

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: Maryland Department of Health
and Mental Hygiene
Docket No. 78-45-MD-HC
Decision No. 85

DATE: February 28, 1980

Stephen J. Sfekas, Assistant Attorney General, and Henry E. Schwartz, Special Attorney, for the Maryland Department of Health and Mental Hygiene. Robert A. Dublin, Attorney, and Jo Ann Abramson, Legal Intern, HEW Office of the General Counsel, Health Care Financing and Human Development Services Division, for the Health Care Financing Administration.

DECISION

This is the final step in the reconsideration process provided in Section 201.14 of Title 45 of the Code of Federal Regulations, implementing Section 1116(d) of the Social Security Act, with the Chairman of the Departmental Grant Appeals Board substituted for the Administrator, Social and Rehabilitation Service (SRS) pursuant to the transfer of functions of March 6, 1978 (43 FR 9266-7). A new Chairman was appointed February 25, 1980, just prior to the issuance of this decision. To remove any doubt as to my authority to decide this matter, the new Chairman, as authorized in the transfer of functions, has made a confirmatory delegation to me of that responsibility.

The State, rather than electing review under 45 CFR Part 16, chose to continue to proceed under the Section 201.14 procedures, as modified, for purposes of reconsideration of a decision issued May 24, 1978, by the Administrator of the Health Care Financing Administration (HCFA), disallowing \$70,022 in Federal financial participation (FFP) in expenditures claimed under Title XIX of the Social Security Act (Medicaid) for the period October 1, 1975 to December 31, 1976, for sterilization services provided to individuals between the ages of 18 and 21 years. It is not challenged that the individuals in question had in fact given informed consent to the sterilizations performed, and were legally capable under State law to give such consent.

Under the transfer of functions, the State was entitled to a conference with the Board Chairman, and, after appropriate notice and the filing of preconference briefs, a conference was held on August 7, 1979. An opportunity to submit post-conference briefing was afforded to both parties, but only HCFA chose to file such a brief.

This case presents an example of the all too frequent situation where Departmental policy which has evolved over a period of time becomes so established in the minds of agency officials that they rely on it as a basis for disallowance of costs incurred during a period when the

Department was considering various options and had not yet clearly committed itself to that policy as a program requirement. The officials here were apparently under the impression that guidelines published in 1973 had imposed a policy of denial of Federal funding for sterilizations of individuals between the ages of 18 and 21 (even where those individuals have given and are legally capable of giving consent under State law). These guidelines, while they did direct agency heads to withhold FFP in sterilizations of individuals under age 21 pending publication of final regulations aimed at insuring voluntary consent, were not a rule binding on the states. Following publication of the guidelines, HEW fluctuated between using 18 or 21 as the critical age for Federal funding of sterilizations, and, even then, did not seek to deny funding below the cutoff age where certain safeguards were met.

HCFA now claims that the Department did adopt a binding policy of outright denial, using age 21, by publishing a preamble statement issued in 1974. Although the text of the final regulation which this statement accompanied merely required consent legally effective under state law, HCFA contends that this position is modified by the preamble, which it construes as a rule prohibiting funding. This takes a strained reading, but HCFA argued in the conference before me that any ambiguities should be excused as a mere failure in draftsmanship. There are reasons for not accepting HCFA's position, however.

HCFA has not explained the policy as one which is required by the relevant statute or case law, but as one relating to the Secretary's authority to provide for the efficient administration of the program by establishing a uniform minimum age for purposes of Federal funding. Establishing a minimum age for such purposes, while within the Secretary's authority, nevertheless means influencing through the Federal pursestrings an area traditionally reserved for the states. Given this context and the further consideration that the agency heads were specifically directed to promulgate sterilization policy through notice of proposed rulemaking leading to final regulations, costs allowable under the terms of a final regulation should not be disallowed solely on the basis of an ambiguous preamble statement when they were incurred during a period when Departmental policy was in flux.

