

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Maryland Department of Health  
and Mental Hygiene  
Docket No. 80-29-MD-HC  
Decision No. 229

DATE: November 30, 1981

DECISION

On January 11, 1980, the Director, Bureau of Program Operations, Health Care Financing Administration (HCFA, Agency), issued a notification of disallowance to the Maryland Department of Health and Mental Hygiene (State) denying \$239,015 in Federal financial participation (FFP). The disallowance concerned intermediate care facility (ICF) services rendered at three nursing facilities under the Medicaid program during the period March through May 1979. The facilities involved and the amounts of the respective disallowances are as follows:

National Lutheran Home	\$ 757
Western Maryland Center	230,497
Long Green Nursing Home	<u>7,761</u>
	\$239,015

The notification of disallowance stated that the disallowed FFP represented claims for ICF services provided during periods when these facilities did not have valid provider agreements.

On February 8, 1980 the State submitted to the Board an application for review, enclosing provider agreements executed with each of the facilities and HCFA Certification and Transmittal Forms 1539 (C&T) for the Long Green Nursing Home and the Western Maryland Center. In its response to the State's appeal, the Agency reduced the disallowance for the Long Green Nursing Home from \$7,761 to \$3,100, so that the total disallowed amount is now \$234,354.

There are no material issues of fact in dispute. We have, therefore, determined to proceed to decision based on the written record and briefs, including the State's response to an Order to Show Cause issued on August 13, 1981. The Agency was not required to respond to the Order and did not do so.

Applicable Regulations

The Medicaid regulations in effect for the period in question are set forth in 42 CFR Part 442 (1978), "Standards for Payment for Skilled Nursing and Intermediate Care Facility Services."

The regulations require generally that prior to the execution of an ICF provider agreement and the making of payments, the agency designated pursuant to 42 CFR 431.610 (the State survey agency) must certify that the facility is in full compliance with standards prescribed in the regulations. 42 CFR 442.12(a) and 442.101. Generally, the term of a provider agreement may not exceed twelve months and the agreement must be for the same duration as the certification period set by the survey agency. 42 CFR 442.15. The effective date of a provider agreement may not be earlier than the date of certification. 42 CFR 442.12(b).

#### Factual Background

A C&T for the National Lutheran Home, located in the District of Columbia, was executed on March 2, 1979 for the period March 1, 1979 through February 29, 1980. A provider agreement for this same period was executed on April 27, 1979. FFP is being disallowed for the one day of March 1, 1979.

A C&T for the Long Green Nursing Home was executed on April 5, 1979 for the period January 1, 1979 through December 31, 1979. A provider agreement for this same period was executed on September 10, 1979. FFP is being disallowed for the period March 1, 1979 to April 5, 1979.

A C&T for the Western Maryland Center was executed on May 17, 1979 for the period September 1, 1978 through August 31, 1979. A provider agreement for this same period was executed on October 17, 1978. The State claims that this facility was surveyed for Medicare and Medicaid participation on April 26-28, 1978. This survey covered both the skilled nursing care and intermediate care portions of the facility. The State claims that the skilled nursing care survey result, with an accompanying C&T, was sent to the Agency's Regional Office on July 18, 1978. The intermediate care survey report, however, was accidentally misplaced at the State survey agency. Consequently, as a survey report provides the information for a C&T, the State survey agency did not execute an ICF C&T. The State contends that the survey disclosed no deficiencies for the intermediate care portion of the facility. The State claims the error was not discovered until May 1979 when the Regional Office requested the State survey agency to send the intermediate care information. The survey agency then executed the C&T on May 17, 1979. FFP is being disallowed for the period March 1, 1979 to May 17, 1979.

#### Parties' Arguments

In its application for review the State argues that the provider agreements it executed with the facilities are valid and comply with all the requirements of the Medicaid regulations. The State contends the

facilities were certified (§442.12 (a)), the provider agreements were of the same duration as the certification periods (§442.15(b)), the provider agreements did not exceed twelve months (§442.15(a)), and the effective dates of the provider agreements were not earlier than the dates of the certification of the facilities (§442.12(b)). The State argues that its survey agency can backdate certifications and that the "date of certification" can only mean the effective date of a facility's certification, the beginning of the certification period. The State further contends that HCFA approves backdated certifications, and cites HCFA's policy on Medicare agreements as support of this contention.\* (State's April 3, 1980 letter, p. 3.) With regard to the Western Maryland Center, the State claims that during the period in question it had enacted a Dual Certification Program, whereby a facility's beds would be approved for both Medicare-SNF and Medicaid-ICF participation. The State therefore argues that as the facility met the standards for Medicare certification and State licensure, which the State claims are more stringent than Medicaid-ICF requirements, it necessarily follows that a decision had in effect been made that the facility met ICF certification requirements, even though a C&T had not been executed. (State's April 3, 1980 letter, p. 1.)

