

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Ohio Department of Public Welfare      DATE: October 30, 1981  
Board Docket No. 79-237-OH-HC  
Decision No. 226

DECISION

By letter dated December 20, 1979, the Ohio Department of Public Welfare (Ohio, State) requested reconsideration of \$3,304,558 in Federal financial participation (FFP) disallowed by the Health Care Financing Administration (HCFA, Agency). The amount disallowed had been claimed by Ohio under Title XIX of the Social Security Act for services to Medicaid recipients by nursing homes during the period July 1, 1973 to June 30, 1976. Subsequently, in a March 28, 1980 supplement to its request, Ohio withdrew its appeal as to \$316,849, which represented unallowable payments for rest home care. This left a balance of \$2,987,709 on appeal.

This dispute is the result of an audit of the Medicaid program in Ohio by the Audit Agency of the (then) Department of Health, Education and Welfare. With respect to the issues involved in this appeal, the auditors recommended that the State return the following amounts of FFP, for the reasons indicated:

1. \$1,898,921 - absence of provider agreements.
2. \$1,058,631 - overpayments due to adjustment of retrospective rates.
3. \$ 30,157 - unallowable payments for life care contracts and failure to deduct patients' income and resources.

In this decision we uphold in part and reverse in part the \$1.9 million disallowance based on the absence of provider agreements. We uphold the entire amount of the disallowance on the remaining points. Our decision is based on the appeal, HCFA's response, various supplemental filings by both parties, an Order to Show Cause and the responses by both parties, and an Order to Develop the Record and the responses by both parties.

A. Absence of Provider Agreements

HCFA disallowed \$1,898,921 FFP based on its finding that the State had reimbursed both skilled nursing facilities (SNFs) and intermediate care facilities (ICFs) for services to Medicaid recipients during periods when those facilities did not have provider agreements with the State. To qualify for FFP, a State must have such agreements in effect. Section 1902(a)(27) of Title XIX of the Social Security Act, 42 U.S.C. §1396a(27), and 45 CFR Part 249 (1973-1976).

Ohio does not deny that some of the facilities for which it claimed FFP did not have provider agreements. Ohio's principal argument is that the disallowance based on the lack of provider agreements should be reversed because of the method by which it was calculated. There are three sub-issues:

- 1) Where does the burden lie of determining the quantum of unallowable costs?
- 2) Has HCFA shown that its method was valid?
- 3) Assuming the method was not valid, what is the remedy?

1) Responsibility for the quantum

The parties each rely on Board decisions to support their arguments that the burden rests with the other to produce a figure for the quantum of unallowable costs. Ohio cites University of California -- General Purpose Equipment, Decision No. 118, September 30, 1980. HCFA cites Massachusetts Department of Public Welfare, Decision No. 155, March 20, 1981; and California State Department of Health, Decision No. 55, May 14, 1978. HCFA also cites Georgia v. Califano, 446 F. Supp. 404 (N.D. Ga. 1977). We find the instant case distinguishable from the situations prompting those decisions and instead elect to follow a principle of shared responsibility such as the one underpinning the result in California Department of Health Services -- San Joaquin Foundation, Decision No. 182, May 29, 1981.

In Georgia v. Califano, *supra* at 410, the court held that the state was "ultimately charged with the duty of proving the allowability of deferred claims." The court made that statement in the context of the state's challenge of the use of sampling per se and went on to hold that the sample was correctly done. *Id.* at p. 411. We do not find this decision relevant in a situation where the Agency has not shown its sample to be valid.

In General Purpose Equipment, the Board sustained the grantee's appeal from a disallowance the quantum of which was based on statistical sampling found to be questionable. Here, because of the State's failure to monitor the renewal of provider agreements, the Agency should not bear alone the responsibility for determining the amounts to be disallowed.

In Massachusetts, the Board sustained the disallowance, even though the Agency admitted that there were defects in the statistical sampling methodology used by the auditors. The Board held that in the "narrow circumstances" where Massachusetts had made a "conscious and deliberate choice" not to apply a reduction in physicians' fees mandated by the legislature, the State had to produce its own estimate or be bound to pay the amount established by HCFA. Decision, pp. 3, 4.