Background

Congress has provided in Title XIX (Medicaid) that a State is entitled to FFP in the costs of family planning services meeting certain requirements. Additional requirements may be imposed by the Secretary, consistent with his authority under the Social Security Act, providing for the efficient administration of the Act. Section 1102. In the Medicaid program, recognition is given to the State as an autonomous grantee with the right "within broad limits, to determine the scope of the program in which it chooses to participate." Voe v. Califano, 434 F. Supp. 1058, 1062 (D. Conn. 1977).

The Secretary has interpreted the family planning section of Title XIX to include sterilization services. There were initially no specific rules or regulations governing the circumstances under which there could be Federal funding of sterilizations although Congress had provided that all family planning should be on a voluntary basis. After national attention was drawn to the problem of improper coercion of needy persons to submit to sterilization upon threat of loss of welfare benefits, HEW published a notice in August 1973, 38 FR 20930, that it was adopting guidelines to be used in issuance of regulations to insure informed consent and voluntariness in Federally funded sterilizations. The actual guidelines were termed "General Guidelines Limiting Federal Financial Assistance for Sterilization of Minors and Other Legally Incompetent Individuals" (Guidelines). Accompanying the Guidelines was a direction to heads of affected HEW agencies to withhold FFP in sterilization of individuals under age 21 or legally incapable of giving consent, pending publication of final regulations. This provision came to be known by agency officials as a "moratorium." The Regional Commissioner of SRS and later the Administrator, HCFA, based the instant disallowance on the 1973 Guidelines notice.

Effect of the 1973 Guidelines

The State's argument that the Guidelines were not properly promulgated as a substantive regulation in 1973 is persuasive for several reasons. First, the Guidelines are expressly addressed to agency officials and not to grantees. Second, the Guidelines specifically state that the agency officials should "promulgate regulations," so the Guidelines themselves are clearly not the regulations. Third, as HCFA conceded at the conference, the Guidelines were not published in accordance with the notice and comment provisions of the Administrative Procedure Act (APA) voluntarily adopted for HEW grant programs by a Federal Register notice dated February 5, 1971, 36 FR 2532, and binding on the agency. See National Welfare Rights Organization v. Mathews, 533 F.2d 636, 646 (D.C. Cir. 1976).

In his decision upholding the disallowance here, the Administrator, HCFA, cited two court cases, Voe v. Califano, 434 F. Supp. 1058 (D. Conn. 1977), and Peck v. Califano, 454 F. Supp. 484 (D. Utah 1977), for the proposition that "Federal District Courts have upheld the Department's Moratorium on FFP for sterilizations of individuals under age 21" (Administrator's Decision, p. 2), but this reliance appears to have been misplaced.

As pointed out in the Notice of Conference issued May 29, 1979, the plaintiffs in the Voe and Peck cases unsuccessfully challenged on an equal protection basis the constitutionality of the "moratorium," viewed by the parties and the Court as a regulation prohibiting Federal funding in the sterilization of individuals under age 21. The Notice suggested that, on preliminary reading, the cases did not

appear to address the issue of whether the Guidelines were, as the State here contended, merely administrative guidelines not binding on the State. In Voe, the matter was not at issue because the State of Connecticut there itself took the position that its State regulation denying such funding was required by the Federal "moratorium." 434 F. Supp. at 1060. In Peck there appeared to be a similar assumption that the notice published in 1973 was a regulation restricting FFP.