The Agency's position is that the earliest date a facility can be considered certified is the date of the execution of a C&T, the date the State survey agency determined that the facility met all the program requirements. The Agency further contends that while it allows a backdated certification for a skilled nursing facility (SNF) in the Medicare program, it has never authorized backdated certifications for Medicaid-ICFs.

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\* In order to have Medicaid conform with Medicare policy concerning the effective date of a provider agreement, HCFA issued new regulations on April 4, 1980 (45 Fed. Reg. 22933). Under the new rule, 42 CFR 442.13, the effective date a State Medicaid agency enters into a provider agreement may be earlier than the date of certification. If all federal requirements are met on the date of the onsite survey, the agreement must be effective on the date the onsite survey is completed, for a new certification. 442.13(b). If all federal requirements are not met on the date of the survey, the agreement must be effective on the date the provider meets all requirements, or the date the provider submits a plan of correction acceptable to the State survey agency or an approvable waiver request, whichever date comes earlier. 442.12(c). There is nothing in the new regulation to indicate that it was intended to be retroactive.

In response to a Board inquiry as to whether the disallowance for the Western Maryland Center could be forgiven because of the State's apparently inadvertent administrative error, the Agency replies in the negative. The Agency states that "when the State survey agency has failed to perform its survey responsibilities pursuant to the federal regulations . . . , a facility's compliance with the applicable federal and state requirements has not been adequately documented for the purpose of FFP." (Agency response, p. 6.) The Agency argues that the State survey agency did not complete its licensure review of the facility until April 1979 and did not determine that the facility met federal requirements until May 17, 1979. The Agency rejects the State's argument that the satisfaction of Medicare-SNF standards means that a facility also meets Medicaid-ICF standards. The Agency argues that the regulations require that a facility meet additional, distinct ICF standards in order to participate in the Medicaid program as an ICF.

#### Discussion

The central issue involving the disallowances for all three facilities is when a facility becomes certified for participation in the Medicaid program. The Agency has contended that it is when a C&T is executed. The State has argued that a C&T and, therefore, a facility's certification can be backdated to include an earlier period.

As was discussed in the Order to Show Cause, the Board has examined this issue in several decisions, most fully in Washington Department of Social and Health Services, Decision No. 176, May 26, 1981. The analysis that follows is adopted from that decision.

The Board in Maryland Department of Health and Mental Hygiene, Decision No. 107, July 2, 1980, has considered the applicability of 42 CFR 442.12 to the requirement for certification of an ICF prior to the existence of a valid provider agreement for FFP purposes, and the use of the C&T form for certification. The actual holding in Maryland is that the Agency was not arbitrary in interpreting 42 CFR 442.12(a) and (b) as meaning that a provider agreement can be effective only from the date of a facility's certification as meeting certain requirements, in view of the Medicaid program's aim to ensure quality care in sanitary and safe conditions. The decision also states that it is the Agency's interpretation that this certification "becomes effective on the date the survey agency indicates its approval by completing a HCFA Form 1539 [C&T]." It was not necessary for the Board to decide whether recertification could be effective prior to the execution of a C&T in Maryland, which involved recertification of a facility. Maryland was there contending that when the survey agency signed the C&T forms it could backdate them to the date the prior provider agreements expired.

The decision did not reach the issue of whether the date of certification had to be the date the C&T form was signed, or whether it could be some earlier date, if all the requirements for certification were then met and certification was manifested in some other manner.

The Board has also said in New Jersey Department of Human Services, Decision No. 137, December 1, 1980, that there was no requirement that a particular form be used by a state survey agency in certifying a facility for Medicaid participation. Thus, the Board concluded in New Jersey that it is possible to have a facility certified without having the C&T form signed. In order to do so, a state survey agency "must communicate certain information in order that a facility be certified for Medicaid participation and that other requirements of the Medicaid regulations are met" (p. 5). If the C&T is used, the Agency has not required that there be any actual communication to the single state agency, or to anyone else, to make certification effective. When the form is signed, certification is complete, before anything else is done.

While the date of the signature on line 19 of the C&T form is presumptively the best evidence of the date a certification determination was in fact made, the Board will find that the certification determination was made on an earlier date, if established by other clear evidence. This evidence must show convincingly that all the requirements for certification are met, and the survey agency not only so determines, but commits its determination to writing in the form of notification to either the single state agency or the facility. Washington, p. 5. It should be pointed out that neither under Maryland nor under Washington may the "date of certification" of an ICF be backdated. Washington permits the "date of certification" to be earlier than the date the C&T is signed, under certain prescribed conditions. Both Maryland and Washington state that an ICF provider agreement may be backdated to be effective from the date of certification, but not any earlier. Since FFP is dependent upon a valid provider agreement being in effect, FFP is not available in any case prior to the "date of certification," whatever that may turn out to be for the particular facility.

