DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: New York Department of Social Services DATE: May 29, 1981
Docket Nos. 78-19-NY-HC 80-7-NY-HC
78-40-NY-HC 80-14-NY-HC
78-138-NY-HC 80-47-NY-HC
79-35-NY-HC 80-87-NY-HC
79-51-NY-HC 80-139-NY-HC
79-226-NY-HC 80-174-NY-HC
Decision No. 181

DECISION

These are twelve appeals by the New York Department of Social Services (New York, State) from decisions of the Health Care Financing Administration (HCFA, Agency) disallowing Federal financial participation (FFP) in the cost of services to Medicaid recipients by three skilled nursing facilities (SNF) and one intermediate care facility (ICF) whose provider agreements had been terminated and allegedly not validly renewed. Some details concerning the disallowances are set out in the Appendix to this decision.

Although all 12 appeals are included in this decision, the disallowances were considered in three groups, each of which was the subject of a separate Order to Show Cause. The disallowances in Group A and B involve the same facilities, but raise different issues. Group A deals with FFP during the provider appeal and Group B with FFP during the State receivership. Group C involves the two other facilities and deals with FFP as a result of court-ordered State payments in an action brought by patients.

Group A - Introduction

The first, or "A", group consists of parts of four cases involving Kings Harbor Manor (Kings Manor), an ICF, and Kings Harbor Care Center (Kings Care), a SNF. The State terminated its provider agreement with Kings Manor on April 1, 1978 and with Kings Care on May 23, 1978. Kings Care had also been terminated by the (then) Department of Health, Education, and Welfare (HEW) as a Medicare provider on March 31, 1978. The terminations of these facilities were the subject of several court orders (described in greater detail below) culminating in the appointment of the Commissioner of the New York Department of Health as involuntary receiver for both facilities on February 13, 1979 and attempted recertifications on March 5 and 6, 1979. The disallowances in Group B deal with FFP for those facilities after February 13, 1979.

Issue

In the Group A disallowances the issue is whether, and for what periods of time, FFP is available where the provider agreement is terminated but as a result of a court order the provider agreement is constructively extended. The Board here decides that FFP is available in payments to Kings Manor for services through February 13, 1979, and to Kings Care, through December 29, 1978.

The Group A decision is based on the appeals; HCFA's responses; copies of court orders and other documents in the records of the Agency proceedings and submitted by New York; an Order to Show Cause issued by the Board on October 16, 1980 for these and related appeals by other states; responses by New York and HCFA to that Order; transcripts of informal conferences held October 9, 1979 and February 11-12, 1981; and post-conference briefs and other materials submitted by New York and HCFA.

Background

Federal litigation

Shortly after the Medicare termination of Kings Care and the Medicaid termination of Kings Manor, these facilities were the subject of litigation in federal and state courts. On April 19, 1978, the United States District Court for the Southern District of New York issued a preliminary order in an action brought by the facilities, enjoining the Agency from terminating Kings Care as a Medicare provider or discontinuing reimbursement to Kings Care for services to Medicare patients and enjoining the State from terminating Kings Care and Kings Manor as Medicaid providers or discontinuing reimbursement for services to Medicaid patients rendered by those facilities. Schwartzberg v. Califano, 78 Civ. 1039. 1/

1/ The court was anticipating the Medicaid termination under 42 CFR §449.33(a)(9), which requires that the Medicaid provider agreement be terminated when a facility is terminated from Medicare. Copies of this and other court orders are to be found at various places in the record, but for convenience unless otherwise noted we refer to the set of orders enclosed with the New York letter dated September 25, 1980. Where citations to reported decisions are available, these are given also.

On June 14, 1978, noting that the State had commenced an administrative hearing concerning the non-renewal of its provider agreement with Kings Manor, the Court dismissed that part of the case involving Kings Manor. The Court held that pending the outcome of the administrative hearing, the provider agreement remained in effect. 2/

On June 23, 1978, the Court withdrew its injunction against the Agency and against the State with respect to Kings Care. In its decision the Court observed that Kings Care had been aware of the deficiencies upon which decertification was based "for quite some time" and had been given ample opportunity to correct them. 453 F. Supp. 1042.

State litigation - Kings Care

Shortly thereafter, on June 29, 1978, the Supreme Court of the State of New York for Kings County, in an action brought by Kings Care, issued a temporary restraining order enjoining the State from terminating Kings Care as a Medicaid provider and discontinuing reimbursement for services to Medicaid patients at Kings Care pending an administrative hearing under the State Public Health Law. Schwartzberg v. Whalen, Index No. 12172/78. The order was made final on August 10, 1978.

On December 29, 1978, the Appellate Division reversed, holding that an administrative hearing was not required because the State's refusal to renew the Medicaid provider agreement "cannot be equated with an actual limitation of the operating certificate for violations of the Public Health Law." The Court also held that "while the State has an independent duty to provide Medicaid assistance to its residents (Matter of Kane v. Parry, 41 NY 2d 1051), that right does not attach to nursing home provider status." 411 NYS 2d 667.

