DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Georgia Department of Medical Assistance DATE: June 30, 1981
Docket Nos. 79-235-GA-HC
80-53-GA-HC
Decision No. 192

DECISION

These are two appeals by the Georgia Department of Medical Assistance (Georgia, State) from disallowances by the Health Care Financing Administration (HCFA, Agency) of Federal financial participation (FFP) in the cost of services to Medicaid recipients under Title XIX of the Social Security Act. Both disallowances cover claims submitted by Georgia for the quarters ended September 30, 1977 through March 31, 1979. 1/

Docket No. 79-235-GA-HC involves the Briarcliff Haven Nursing Home (Briarcliff). The November 21, 1979 disallowance is for $244,892 FFP.

Docket No. 80-53-GA-HC involves the Ansley Pavilion Nursing Home (Ansley). The February 20, 1980 disallowance is for $443,074 FFP.

Issues

There are two issues in these appeals:

1) Whether Georgia law provided for continued validity of the provider agreements pending appeals by Briarcliff and Ansley from the expiration and nonrenewal of their provider agreements; and
2) If so, is the State entitled to FFP for payments to the facilities during these appeals?

The Board here decides that Georgia law does effectively provide for such continued validity and that the State is entitled to FFP for 12 months from the expiration of the respective provider agreements.

1/ The 79-235 disallowance covers the March 31, 1979 quarter only through January 31, 1979 (intermediate care services) and February 12, 1979 (skilled nursing services).

This decision is based on the appeals; HCFA's responses; documents filed by Georgia January 12, 1981 in No. 79-235 in response to the Board's request of October 23, 1980; the Order to Show Cause issued October 16, 1980 for these and related appeals; responses by Georgia and HCFA to that Order; a transcript of an informal conference February 11-12, 1981; and HCFA's post-conference submissions.

Background

On May 31, 1977, provider agreements between Georgia and Briarcliff and Ansley expired. Both facilities had been surveyed by the State in January 1977, had been found to have deficiencies, and had submitted plans of correction which had not been accepted by the State.

On May 5, 1977, Briarcliff sought administrative review of the State's decision not to recertify. On May 24, 1979, the Georgia Department of Human Resources (GHR) issued its "final administrative decision" that Briarcliff "may not be recertified as a Medicaid Provider." Appeal, Exhibit D, pp. II, V. Briarcliff then sought review in the State Superior Court of Dekalb County. By order dated August 10, 1979, the court stayed the effective date of the GHR decision and directed the State to continue medical assistance payments to Briarcliff until final action by State courts.

Although Briarcliff was not certified, the State signed a "Nursing Home Provider Agreement" with it on June 21, 1977; and on June 6, 1978, a "Statement of Participation" in the Georgia Medical Assistance Program. The former was to expire June 30, 1978; the latter, June 30, 1979. Appeal, Exhibits H and I.

On or about May 1, 1977, Ansley Pavilion also sought administrative review of its decertification. As part of that review, Ansley received a hearing August 12-16, 1977. The record was closed August 29, 1977, and a decision rendered in favor of the State survey agency December 1978. On February 9, 1979, the Commissioner, GHR, overturned that decision because it was not rendered within 30 days of the close of the record as required by Georgia law. Georgia Administrative Procedure Act, Georgia Code 3A118. Response of HCFA to appeal, Exhibits D and E.

The State executed provider agreements with Ansley in June 1977 and June 1978, without the facility being certified. Notification of Disallowance, p. 2. Ansley was resurveyed by GHR May 8-9, 1978, and deficiencies found, but no certification determination made because GHR saw "no point in processing another survey with essentially the

same deficiencies [as January 1977]." Letter from the Director, Standards and Licensure Section, GHR, to the Director, Division of Survey and Certification, Bureau of Health Standards and Quality, HCFA, set out in HCFA Response, Exhibit A, p. 2.

Discussion

HCFA contends that it is not authorized to pay FFP for the period involved in these cases because even though the State executed provider agreements with these facilities, those agreements were invalid because they were not based on certification. Georgia does not dispute the certification requirement but argues that it was met by operation of State law keeping the prior certification in effect pending administrative review of decertification.

MSA-PRG-11 (PRG-11), a December 1971 Program Regulation Guide issued by the predecessor of HCFA, sets out the basic rule that FFP is not available if a facility does not have a currently effective [i.e., valid] provider agreement, but notes two exceptions:

1. A facility is on appeal before an administrative agency and "State law provides for continued validity of the provider agreement pending appeal."
2. A facility is upheld on appeal and "State law provides for retroactive reinstatement of the agreement."

Tab F, Order to Show Cause.