Here, although the Agency does not admit to the defects in the sampling methodology, those defects can be demonstrated. See page 7, infra. And although Ohio is responsible for the failure which occasioned the disallowance, its wrong was not one of deliberately choosing not to apply a program requirement, as in Massachusetts.

The California case (Decision No. 55) actually did not involve a sampling issue like the one in this case. The Board ruled against the State's use of a ratio derived from a sample to estimate the number of persons eligible for Medi-Cal in a group for which the State did not have records. <sup>1/</sup> HCFA had treated the entire group as ineligible. The Board found that the State has "the ultimate burden of establishing and documenting eligibility" and, in any event, "beneficiaries for whom records are not found are more likely to be ineligible than those for whom records are found." Decision, pp. 4, 5. Here, even though we find that the State bears at least part of the burden of establishing the quantum, we also find the figure chosen by HCFA to be of questionable validity.

San Joaquin (Decision No. 182), like California, involved a question of payments for persons not eligible for Medicaid. Similar to the situation in the instant case, the dispute was over the methodology in determining the amount, not the disallowance itself. In the face of an admission by a HCFA witness that its sample was defective and the Board's analysis showing that HCFA's choice of a figure for the disallowance was arbitrary, the Board decided not to uphold the disallowance "as it now stands." Decision, p. 5. The Agency auditors, assisted by the State, were given an opportunity to modify or reaffirm the disallowance by means of full review or a valid sampling technique. Id. at p. 6.

Thus, in situations where a disallowance is obviously called for, but the quantum has not been properly established, the Board has not found that the State has the burden of proving its claim under all circumstances. While as a general proposition it is true that the State bears the ultimate burden of justifying its claims for FFP, the Agency shares the burden of going forward with evidence, in the sense that the Agency cannot merely make arbitrary counterclaims; if the Agency disputes a claim by the State, and does so using statistical sampling methodology, the Agency must, if asked, show the reasonableness of its methodology. The State bears a similar burden, in that it has responsibilities of justifying its claim and facilitating Agency access to necessary records. These shared responsibilities track the cooperative nature of Federal-state relations in assistance programs generally and of the Medicaid program in particular.

## 2. HCFA's showing of validity

The \$3,517,403 (\$1,898,921 FFP) which HCFA concluded the State paid to nursing homes without provider agreements was the total of one actual finding and two

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<sup>1/</sup> Medi-Cal is the term for the Medicaid program in California.

estimates derived from samples. 2/ The principal question here is whether the sample estimates reasonably can be said to be valid.

The audit encompassed 880 nursing homes. Five SNFs were examined; four of these did not have provider agreements and had been paid a total of \$1,400,175. 3/ The remaining 875 facilities consisted of 333 SNFs and 542 ICFs. 4/ Samples of 58 SNFs and 114 ICFs were taken. 5/

In the sample of 58 SNFs, five were found not to have provider agreements. 6/ Inexplicably, one of these had not received any payments, although it was on the list of approved providers. HCFA August 1981 Response, p. 9. The other four had received payments totalling \$347,407. 7/ From this the Agency estimated that the total paid to those SNFs without provider agreements (in the universe of 333) was somewhere between \$1,151,847 and \$2,837,493. For the disallowance, it chose a point midway between the two extremes -- \$1,994,670 (hereinafter called the "point estimate"). It claimed a "confidence level" of 90 percent. 8/

2/ A total of \$3,964,487 was identified, but HCFA subtracted an amount totalling \$447,084 which was subject to disallowance also for other reasons.

3/ In its August 21, 1980 response to the appeal, HCFA indicated that there were four SNFs which had been paid \$1,427,175. Page 6. In its August 19, 1981 response to the Order to Develop the Record HCFA stated that the four SNFs were part of a "judgment sample" (not explained) of five SNFs and that the payments to the four totalled \$1,400,175. Page 8.

4/ The audit report states that there were "about" 541 ICFs, 6 SNFs, and 333 ICF/SNF facilities. Page 1. In its response to the Order to Develop the Record, HCFA states that there were as of September 15, 1975, 542 ICFs and 338 SNFs (333 remaining after the five in the "judgment sample" were subtracted). Page 9. HCFA explained that the figures at page one of the audit report were current at the time the report was prepared (1978) but change from month to month and were included only to "provide perspective." Id. at 8.