On September 7, 1978, the State had revoked the operating certificates of both facilities. Both sought judicial review of that determination, filing a request for an Order to Show Cause in the Supreme Court for Albany County (Calendar No. 47). On November 3, 1978, that court

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2/ New York states in its January 16, 1981, brief in response to the Board's October 1980 Order that the State gave the District Court an affidavit attaching an amendment to the notice of the State hearing on the proposed revocation of the operating certificate. The amended notice added to the proceedings the issue of the termination of Kings Manor's provider agreement. Brief, p. 4 and Exhibit B.

enjoined the State from prohibiting the admission of new patients and from requiring the surrender of the operating certificates. On February 13, 1979, the court appointed the State as involuntary receiver for both facilities, vacating the court's prior order.

On March 5, 1979, the State purported to certify Kings Care; and on March 6, Kings Manor. Docket Number 80-47-NY-HC, Record Tab 15; Exhibit D, New York Response to December 16, 1980 Order to Show Cause in Docket Number 80-47-NY-HC. Both facilities had been surveyed in January 1979. Exhibits J and K, supra. HCFA does not dispute that new provider agreements were issued annually pursuant to this and later certifications. See HCFA response to appeal in Docket No. 80-47-NY-HC.

Discussion

The primary question is the effect of the federal court orders of April 19 and June 14, 1978 on the availability of FFP in payments to Kings Manor during the period April 1, 1978 to March 6, 1979. The Board held recently in Ohio Department of Public Welfare, Decision No. 173, April 30, 1981, that where a facility appeals the termination of its provider agreement and a court orders the state to continue to reimburse the facility for the cost of services to Medicaid recipients pending the appeal, the provider agreement is constructively extended and FFP is available for up to 12 months from the termination, or until there is a new survey and determination thereon. The Board based its decision on 1) a program regulation guide issued by the Medical Services Administration, Social and Rehabilitation Service (predecessor to HCFA) (MSA-PRG-11) and 2) 45 CFR §205.10(b)(3). 3/ By applying those policies and the holding in Ohio, we reach the result for each facility indicated below.

3/ These provide, in pertinent part, for FFP:

> MSA-PRG-11:
> [If] State law provides for continued validity of the provider agreement pending appeal [from the nonrenewal or termination of a provider agreement].
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> 45 CFR §205.10(b)(3):
> [In] payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order.

Kings Manor

Kings Manor was the subject of both a federal and a State court order. Inasmuch as we find that the federal court order covers the entire period at issue, it is not necessary to address the effect of the State court order (we will discuss that order with respect to Kings Care, infra).

As we noted in our Background, supra, the State's review of the proposed revocation of the operating certificate for Kings Manor was expanded to include review of the termination of the provider agreement. 4/ It was on the basis of this representation that the federal court on June 14, 1978, chose not to continue its April 19 order, dismissing the Kings Manor part of the case and declaring that the provider agreement would remain in effect pending the outcome of the State's hearing. The record does not show when, or if, that hearing was ever held, nor does it matter. We find that FFP was no longer available on that basis after the State's appointment as involuntary receiver on February 13, 1979. Ohio Department of Public Welfare, supra. The federal court order did not have any effect after February 13 because the revocation of the operating certificate mooted out the issue of the Medicaid termination. The State could not issue a provider agreement in the absence of an operating certificate.

Kings Care

On April 19, 1978, the federal court enjoined the State from terminating Kings Care as a Medicaid provider or discontinuing reimbursement for services to Medicaid patients by Kings Care. On June 23, 1978, the court withdrew the injunction with respect to Kings Care but by contrast with its June 14 action on Kings Manor, the court did not specify continuation of the provider agreement, nor did it refer to a State hearing. We do not have before us in these cases (or elsewhere on our docket) a HCFA disallowance, for the period May 23 - June 23, 1978, so we do not reach the question of the effect of the federal court order.

The June 29, and August 10, 1978 orders of the Kings County court also enjoined the State from terminating or discontinuing the Medicaid reimbursement of Kings Care -- pending an administrative hearing under State law. In the case of Kings Care, however, unlike Kings Manor, the State did not amend its notice of hearing to include the termination

4/ Section 2806 of the New York Public Health Law provides that "no hospital operating certificate shall be revoked, suspended, limited or annulled without a hearing."

of Kings Care, on the grounds that the termination of Kings Care, as an SNF terminated from Medicare, was mandated by federal law. 5/ Thus the administrative hearing concerned only the issue of the proposed revocation of the operating certificate and not the Medicaid termination. PRG-11 deals only with termination of a provider agreement, not a state operating certificate or other license and does not apply here. New York January 16, 1981 Response, Exhibit B.