The Board's Order set forth the above analysis and directed the State to show cause why the Board should not sustain the disallowance on the grounds that there was no evidence that the facilities were properly certified until the State survey agency executed the C&Ts. The Order informed the State that if it could document that certification decisions had been made and committed to writing before the C&Ts were executed, part or all of the disallowance might be modified.

In its response to the Order, the State submitted arguments concerning only the Western Maryland Center. Consequently, as the State had not provided us with any evidence that the National Lutheran Home and the Long Green Nursing Home were certified by the State survey agency prior to the execution of the C&Ts, we sustain the disallowances for those two facilities.

With regard to the Western Maryland Center, the State repeated its earlier assertion that the State survey agency's certification of the SNF portion of the facility indicates that the facility also met ICF certification requirements. In the Order the Board tentatively concluded that the Agency was correct in its assertion that a facility's meeting of Medicare-SNF standards does not mean that the facility also meets Medicaid-ICF requirements. The Order noted that 42 CFR 442.254 sets out additional requirements which a Medicare-SNF must meet in order to provide reimbursable ICF services.

In its response the State claimed that the SNF survey report form (HCEA 1569) "covers in substance every item" on the ICF survey report addendum (HCEA 3070D), which details the requirements set forth in 42 CFR 442.254. In support of this contention, the State supplied a memorandum from a survey agency official "delineating the comparable regulations" for ICF and SNF certification. This memorandum compared the regulatory requirements in the 1569 and 3070D forms and concluded that "a close examination of the Skilled Survey Report Form will indicate quite clearly that it covers each and every component addressed in the ICF memorandum."

Thus, according to the State, the State survey agency's certification of the facility for Medicare-SNF participation meets the Washington criteria because "as the SNF certification in fact indicated full compliance with ICF certification requirements, ICF compliance approval was communicated, by the State survey agency, to the single State Medicaid Agency, when the SNF certification form was timely transmitted." The State also repeated its assertion that under State licensure regulations for comprehensive care facilities, all beds were required to have dual certification for SNF and ICF services.

An analysis of the memorandum supplied by the State reveals that while most of the ICF requirements are, in substance, duplicated in the SNF certification requirements, others are not. For example, 42 CFR 442.254(a)(5) states that an ICF must meet the requirement for handrails set forth in 42 CFR 442.324(b). The comparable SNF regulation cited in the State's memorandum does not specifically refer to handrails. Similarly, the ICF requirements for resident financial records, set forth at 42 CFR 442.430, are not completely covered by the SNF regulation cited in the State's memorandum. These differences

lead us to question whether the State's Dual Certification Program encompassed all the requirements for an ICF.

We have further difficulty finding that the facility's SNF certification conveyed a determination that the facility qualified as an ICF. There is no evidence before us that the facility was free of deficiencies. Indeed, the State has supplied a document that indicates that the Medicare-SNF survey report reflected deficiencies at the facility and that the facility's SNF participation was based on the submission of an acceptable plan of correction. (State's April 3, 1980 submission, Exhibit C.) While the 3070D survey report for the facility does state, "NO HEALTH DEFICIENCIES," the ICF C&T that was ultimately executed on May 17, 1979 nevertheless indicates that a plan of correction was required and that an automatic cancellation clause was included. This leads us to believe that, contrary to the State's assertion that the facility was deficiency-free, deficiencies did exist at the facility. We do not know the nature of these deficiencies or when the plan of correction was accepted.

Moreover, the State failed to supply us with a copy of the facility's SNF C&T to indicate when the survey agency determined that the facility met SNF standards. Thus, there is nothing in the record, beyond conclusory argument from the State, to indicate that the State survey agency ever communicated a decision concerning the SNF standards to the single State agency.

Furthermore, the 3070D survey report, while indicating that a survey was conducted at the facility on June 20-21, 1978, was not actually approved by a survey agency official until May 4, 1979.

The cumulative effect of these factors is to convince us that in this case the certification of the facility as a Medicare-SNF was not sufficient to convey to the single State agency a determination as to the facility's certification as a Medicaid-ICF. The Medicaid regulations are explicit in requiring both that a State survey agency make a determination that a facility meets all the standards for an ICF before certifying the facility for Medicaid participation and that the State may not execute a provider agreement for ICF services unless a facility has been certified to provide those services. The State has not provided us with any clear and convincing evidence that such a determination was made before the execution of the C&T on May 17, 1979. Accordingly, we sustain the disallowance for the Western Maryland Center.

#### Conclusion

For the reasons stated above, we sustain the disallowance in the following amounts: \$757 for the National Lutheran Home; \$3,100 for

the Long Green Nursing Home; and \$230,497 for the Western Maryland Center. (Total—\$234,354.)

/s/ Cecilia Sparks Ford

/s/ Norval D. (John) Settle

/s/ Alexander G. Teitz, Panel Chair