5/ HCFA does not explain why the original sample of 107 ICFs was expanded to 114. August 1980 Response, p. 7.

6/ Exhibit 1 to HCFA's August 1981 Response indicates there were only four, but in the Response itself HCFA states there were five. Page 9.

7/ The payments were \$47,665; \$40,198; \$12,911; and \$236,633. HCFA August 1981 Response, p. 13.

8/ Another way of expressing this is that there is 1 chance in 10 that the correct amount does not lie within the alleged range.

In the sample of 114 ICFs, nine were found not to have provider agreements. The nine received payments totalling \$119,868. 9/ From this the Agency estimated that the total paid to those ICFs without provider agreements was somewhere between \$388,072 and \$751,212. For the disallowance, it chose a point midway between the two extremes -- \$569,642 ("point estimate"). It claimed a "confidence level" of 90 percent.

Ohio argues 1) a confidence level of 90 percent is not high enough; 2) it is not possible to substantiate a confidence level of 90 percent by use of the midpoint; and 3) it could not ascertain how the Agency decided on the size of the samples, but the extent of variance in the payments as shown by the \$236,633 for one of the five SNFs warranted an increase in the size of the samples. Submission dated March 28, 1980 (pages not numbered). HCFA has never adequately responded to these points, even after the Board requested specific information in the Order to Develop the Record.

In that Order, the Board asked for the following data and attendant calculations with respect to each sample: the mean, the standard error, the tolerable error, and the coefficient of variation. 10/ In a blurred, copier-darkened, handwritten document, 11/ HCFA supplied most of the data but none of the calculations. August 1981 Response, p. 13 and Exhibit 1. The exhibit states that the tolerable error was not "established." HCFA reported the mean for the SNF sample to be \$5990. It supplied no calculations, but \$5990 can be obtained by dividing the \$347,407 total for the

9/ The payments were:

\$53,673	\$9,400
6,180	6,895
252	1,260
5,927	4,245
32,036	

Id. at p. 13.

10/ These are standard concepts used in statistical sampling. See, for example, Statistics for Management (1977) by B. J. Mandel, Professor Emeritus of Statistics and Former Chairman of the Statistics Department, University of Baltimore. HCFA relied on the published work of Herbert Arkin, Professor of Business Statistics at the City University of New York.

11/ One explanation for this might be that the exhibit is a copy of the audit work papers, but HCFA did not say so. It would have been better if HCFA had typed the information, or at least submitted a more legible copy, and identified the source of the information. See Standards for Audit of Governmental Organizations, Programs, Activities, and Functions by the Comptroller General of the United States (1981), pp. 25-26 "Working Papers."

sampled SNFs lacking provider agreements by 58, the SNF sample size. Multiplying \$5990 by 333, the SNF universe, yields \$1,994,670. This may have been how the point estimate (\$1,994,670) used for the disallowance was derived. Similar computations produce a like result for the ICFs.

HCFA reported the coefficient of variation for the SNF sample as 5.35743. 12/ It reported two figures as the standard deviation -- \$12,052 allegedly calculated manually and \$32,090 generated by use of a computer. 13/ HCFA does not provide any calculations to show how it arrived at any of these figures except by a general reference to Dr. Arkin's textbook, nor does it explain why the manual and computer results differ. Ohio cites Dr. Arkin's text in support of the State's contention that the method used by HCFA may not produce a point estimate sufficiently accurate to present as legal evidence. Ohio September 1981 Response, p. 8.

We do not find that either party has established the validity or invalidity of the 90 percent confidence level, but using HCFA's figures in a standard formulation we conclude that the point estimate does not have a sufficiently valid basis to be used in a disallowance. We will demonstrate this by using the formula for determining sample size for variables, because the high coefficient of variation indicates that the sample was not large enough. 14/ We use the formula for variables because HCFA's position is that it was sampling to determine the

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12/ The coefficient of variation is a measure of the extent of variation of units (here, payments) from their mean value. Thus, the presence of one value of \$12,911 and another of \$236,633 in a set of four SNFs presages a very high coefficient. Expressed as a percentage (multiplying it by 100), it would be 536 per cent (rounded).