These State court orders, however, are a basis for the application of 45 CFR 205.10(b)(3). That regulation does not depend on whether the court order is tied directly to the Medicaid termination, but whether the result (i.e., revocation of the state license) is that Medicaid reimbursement to the facility would otherwise cease. Nor does the reversal of the Kings County decision on December 29, 1978, deprive the State of its right to FFP as a result of the earlier erroneous order. Section 205.10(b)(3) applies if the order directs payments in the context of the review of a decision to discontinue reimbursement for Medicaid services, and is not barred because a court order is ultimately reversed. Thus, the State is entitled to FFP through December 29, 1978.

The reversal of the Kings County decision on December 29, 1978, does not, however, deprive the State of its right to FFP as a result of the earlier erroneous order. The application of 45 CFR 205.10(b)(3) does not depend on whether a court order is ultimately affirmed, but rather whether it directs payments in context, as this one did. Thus, the State is entitled to FFP through December 29, 1978. 6/

Kings Care was also the subject of an order by the State Supreme Court (Albany County) dated November 3, 1978. That order, however, did not direct the continued reimbursement of Medicaid - based claims, nor did it enjoin the termination of the provider agreement. No one disputes that without an operating certificate there can be no provider agreement, but conversely an operating certificate alone (court ordered or otherwise) does not support reimbursement for services to Medicaid recipients. We find this court order is not a basis for FFP.

5/ Kings Care was terminated as a Medicare facility on March 31, 1978.

6/ The disallowances before us do not cover any period of service by Kings Care prior to December 1, 1978.

Res Judicata

At the February 11-12, 1981 conference, HCFA argued for the first time that New York is barred by the doctrine of res judicata from litigating in these appeals the issue of whether it is entitled to FFP pending the outcome of court-ordered provider termination hearings. Conference Transcript, pp. 31-45. HCFA relied principally on a portion of a transcript of a May 4, 1978 proceeding in Schwartzberg v. Califano, supra, allegedly showing that although the court was asked by New York to order HCFA to provide FFP, the court chose not to do so. Conference Transcript, p. 32. HCFA also contends that even if New York had not made such a request, the opportunity to make it would also bar the State from claiming FFP here, under the doctrine of collateral estoppel. Conference Transcript, p. 38.

By letter dated March 2, 1981, New York supplied the transcript of a March 31, 1978 proceeding in Schwartzberg, supra. Where there was only a passing reference to the FFP question in the May 4 proceeding, on March 31 the parties had discussed the matter with the court at some length. The Assistant United States Attorney informed the court that "[i]f the State is refused reimbursement they do have an administrative remedy." The court commented:

> I hope it doesn't come back here. I don't know my attitude in the matter ... I don't think I can order you to do anything about that. There is nothing before me on it. You haven't done anything so far. Transcript, p. 5.

The implication is that the State must first exhaust its administrative remedy (i.e., request reconsideration by this Board on the FFP issue). We find that HCFA's reliance on res judicata and collateral estoppel is misplaced in view of the position taken by the federal government in Schwartzberg, supra, that the State had an administrative remedy. Our disposition of the issue on this basis does not mean that we agree with HCFA that the res judicata doctrine might apply in the absence of a showing that the Agency had argued the exhaustion of remedies defense in court. Having disposed of the issue on this basis, we simply do not reach the other arguments pressed by New York and HCFA.

Group B - Introduction

The second, or "B", group consists of four cases involving Kings Manor and Kings Care. These cases begin February 13, 1979, when the State was appointed as receiver.

Issues

In the Group B disallowances the principal issues are:

1) Whether the State's status as involuntary receiver allows it to certify a facility with repeat deficiencies in the absence of documentation that the facility did achieve compliance with the standards at some time during the prior period.

2) Whether the State's status as involuntary receiver allows it to certify an SNF as a Medicaid provider where the facility had been terminated from the Medicare program and some of the same deficiencies found in the survey on which the decision to terminate was based are repeated in subsequent surveys.

The Board here decides that the State improperly certified the facilities and upholds the disallowances. The decision is based on the appeals, HCFA's responses, the December 16, 1980 Order to Show Cause issued by the Board, and the responses thereto.

Background

The Commissioner of the New York State Department of Health became receiver for both facilities by virtue of a February 13, 1979 order of the State Supreme Court (Albany County) directing him to:

> [t]ake all necessary and practical steps to eliminate serious operating deficiencies and to attempt to maintain and /or regain medicaid reimbursement from the federal government so that he can maintain the patients in both facilities, provided however, that if he cannot eliminate the deficiencies or he cannot obtain medicaid reimbursement from the federal government, then nothing in this ordering paragraph shall impede on his power under subdivision (2) of §2810 of the Public Health Law to orderly transfer the patients to other facilities, and further provided the limiting terms of this ordering paragraph shall expire, in any event, on July 15, 1979.

Tab 11, p. 3 of Agency Record filed in Docket No. 80-47-NY-HC (80-47 Record) (also 416 NYS 2952).