HCFA contends that even if the State is required to continue payments, FFP is not authorized. However, in Ohio Department of Public Welfare, Decision No. 173, April 30, 1981, the Board held (p. 14) that PRG-11 had not been nullified, repealed, or amended, applying it there to situations where a facility appeals and a court orders the state to continue payments. In Colorado, supra, the Board concluded (p. 7) that its Ohio holding also applied to an appeal under the Colorado Administrative Procedure Act.

Georgia law provides for continued validity

These cases involve the first of these two PRG-11 exceptions. Georgia argues that under State statutes and regulations allowing a provider to appeal a threatened termination, the State may not deny payments to the facility until after a hearing and a "final" administrative decision (which may be stayed by judicial action). 79-235 Appeal, p. 3; 80-53

Appeal, pp. 1-3. HCFA contends that the provision in §350-4-.01(1)(c) of the Rules of the Georgia Department of Medical Assistance providing for a hearing "when a person or an institution...has been terminated as a provider" means a post-termination rather than a pre-termination hearing. HCFA also argues in Ansley, that the laws and regulations cited by Georgia do not state, or even imply, that the State is obligated to continue payments. HCFA response in 80-53, p. 6.

HCFA's argument conflicts with the position taken earlier by HEW in Briarcliff Haven, Inc. v. Department of Human Resources, Georgia, 403 F. Supp. 1355, 1360-61 (N.D. Ga. 1975) that a provider does have "an opportunity for a pretermination hearing under the Georgia Medicaid program." The court agreed with HEW (and Georgia) that §502 of the Nursing Home Services Manual (GHR) requires a pretermination hearing. Id. at 1363, 1364.

Further, in its response in 79-235 (Briarcliff), HCFA did not dispute that "state law requires [Georgia] to continue making payments to the nursing home." Response, p. 10, n. 11. In that case Georgia cited, in addition, §3A-119 of its Administrative Procedure Act. That section provides, in (b):

> When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency...

Georgia also cites a companion provision, §290-1-1-.01(k) of the GHR Rules, defining license as "any Department permit, certificate, approval, registration or similar form of permission with reference to any activity of continuing nature..." Appeal, Exhibit B.

The Board dealt with provisions of Colorado law very similar to Georgia's in Colorado Department of Social Services, Decision No. 187, May 31, 1981, holding (pp. 6-7):

> While the term "provider agreement" is nowhere mentioned in the State's APA, we consider it significant that the APA, at 24-4-102(7), specifically defines "license" as including any certificate issued by a State agency. From this we conclude that a Medicaid certification, the basis for a provider agreement, falls within the APA definition

of "license." In addition, the APA is used in Colorado for the purposes of appealing a Medicaid decertification. We thus find that, where Medicaid certification is at issue, the Colorado APA meets the requirements of a State law for the purposes of the first part of PRG-11. This case is distinguishable from that decided in Nebraska Department of Public Welfare, Decision No. 174, April 30, 1981. In that case the Board held that the PRG-11 exceptions were not applicable to Nebraska law which provides for the continued validity of licenses pending appeal, but is silent as to certifications. The Nebraska appeals pertained solely to specific state licensing requirements, and were not regarded as appeals of Medicaid decertifications.

Looking at the Georgia statutory and regulatory scheme as a whole, we conclude that it effectively continues Medicaid certification and the provider agreement beyond the initial termination or expiration. Thus provider appeals in Georgia meet the PRG-11 requirement for FFP because State law provides for continued validity of the provider agreement pending appeal.

Application of PRG-11

We find here that FFP is authorized, pursuant to PRG-11 and the Georgia statutory and regulatory provisions discussed above, until May 31, 1978 -- 12 months after expiration and nonrenewal. In Ohio and Colorado the Board held that the part of PRG-11 relevant here limited the availability of FFP to no more than "12 months following nonrenewal or termination or until the next survey/certification cycle, whichever comes first." There being no earlier certification determination in these cases, the full 12 months is available, but no more. 2/

Conclusion

In summary, we uphold the disallowances for June 1, 1978 through the quarter ending March 31, 1979. We reverse the disallowances for the

2/ As noted in the Background statement, Ansley was surveyed May 8-9, 1978. A certification decision was not made because the same deficiencies were found. Even if we regarded this as constructively a decision not to certify, the letter conveying that decision is dated September 14, 1978--beyond the 12-month period. See HCFA response in 80-53, Exhibit A.

quarter ending September 30, 1977 through May 31, 1978. Because the disallowances are based on quarterly claims and June 1 falls during a quarter, HCFA will have to calculate the amounts.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

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