We do not know how HCFA calculated its coefficient, but dividing the standard deviation (\$32,090) by the mean (\$5990), we obtain 5.36.

13/ The standard deviation is a measure of the average difference of the units (payments) from their mean value; it is the square root of the mean of squared differences of the values from their mean. We were not able to ascertain how HCFA arrived at either the manual or computer generated figures.

14/ We realize that our analysis may not be the only approach for demonstrating the weakness of this sampling methodology. However, we were forced to perform our own evaluation because neither party made an adequate showing of the validity or invalidity of the sampling methodology.

amount paid (a variable), not the attribute of having a provider agreement. 15/

The formula is to take the product of the universe (N) multiplied by the confidence factor (t) squared times the coefficient of variation (V) squared and divide this product by the sum of N multiplied by the tolerable error (E) squared plus the product of t squared multiplied by V squared. 16/

$$\text{Thus, } n \text{ (sample size)} = \frac{Nt^2V^2}{NE^2 + t^2V^2}.$$

Since the sample size is known and the tolerable error is not, we convert the formula to

$$E = \sqrt{\frac{t^2V^2}{n} - \frac{t^2V^2}{N}}.$$

Using HCFA's figures, we arrive at a tolerable error of 105 percent for the SNF sample and 77 per cent for the ICF sample. 17/ We find it unreasonable to base a disallowance on such a high rate of error. As shown above, the tolerable error rate is a key factor in determining sample size. By way of contrast, had the Agency chosen a tolerable

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15/ In its Response to the Order to Develop the Record, HCFA stated the number of SNFs estimated to lack provider agreements -- 29 -- had no bearing on the dollar point estimate. Page 10.

16/ The confidence factor is used to apply the confidence level. It can be found in a table referred to as the Normal Distribution Curve (bell-shaped) and is probably a standard feature of all statistics textbooks. See Appendix C in Dr. Mandel's text, supra (1977 edition). For a confidence level of 90 percent, the factor is 1.65. Thus, 90 percent of the true values lie within plus or minus 1.65 times the standard deviation from the mean.

17/ The confidence factor squared is 2.7, based on the confidence level of 90 percent. The coefficients of variation squared are 28.7 (SNFs) and 32 (ICFs). Multiplied by the confidence factor, they are 77.6 (SNFs) and 86.5 (ICFs). These products, divided by the respective samples (58-SNFs, 114 - ICFs) and universes (333 - SNFs, 542 - ICFs), the universe quotients subtracted from the sample quotients, and the square root taken of the results, gives us 1.05 for the SNFs and .77 for the ICFs.

error rate of 5 per cent, it would have had to "sample" virtually the entire universe in each instance (329 SNFs, 533 ICFs), given the same high coefficient of variation. The Agency's admission that it did not establish a tolerable error rate, in addition to our own computations above, lead us to conclude that the sample size was chosen arbitrarily and without reference to the problem of variance.

This finding is strengthened by HCFA's response to the Board's request that the Agency demonstrate how the sample sizes were appropriate for determining payments to facilities lacking provider agreements. The Agency response alludes to "problems of cost and time" and in addition sets out numbers and calculations which at best give collateral but coincidental support only to the ICF part of the disallowance. August 1981 Response, p. 11.

### 3. The remedy

We find that HCFA's failure to validate the potential inaccuracies in the point estimates for both SNFs and ICFs as demonstrated above makes those estimates highly questionable as bases for this disallowance. On the other hand, the State admittedly failed to monitor the renewal of provider agreements and a disallowance of some amount is justified. Accordingly, we sustain this disallowance in part based on what we find to be the best available figures, as follows:

a. In its attempt to justify the ICF part of the disallowance, HCFA alleged that the auditors found a total of \$524,078 paid to ICFs lacking provider agreements. This was not based on a sample, but a 100 percent audit of only those ICFs giving rest home care. 18/ August 1980 Response, p. 8. The Board noted this finding in the Order to Show Cause and Ohio has not refuted it. Therefore, we uphold the ICF part of the disallowance to the extent of \$524,078, FFP to be determined at the applicable rate.