In a subsequent Order, on June 6, 1979, the Court directed the receiver to "take all steps which may be necessary, including resort to judicial relief, to ensure expeditious and continuing receipt of payment for

all services rendered by Kings Care and Kings Manor, including, without limitation, reimbursement from governmental sources for Medicaid - sponsored patients..." Tab 9, p. 7, 80-47 Record.

On March 5, 1979, the State purported to certify Kings Care; and on March 6, Kings Manor, both for the period February 14 to July 31, 1979. Tab 15, 80-47 Record; Exhibit D to New York Brief dated March 16, 1981 (New York Brief). Again on September 5, 1979, the State purported to certify both facilities, for the period August 1, 1979 to July 31, 1980. Tab 13, 80-47 Record; Exhibit D, New York Brief.

The purported certifications in March were based on a January 1979 survey. The State concedes that Kings Care had 12 repeat deficiencies and Kings Manor, four. The September 5 purported certification was based on an April 1979 survey. Again, the State concedes that Kings Care still had six deficiencies and Kings Manor two deficiencies, repeating from the November 1977 survey (on which termination was based). Kings Manor also had two other deficiencies repeating from the January 1979 survey. Exhibits G, I, J, K, New York Brief.

Regulations

42 §442.20(b) requires termination of the Medicaid provider agreement when a facility is terminated from the Medicare program. Under §442.20(c) the State may not make another Medicaid agreement with the facility until:

> (1) The conditions causing the termination are removed; and
> (2) The SNF provides reasonable assurance to the survey agency that the conditions will not recur.

42 §442.105 permits certification of a facility if certain findings are made 7/ and the State:

> (b) ... finds acceptable the facility's written plan for correcting the facilities.

Moreover, the State must also do one or both of the following, as the situation warrants:

> (c) If a facility was previously certified with a deficiency and has a different deficiency at the time of the next survey, the agency documents that the facility -

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7/ The State must find that the facility's deficiencies, individually or in combination, do not jeopardize the patient's health and safety, nor seriously limit the facility's capacity to give adequate care and must maintain a written justification of these findings.

(1) Was unable to stay in compliance with the standard for reasons beyond its control, or despite intensive efforts to comply; and
(2) Is making the best use of its resources to furnish adequate care.

(d) If a facility has the same deficiency it had under the prior certification, the agency documents that the facility -
(1) Did achieve compliance with the standard at some time during the prior certification period;
(2) Made a good faith effort, as judged by the survey agency, to stay in compliance; and
(3) Again became out of compliance for reasons beyond its control.

Discussion

In its December 16, 1980 Order to Show Cause, the Board pointed out that the State had not yet provided information to the Board showing that it met the conditions for certification under Sections 442.20 and 442.105. In its response the State submitted an affidavit by the Assistant Director of the Facility Surveillance Group of the Office of Health Systems Management (OHSM), New York State Department of Health. The affidavit asserts that based on the evaluation of the January 1979 survey by OHSM the deficiencies (repeat and new) "did not individually or in combination jeopardize the health and safety of the patients" in both facilities, nor did the deficiencies "seriously limit the [facilities'] capacity to give adequate care." New York Brief, Exhibit G. The affidavit also states that a number of "standards" were deficient (17 in January and seven in April), but "0 Conditions" were deficient in the case of Kings Care. The State has not shown here that either facility achieved compliance with the standards under which deficiencies were found during the prior certification period. The State also did not offer any proof that prior to either certification Kings Care had provided reasonable assurance that the deficient conditions would not recur.

New York as New Operator

New York's principal argument is that as receiver it should be treated like a new operator, contending that as a new operator Kings Care would not have to make the showing required by Section 442.20 and neither facility would have to meet the conditions for certification with deficiencies in Section 442.105.

Even assuming arguendo that New York had the status of a new operator when it attempted to certify the facilities on March 5 and 6, 1979, this does not support its claim for FFP from February 14, 1979, when it became receiver, or after July 31, 1979 when that certification expired. The first period in question (2/14 to 3/5/6/79) is governed by 42 CFR 442.12(b) (1978), which requires that the effective date of a provider agreement may not be earlier than the date of certification. The record shows that certification took place March 5 for Kings Care and March 6 for Kings Manor, the dates on which the survey agency signed the HCFA Form 1539 Certification and Transmittal (C&T). It is this date which HCFA would regard as certification (if the certification were valid). Maryland Department of Health and Mental Hygiene, Decision No. 107, July 3, 1980. 8/ We find here that March 5 and 6 are the dates of certification even though the C&Ts show the period of certification as starting February 14.

This conclusion would also require that the C&T signed September 5 be effective from that date, rather than the period of certification shown therein starting August 1, 1979. However, we do not have to reach that point because the attempted September 5 certification is invalid under the terms of Section 442.105. Even with a new operator, the facilities could not be certified September 5 with admittedly repeat deficiencies. Accordingly, we find that FFP is not available after July 31, 1979 (whether or not available prior to that date).