In a preconference brief here, filed by a legal intern, HCFA acknowledged, "In Voe and Peck, the courts upheld the validity of the moratorium without ever addressing the issue of compliance with the APA." (p. 8.) This brief argued, however, that in the case of Doe v. Califano, Civ. No. 4-78 Civ. 311 (D. Minn. filed September 25, 1978), the issue of APA compliance was specifically addressed, and "the court upheld the moratorium, reasoning that the 'emergency circumstances under which the moratorium was promulgated' justified whatever failure to comply might have existed." (p. 9.) No copy of the Doe opinion was attached to HCFA's preconference brief, but, upon request, copies were supplied to the Board and to the State. A reading of this decision supports the State's position (Supplemental Brief of Appellant, p. 2) that HCFA's statement in the preconference brief is a "distortion of the meaning and legal effect of Doe v. Califano." The issue before the Court in the cited Doe opinion was the propriety of granting a preliminary injunction and the Court did not rule on the merits. Further, while the Court denied the preliminary injunction, the basis for the decision was that "[a]lthough plaintiff may present sufficiently serious questions on the merits and/or a probability of success on the merits, the court finds that she has not demonstrated a balancing of hardships tipping decidedly in her favor or possible irreparable injury." (Doe Order, p. 4.) The quotation in HCFA's brief referring to emergency circumstances is preceded in the decision by the phrase "the Secretary argues" and does not constitute a determination by the court. (Doe Order, p. 3.)

At the conference, HCFA was asked whether there was further litigation in the Doe case which resulted in a decision on the merits. HCFA replied that the issuance of revised sterilization regulations on November 8, 1978, had resulted in termination of the litigation. Clearly, then, the Doe decision does not compel the conclusion that the State was bound by the 1973 Guidelines and may even be some support for the opposite result. Further, HCFA was afforded the opportunity to show that in the Voe and Peck cases the courts had reached the issue of the effect of the Guidelines on the states but has failed to do so, although surely HCFA has access to the briefs filed in those cases and knowledge of whether the issue was considered.

The Voe and Peck cases were not decided until 1977. By that time the agency had taken a position of treating the 1973 Notice of Guidelines as a "moratorium regulation." As discussed below, Departmental policy was much less clear at the time the disallowed costs were incurred.

The Rulemaking Proceedings

Following the publication of the Guidelines, the SRS, then responsible for the Medicaid program, published a notice of proposed rulemaking with provisions, paralleling the Guidelines, which would require that, for sterilization of individuals under age 21, FFP was available so long as there was committee review and compliance with other informed consent requirements. 38 FR 26459, September 21, 1973. This resulted in a final regulation published on February 6, 1974. With respect to State plans under Title XIX, the February 6 rules required that such plans provide that there be no FFP in nontherapeutic sterilizations performed "on an individual who is under the age of eighteen or who is legally incapable of giving informed consent" unless certain procedures had been followed. 39 FR 4733. For purposes of this rule, the term "legally incapable of giving informed consent" was defined to include any person who "[u]nder State law is a minor whose consent to the sterilization would not be legally effective." 39 FR 4734. A basis and purpose statement in the preamble to the February 6 regulation explained in response to comments why the age limit for committee review was set at 18 and stated that "absolute denial of sterilizations to persons under eighteen regardless of the circumstances is unacceptable to the Department." 39 FR at 4731.

The effective date of the February 6 regulations was delayed pending the outcome of several cases filed in Federal district court challenging the rules. 39 FR 5315, February 12, 1974; 39 FR 9178, March 8, 1974. These district court actions (one filed by five individual plaintiffs including Katie Relf and one filed by the National Welfare Rights Organization) were consolidated for purposes of a decision issued on March 15, 1974, in Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974). The District Court permanently enjoined the use of Federal funds "for the sterilization of any person who ... is in fact legally incompetent under the applicable state laws to give informed and binding consent to the performance of such an operation because of age or mental capacity...." 372 F. Supp. at 1204. (The February 6, 1974 rules were also found to be arbitrary and unreasonable in that they did not require that legally competent persons be properly advised that their Federal benefits could not be terminated by reason of a decision not to be sterilized.)

On March 20, 1974, a notice was published in the Federal Register further delaying the effective date of the challenged regulations. This notice stated that "the previous notice of the Department on Sterilization Guidelines - Departmental Policy, 38 FR 20930, is continued in effect" until April 17, 1974. New regulations were then published on April 18, 1974, to "replace" the February 6 regulations struck down in Relf. 39 FR 13872, 13887.

