to be imposed, it is possible to conclude that 97.6% is the functional equivalent of 98%. Such a conclusion is supported by the legislative history of the provision which says:

> This provision was included because HEW has announced penalties on States which failed to review only two or three homes out of hundreds of homes subject to review within the annual time limit. In the light of the Secretary's position that HEW has no discretion in determining that the requirements of the law have been met, the Committee has provided a standard of reasonableness in the bill. (H. Rep. 95-393, Part II, 85, July 12, 1977, reprinted in 1977 U.S. Code Cong. & Ad. News 3088.)

Conclusion

We conclude that the State failed to meet the regulatory report requirements for a timely independent professional review; however, we also conclude that the review which failed to meet the statutory standard,

combined with the successful review completed in February 1980, falls within the statutory exception expressed in Section 1903(g)(4)(B). Therefore, the disallowance should be reversed.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

/s/ Alexander G. Teitz, Panel Chair