HCFA argues that it does not matter whether the State is considered a new operator, because the regulations address the facilities, not the owners or operators. HCFA Response to Appeal, Docket No. 80-47-NY-HC, pp. 7-8. Although the regulations obviously use the term "facility," we would not necessarily agree with HCFA that they apply equally to a new operator as to something less. The parties have not cited, nor have we found any regulations defining a new operator or suggesting different treatment on that basis. However, because we find here that New York is not a new operator, we do not reach the question posed by HCFA's argument.

8/ In New Jersey Department of Human Services, Decision No. 137, December 1, 1980; and Washington Department of Social and Health Services, Decision No. 176, May 26, 1981, the Board held that the State may rely on documentation other than the C&T, but that is not an issue here. The presumption is that certification is effective as of the C&T execution date and nothing in this record overcomes that presumption.

New York as Receiver

We conclude that New York is not a new operator based on the New York law under which it was appointed receiver. Under that statute, Section 2810 of the New York Public Health Law (New York Brief, Exhibit C), the State is described as having "the powers and duties of a receiver appointed in an action to foreclose a mortgage on real property" and must, within 18 months, provide for the orderly transfer of all patients. While it operates the facility, the State must correct deficiencies that "seriously endanger the life, health or safety" of the patients except where this would involve "major alterations of the physical structure of the facility." We find that these conditions do not give the State the same freedom with these facilities that an operator would be expected to have -- particularly the capacity to make major physical alterations if necessary to ensure the life, health or safety of the patients. Nor is the State exempt from the requirements of the Medicaid regulations because of any special status as a receiver. See New Jersey Department of Human Services, Decision No. 164, April 30, 1981, p. 4; and Missouri Department of Social Services, Decision No. 175, April 30, 1981, p. 12. Accordingly, we find that the State is subject to the regulations as though the status had not changed.

On this basis, the certification with repeat deficiencies on March 5 and 6 is no more valid than that of September 9, which we have already determined to be lacking the documentation required by Section 442.105. Moreover, having held that the State is not a new operator for the purposes of Section 442.105, we also find that the State is bound by Section 442.20.

New York argues that its January and April 1979 survey findings that no conditions were deficient shows that it met the requirement that the deficient conditions found in the November 1977 survey be removed. New York Brief, p. 9. New York relies on an affidavit by the Director, Bureau of Health Facility Coordination, OHSM (Ibid, Exhibit A) which attempts to draw a distinction between major headings on a survey report ("conditions") and subheadings ("standards" and "elements") and concludes that it is not necessary for each and every standard under a condition of participation to be met for the condition to be in compliance.

The Medicare regulations do list several standards under each condition of participation, but New York does not cite nor do we find support for its suggested interpretation of Section 442.20. Moreover, the State has not shown that Kings Care gave reasonable assurance that the conditions would not recur, nor was such a declaration likely since

both the March and September attempts at certification were based on acceptable plans of correction of the very deficiencies that had led to termination. Thus the certifications of Kings Care are not valid under §442.20.

Other Issues

The Agency also relies on its authority under 42 CFR §442.30 to "look behind" the State's provider agreement and certification to determine that the facility is not certifiable. The State objects that the Agency did not specify in sufficient detail in the disallowances to satisfy the requirement of this regulation that there be a determination by the Administrator, HCFA. The "look-behind" regulation does specify that a provider agreement is not valid evidence of certification if the Administrator of HCFA determines that the requirements listed in §442.30 have not been met. Other than general statements in the disallowance letters, the Agency has not shown in these cases that the Administrator made formal findings. However, this Board has not held that such formal findings are necessary and has relied on the "look-behind" authority in upholding disallowances based on similarly general statements by HCFA that certifications or provider agreements were invalid. Nebraska Department of Public Welfare, Decision No. 111, July 16, 1980; New Jersey Department of Human Services, Decision No. 164, April 30, 1981.

New York also argues that the Board has no "implied" authority to "look behind." Here we need not reach these issues of the use of "look-behind" by HCFA or by this Board, because we find that sections 442.105 and 442.20 are sufficient bases to uphold the disallowances.

The State continues to object to the admittedly erroneous citation of Section 442.20 as a basis for the disallowances for Kings Manor, an ICF, in Docket Nos. 80-139 and 80-174. The Board noted this in its Order to Show Cause, but we do not find that this is a basis for reversing those two disallowances. In the first place, the earlier disallowances also cited Section 442.105 which, as we have already held, supra, is a proper basis for upholding disallowances for both facilities in all four cases. Second, we find that the two disallowances as a whole and in the context of being merely additional quarters of the earlier disallowances satisfy the requirement of notice to the State in 45 CFR §16.91. In any event, HCFA could still re-issue the disallowances, and we choose not to further delay resolution of this dispute on such a basis.

Group C - Introduction

The third, or "C", group consists of all or parts of eight disallowances involving two SNF's -- Doane's and Earle (see Appendix). In its appeal in 80-87-NY-HC, New York asked that the Doane's and Earle issues be considered separately from the Kings Care and Kings Manor issues; HCFA agreed; and the Board has proceeded accordingly.