The Applicable Regulation

The April 18 replacement regulations contained the following provision at section 205.35 of 45 CFR with respect to FFP under Titles XIX, IV-A and VI of the Social Security Act:

No nonemergency sterilization may be performed unless legally effective informed consent is obtained from the individual on whom the sterilization is to be performed. 45 CFR 205.35(a)(1)(ii).

This regulation, using a "legally effective" consent test and not specifying a minimum age, was in effect during the relevant time period. The history of the regulation and the related court case clearly indicate that the relevant law for determining the effectiveness of consent is State law. The District Court in Relf measured legal competency by the "applicable state laws." 372 F. Supp. at 1204. The replaced (February 6) regulation specified state law as determinative of legal effectiveness of consent. See 39 FR 4734, §205.35(a)(2)(iii)(A).

In the State of Maryland age 18 is the age of majority. Article I, Maryland Annotated Code, Section 24, effective July 1, 1973. Thus, under the applicable regulation, Federal funding was available for the sterilizations in question unless some other rule prohibited it.

The Preamble Statement

The Administrator of HCFA relied on the 1973 Guidelines and the Voe and Peck cases for his disallowance decision. As we have seen, this does not afford a valid basis for the decision. HCFA argued for the first time at the conference that a preamble statement to the April 18 regulation acted as a rule prohibiting sterilizations of individuals under age 21. This preamble statement referred to the August 1973 notice of Guidelines, stating that it--

provided that pending the effective date of the final regulations Federal financial participation should be withheld from any sterilization procedure performed on an individual who is under the age of 21 or who is himself legally incapable of consenting to the sterilization.

The preamble further stated:

The purpose of this document is to adopt regulations in accordance with the Court Order [in Relf] with respect to persons legally capable of consenting to a sterilization while continuing in effect the moratorium set forth

in the previous notice of the Department with respect to sterilization of individuals under the age of 21 or legally incapable of consenting to the sterilization. 39 FR 13873.

The language here, providing for "continuing in effect the moratorium" so that FFP should be "withheld" pending final regulations, does not suggest the adoption of a rule nor otherwise give clear notice of an intent to never provide such FFP. Moreover, the term "moratorium" implies, generally, a period of delay in the performance of a legal obligation or the payment of a debt, not a denial of an obligation.

There is another consideration weighing against HCFA's interpretation here. To read this preamble as a binding requirement would be to assume that the agency had violated the HEW policy, expressed in the Guidelines, of establishing sterilization requirements through adoption of final regulations issued as a result of notice and comment proceedings. HCFA argues that it is possible to view the preamble as a product of the same notice and comment proceedings which resulted in the February 6 regulations struck down in Relf. Those proceedings were directed, however, at adopting regulations in a format for incorporation into the Code of Federal Regulations, which normally does not include the preamble. The preamble is in principle an explanatory not a regulatory part of the instrument. Moreover, there is a conspicuous absence of any statement in the preamble describing any basis or purpose for adopting age 21 as a limit less than three months after age 18 was chosen in response to the comment process. See 39 FR at 4731.

Furthermore, an alternative reading of the preamble statement is possible. There were programs other than those covered by the April 18 final regulations which provided family planning services. (For instance, Titles I, X, and XIV, applicable to Guam, Puerto Rico, and the Virgin Islands, had provisions for FFP in social services.) Adoption of the April 18 regulations would bring the Department into compliance with the Court Order only with respect to the covered programs, so there may have been a need for continued withholding of FFP in uncovered programs until final regulations with respect to those programs were promulgated. This consideration may not have, in fact, been behind the preamble statement but does nevertheless weigh against HCFA's contention that the State should have known that the preamble statement was intended as a rule applying to the Medicaid program. What I consider a more realistic explanation of the preamble is that the draftsman, conscious of regulatory ambivalence, simply preferred to be less than clear. That speculation is not, however, necessary to the result.