New York terminated Doane's as a Medicaid provider on May 10, 1975; and Earle, June 9, 1976. Shortly thereafter, Medicaid recipients at each facility obtained a court order directing the State to continue reimbursing the facilities for services to these recipients pending the outcome of administrative hearings on the State's decisions to terminate the facilities.

Issue

In the Group C disallowances the principal issue is whether, and for what periods, if any, FFP is available subsequent to the May 10, 1975, and June 9, 1976 terminations, as a result of the court orders. The Board here decides that FFP is available (1) in the cost of payments to Doane's for services through May 10, 1976; (2) in the cost of payments to Earle for services through June 9, 1977; (3) plus up to 30 days to cover the times in December 1978 and January 1979 (Doane's) and in December 1977 (Earle) when the State made reasonable efforts to transfer the patients to another facility or to alternate care (for individuals admitted prior to termination). The decision is based on the appeals; HCFA's responses; the Board's Order to Show Cause dated December 10, 1980; New York's response to the Order (the Agency was not required to respond); and the records of the proceedings before the Agency.

Background

Doane's

On June 11, 1975, the Supreme Court of the State of New York (Orange County) issued a temporary restraining order enjoining the Commissioner of the Orange County Department of Social Services and the Commissioner of the New York Department of Social Services from denying Medicaid benefits to recipients at Doane's. Kane v. Parry, Index No. 2928-75. On July 28, 1975, the court issued a final order directing the above named parties to afford the medicaid recipients at Doane's a hearing "to consider the appropriateness of the proposed action" and enjoining the removal of the recipients or the termination of payments by the "local agency" pending "final administrative disposition of said proceedings." The Court expressed its view:

> that petitioners do not seek any judgment declaring that federal reimbursement should be continued. Although it is a relevant consideration, respondents' obligation to provide medical assistance is independent of the federal law and regulations with respect to Federal financial participation. The State's own administrative letter (74 ADM-172) acknowledges that payments to decertified nursing homes after a certain time period may be made but that they will be "non-reimbursable."

Kane v. Parry, 371 NYS 2d 605.

On December 27, 1976, the Appellate Division reversed, holding that the failure of the recipients to comply with the reasonable condition of residing in a qualified nursing home constitutes a waiver of their right to receive payments. Kane v. Parry, 390 NYS 2d 191.

Subsequently, the Court of Appeals reinstated the judgment of the Supreme Court on the grounds that "[i]n the interests of administrative and judicial economy the better discretion would have been to proceed expeditiously with the fair hearings." Kane v. Parry, 396 NYS 2d 182.

The State conducted hearings on or about January 5, 1978, and on March 6, 1978 reached decisions in effect requiring the Medicaid recipients at Doane's to transfer or to be terminated from medical assistance. New York Response, p. 3. Enforcement of these decisions was enjoined by the Supreme Court (Orange County) on April 3, 1978, and the aforementioned State and County commissioners were ordered to continue payments pending a show cause hearing. On June 27, 1978, the court directed the further continuation of medical assistance payments to Medicaid recipients pending new administrative hearings at which evidence of the "actual" fire hazards had to be considered and weighed against the "threat to life ... established by the medical and psychiatric reports in the record...."

It does not appear from the documents filed with this Board that the State ever conducted such hearings, but by January 17, 1979 all of the Medicaid recipients had been removed from Doane's. New York Response, p. 4.

Earle

On July 8, 1976, Medicaid recipients at Earle obtained a temporary restraining order from the Supreme Court (Orange County) directing (1) the continuation of payments and prohibiting the removal or transfer of these patients pending "the determination and decision

of this proceeding;" and (2) the examination of the recipients "by another doctor with respect to the advisability of moving the petitioners from Earle Nursing Home pending the outcome of a fair hearing." Gardner v. Parry, Index No. 3471/76.

In its final order on July 29, 1976, the Court directed the continuation of payments pending a fair hearing determination as required by both State and federal law. The Court noted its earlier decision in Kane that the State was obliged to provide medical assistance even if the federal government would not reimburse the State. Gardner v. Parry, 386 NYS 2d 322.

The State conducted hearings on August 10, 1976, and on August 3, 1977, rendered decisions to terminate payments to Earle and transfer the recipients to another facility. New York Response, p. 5. On August 19, 1977, the Supreme Court (Orange County) reversed the State's decisions and ordered more hearings "as may be necessary to evaluate the hazards to the health and safety of petitioners from transfer trauma..." Gardner v. Toia, Index No. 4630-77. This order was lifted by the court on December 3, 1977 because Earle had lost its operating certificate. All of the Medicaid recipients had been removed by December 31, 1977. New York Response, p. 6.

Regulations

New York relies on Medicaid regulations codified under "General Administration -- Public Assistance Programs -- Hearings (a) State plan requirements and (b) Federal financial participation." These are:

45 CFR 205.10(a)(5) and (6) (1976) (in pertinent part):

> (5) An opportunity for a hearing shall be granted to any applicant who requests a hearing because his claim for financial or medical assistance is denied, or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance or termination of assistance.
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> * * * * *
>
> (6) If the recipient requests a hearing within the timely notice period:
>
> (i) Assistance shall not be suspended, reduced, discontinued or terminated, (but is subject to recovery by the agency if its action is sustained), until a decision is rendered after a hearing, unless:

(A) A determination is made at the hearing that the sole issue is one of State or Federal law or policy, or change in State or Federal law and not one of incorrect grant computation...

45 CFR 205.10(b)(1) and (3) (1976):

(b) Federal financial participation. Federal financial participation is available for the following items:
(1) Payments of assistance continued pending a hearing decision.

* * * * *

(3) Payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order.

Discussion

It is not disputed here that the courts ordered payments pending hearings. The Board held in Ohio Department of Public Welfare, supra, that FFP is available where a facility appeals a termination and a court orders the state to continue reimbursing the facility pending appeal, constructively continuing the provider agreement. The question here is whether FFP is available for court-ordered payments pending hearings sought by recipients as a result of the termination of the facility in which they are housed.

The Ohio decision was based in part on PRG-11. That guideline does not apply here because it is confined to provider appeals. The other basis for Ohio was 45 CFR §205.10(b)(3), which is not restricted to provider appeals. Moreover, it is part of a regulation requiring states to establish a system of hearings for applicants and recipients.

HCFA argues that the fair hearing provisions do not apply here because the State was not required to give recipients hearings when facilities are terminated. Indeed, the State concedes that the issue in the hearings was not the termination but the possible detrimental effect on the elderly patients of a transfer from the facility (transfer trauma). New York Response, pp. 3, 4, 5.

HCFA cites the decision of the Supreme Court in O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980). The Court found "unpersuasive" the argument that the risk of transfer trauma was "tantamount to a deprivation of life or liberty, which must be preceded by a due process hearing," holding:

> Whether viewed singly or in combination, the Medicaid provisions relied upon by the Court of Appeals do not confer a right to continued residence in the home of one's choice. 42 U.S.C. §1396a(a)(23) gives recipients the right to choose among a range of qualified providers, without government interference. By implication, it also confers an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified. But it clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified. Second, although the regulations do protect patients by limiting the circumstances under which a home may transfer or discharge a Medicaid recipient, they do not purport to limit the Government's right to make a transfer necessary by decertifying a facility. Finally, since decertification does not reduce or terminate a patient's financial assistance, but merely requires him to use it for care at a different facility, regulations granting recipients the right to a hearing prior to a reduction in financial benefits are irrelevant.

Ibid, p. 785. Also, in Ohio, supra, p. 5, the Board held that the possibility of transfer trauma was not a valid reason for failing to discontinue Medicaid reimbursement for a decertified facility.

We find that New York's reliance on Sections 205.10(a)(5) and (6) is misplaced. These regulations provide for hearings to which applicants and recipients do have a right, unlike the transfer trauma hearings ordered by the New York courts in these cases. The Agency promulgated these regulations in response to the Supreme Court decision in Goldberg v. Kelly, 397 US 254 (1970), dealing with due process for applicants and recipients. We find that HCFA is not arbitrary in its interpretation of the regulations in question as being confined to protected due process rights. This does not mean that the applicant or recipient has to prevail to have the benefit of these provisions, but that the basis for the hearing must be within the pale of due process. Transfer trauma clearly was not.

New York counters that the O'Bannon decision can be given only prospective application, but we disagree. Transfer trauma did not fall outside of the due process circle as a result of O'Bannon; it never was in it, the New York State court decisions notwithstanding.

This analysis also leads us to the conclusion that §205.10(b)(1) is not a basis for authorizing FFP here. We reach a different result, however, with respect to the application of section 205.10(b)(3). As we pointed out in Ohio, supra, p. 11, in the instance of that regulation the Agency has taken a broader view. It does not limit its application to applicant/recipient hearings, nor to established due process rights. The Agency has taken the position that Section 205.10(b)(3) applies to provider appeals, although in O'Bannon, supra, p. 485 n. 17, the court indicated that providers did not have a due process right to a pretermination hearing. Accordingly, the transfer trauma nature of the hearing is not a bar to the application of Section 205.10(b)(3). Section 205.10(b)(3) applies because the court directed the State to continue payments, constructively extending the provider agreement. Ohio, supra. It is not a bar that the order was pending hearings on the issue of transfer trauma, rather than the provider's deficiencies.

We find, then, that Section 205.10(b)(3) requires the payment of FFP through May 10, 1976 for Doane's and through June 9, 1977 for Earle. As in Ohio, supra, although the court orders overcome the terminations of the facilities, the effect of the court orders does not extend beyond 12 months from the terminations (there being no subsequent survey/certification determinations). We held in Ohio that reimbursement for court ordered "payments ... within the scope" of the Medicaid program could not exceed that limitation.