Lack of a Clear Policy

During the time period in question, policy statements issued by the Department indicate that there was considerable vacillation on the issue of establishing a minimum age limit for FFP in sterilizations. The position

in the Guidelines was that FFP was available in sterilization of individuals who were legally incapable of giving consent solely by reason of age, providing there was review by an appropriate committee. The Guidelines and the September 1973 notice of proposed rulemaking used age 21 as the determinative factor in whether committee review was necessary, but, in recognition of the trend of adoption by states of age 18 as the age of majority, the regulations published February 6, 1974, used age 18 as the cutoff point. These were the regulations found to be invalid by the District Court in the Relf case, in part because the Court disagreed that committee review was sufficient where a person was legally incapable of giving consent due to lack of majority under the applicable State law. During later proceedings in the Relf case, the Department proposed a regulation, modified in other respects, but which continued to use 18 as the critical age. Moreover, the Department continued in its position that, if certain safeguards were met, sterilization of persons legally incapable of giving consent was permissible.

HEW has ultimately settled on a minimum age of 21 in regulations published November 8, 1978, roughly two years after the period here involved, but even then declared itself open to reconsideration of the question. 43 FR 52151-3. The stated purpose for adoption of the 1978 rule was to provide for efficiency in administration by establishing a uniform standard for all the States and to eliminate those instances where substantial questions of informed consent might arise.

Clearly the State had some notice that the Department intended to withhold FFP in at least some sterilizations of individuals under age 21 while it considered its options for appealing the Relf decision and while it examined the underlying question of the effectiveness of various forms of consent. There was no clear Department policy at the time the disputed costs were incurred, however, to prohibit in a binding way FFP in the Medicaid program for sterilization of individuals between the ages of 18 and 21 where consent was informed and legally effective under state law and otherwise met Federal requirements.

Viewing the Guidelines or the accompanying "moratorium," by themselves or in conjunction with the preamble to the April, 1974 final regulation, as imposing a prohibition of FFP without asking how they would be binding on the State fails to give consideration to the grantor/grantee relationship in the Medicaid program. Where the Federal government is influencing, through its pursestrings, an area traditionally reserved for the State, such as when consent is to be effective (See Broad, Federal Common Law: Protecting State Interests, 35 Fed. Bar J.27, 21, (1978)), it should not do so without notice to the State of an explicit requirement intended to be binding in a permanent fashion, and an ambiguous document should not be construed as having that effect.

Conclusion

Accordingly, the disallowance is reversed on the ground that the consent given for the sterilizations performed by the State was legally effective under State law and there was at the time no binding policy prohibiting FFP in such sterilizations, only a temporary moratorium on such funding which is no longer necessary. HCFA has not shown that the cases of Peck v. Califano, 454 F. Supp. 484 (D. Ut. 1977); Voe v. Califano, 434 F. Supp. 1058 (D. Conn. 1977) and Doe v. Califano, D. Minn., Civ. No. 4-78 Civ. 311, September 25, 1978, require a different result.

This decision is not a determination that an agency regulation is invalid. The questioned costs were in fact allowable under the plain terms of the final regulation then in effect, and HCFA has not shown that either the Guidelines, originally cited as a basis for the disallowance, or the preamble statement later relied on by HCFA, are regulations properly applied to those costs. Accordingly, the issue raised by HCFA with respect to Board authority or, more properly the authority of the Board Chairman as successor to the Administrator, SRS, to invalidate a regulation need not be reached.

Furthermore, this decision applies only to the time period in question, during which Departmental policy with respect to minimum age was unsettled, and to sterilizations of individuals between ages 18 and 21 where 18 was the State age of majority. It is possible that, after agency officials began to treat the "moratorium" as a regulation, the State was at some point sufficiently put on notice as to a policy to prohibit FFP in such sterilizations, but it is not necessary for purposes of this decision to reach that issue.

Finally, it should be noted that this decision in no way questions the Department's authority to establish a minimum age for purposes of Federal funding, see Peck, 454 F. Supp. at 486, but merely decides that there was no policy applicable to the costs in question establishing 21 as a minimum age.

/s/ Malcolm S. Mason