In addition, although it is not an issue in these cases, the State is entitled to FFP for periods up to 30 days when it was engaged in transferring the patients to other facilities. 42 CFR §441.11, §442.15; Weikel Letter, Tab E, Order to Show Cause dated October 16, 1980, supra. For Doane's, this occurred some or all of the 30 days preceding January 17, 1979; for Earle, between December 3 and 31, 1977, depending on HCFA's determination.

Summary of Our Holdings

In conclusion, we have made the following determinations in these cases:

A. In 79-35, 79-51, 79-226, 80-14, 80-47:

1. Kings Manor

Pursuant to PRG-11 and the federal court order, FFP is authorized in claims for the cost of services to Medicaid recipients from April 1, 1978 to February 13, 1979.

2. Kings Care

Pursuant to §205.10(b)(3) and the State court order, FFP is available May 23, 1978 to December 29, 1978.

B. In 80-47, 80-87, 80-139, 80-174:

1. Kings Manor

Because of the failure of the State to provide the necessary documentation under 42 CFR 442. 105, we find the March 6, 1979 and September 5, 1979 certifications to be invalid and uphold the disallowances.

2. Kings Care

Because of the failure of the State to provide the necessary documentation under 42 CFR §442.20 and §442.105, we find the March 6, 1979 and September 5, 1979 certifications to be invalid and uphold the disallowances.

C. In 78-19, 78-40, 78-138, 79-35, 79-51, 79-226, 80-7, and 80-14:

1. Pursuant to the State court orders, FFP is available for Doane's May 10, 1975 to May 10, 1976, and for Earle June 9, 1976 to June 9, 1977.

2. Pursuant to 42 CFR §441.11 and §442.15 and the Weikel letter, FFP is available for patients admitted prior to termination for up to 30 days in December 1978 (Doane's) and January 1979 (Doane's and Earle) of such time as HCFA determines the State made reasonable efforts to transfer the patients to another facility or to alternate care.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

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

APPENDIX

DGAB No.	Amount	Service From
Doane's (SNF)		
78-19	$ 3,139	6/1 to 8/31/77
78-40	2,615	9/1 to 11/30/77
78-138	2,653	12/1/77-2/28/78
79-35	2,507	3/1 to 5/31/78
79-51	2,523	6/1 to 8/31/78
79-226	2,204	9/1 to 11/30/78
80-7	6,398	1/
80-14	892	12/1/78 - 1/31/79
Subtotal	$22,931	
Earle (SNF)		
78-19	$13,207	6/1 to 8/31/77
78-40	14,678	9/1 to 12/22/77
78-138	665	12/23 to 12/31/77
80-7	28,316	1/
Subtotal	$56,866	
Kings Manor (ICF)		
79-35	$ 139,334	5/1 to 5/31/78
79-51	387,206	6/1 to 8/31/78
79-226	420,762	9/1 to 11/30/78
80-14	400,185	12/1/78 - 2/28/79
80-47	499,024	3/1 to 6/30/79
80-87	584,940	6/1 to 8/31/79
80-139	444,714	9/1 to 11/30/79
80-174	629,590	12/1/79 - 2/28/80
Subtotal	$3,505,755	
Kings Care (SNF)		
80-14	$ 721,755	12/1/78 - 2/28/79
80-47	732,745	3/1 to 6/30/79
80-87	750,543	6/1 to 8/31/79
80-139	830,513	9/1 to 11/30/79
80-174	1,038,954	12/1/79 - 2/28/80
Subtotal	$4,074,510	

1/ This actually consisted of two disallowances announced in the same letter -- from HCFA files ME-NY 7701 and ME-NY 7702. In Number 7701, for the quarter ended March 31, 1977, Doane's is disallowed $3,260 and Earle $15,108. In Number 7702, for the quarter ended June 30, 1977, Doane's is disallowed $3,138 and Earle $13,208. The periods of service are not shown.

Summary

DCAB No.	Amount	Disallowance	Appeal
78-19	16,346	3-15-78	4-14-78
78-40	17,293 2/	5-19-78	6-16-78
78-138	3,318	9-25-78	10-25-78
79-35	141,841	2-2-79	3-1-79
79-51	389,729 3/	2-5-79	3-7-79
79-226	422,966	11-2-79	11-23-79
80-7	34,714	1-8-80	2-1-80
80-14	1,122,832	12-10-79	1-9-80
80-47	1,231,769	2-15-80	3-17-80
80-87	1,335,483	4-10-80	5-9-80
80-139	1,275,227	6-7-80	6-21-80
80-174	1,668,544	10-22-80	11-21-80
Total	7,660,062		

2/ In addition, there was also a disallowance for Latta Road Nursing Home totalling $1,382. New York withdrew its appeal on Latta Road on April 11, 1979.

3/ In addition, there was also a disallowance for Beechwood Nursing Home totalling $16,983. HCFA withdrew the disallowance on Beechwood on October 9, 1980.