b. We also uphold the actual SNF finding to the extent of \$1,400,175, FFP to be determined at the applicable rate. Ohio objected to the HCFA's combining of this actual finding with the estimates derived

18/ The total includes payments to ICFs selected in the sample. FFP was not available for rest home care and HCFA disallowed \$584,077 (\$316,849 FFP) which Ohio is no longer appealing. There is no overlap with the amount disallowed for lack of provider agreements because the Agency subtracted \$447,084 in arriving at the latter, specifically to eliminate duplication with disallowances for other reasons cited in the audit report. Notification of Disallowance, p. 3.



from the two samples, but did not refute the finding itself. The Board made a tentative finding in the Order to Show Cause that mixing actual and estimated findings could be valid. Ohio has continued its objection but has not produced any support for its conclusion. September 1981 Response, p. 6. Accordingly, we uphold this part of the SNF disallowance and conclude that it may properly be added to estimated findings.

c. We uphold the remainder of the SNF disallowance to the extent of \$1,151,847, which is the lower end of the range established by HCFA. Ohio has argued throughout that the use of the point estimate was not valid, but it noted the auditors' initial decision to use the lower boundary and characterized it as "more prudent" than the point estimate. March 28, 1980 submission (not paginated). The lower boundary may be subject to some of the same infirmities as the point estimate; but consistent with our holding that the State shares responsibility with HCFA for this estimate, we sustain this amount. 19/

d. We also give both parties an alternative to our holdings on the two estimated findings, "a" and "c", totalling \$1,675,925. With respect to either or both of the holdings, the parties may conduct a 100 percent audit or a valid sample. If the State intends to do this, it must notify the Board and the Agency within 10 days from receipt of this decision. The effect of our decision is suspended for 25 days to permit the State time to give notice and will be suspended for an additional 35 days if the State elects to audit or sample. Similarly, HCFA may issue a new disallowance within 60 days from the date of our decision. If HCFA does not agree to the State's figures, or the State does not agree to HCFA's, the State may appeal again to this Board, within 30 days of receiving HCFA's determination.

#### 4. Other issues

Ohio also has four other points with respect to the provider agreement issue. We find against the State on each of these.

a. Ohio contended that Adams Manor, one of the sampled ICFs allegedly lacking a provider agreement, was certified and did have a provider agreement for December 1975, the month at issue. In support, Ohio submitted a Certification and Transmittal form signed June 16, 1976

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19/ In its response to the Order to Develop the Record, Ohio designated the method by which HCFA calculated the range as the "average range method" and cited a general statement in the Arkin text that "it would be well" to use an unspecified "more exact method" if the results were to be presented as legal evidence. We think this falls short of a clear repudiation of the lower boundary.

and a provider agreement signed July 12, 1976. Exhibit 2bi, July 31, 1981 submission; Exhibit 2b, July 28, 1980 submission. We hold, in keeping with prior Board decisions, that the provider agreement may not be effective earlier than the date of certification -- in this case, June 16, 1976. Washington Department of Social and Health Services, Decision No. 176, May 26, 1981; Maryland Department of Health and Mental Hygiene, Decision No. 107, July 2, 1980. Thus, Ohio has not shown that there was a valid provider agreement in effect for Adams Manor in December 1975. Even if it had, our decision on the ICF part of the disallowance does not depend on the ICF sample and we would still uphold that part to the extent indicated.

b. Ohio argued that a disallowance by HCFA dated January 28, 1977, overlapped this disallowance. February 28, 1980 submission. The disallowance on appeal here relates to claims for services during the periods January 1, 1974 - February 29, 1976 (SNFs) and May 10 - December 31, 1975 (ICFs). The 1977 disallowance covered claims submitted in reports for the quarters ended March 31, 1976; June 30, 1976; and September 30, 1976.

HCFA alleged that its examination of the work papers for the audits on which the two disallowances were based indicated no overlap. HCFA also pointed out that the audit in the January 1977 disallowance did not begin until five months after the completion of the earlier audit. August 1980 Response, p. 9.

In the Order to Show Cause, the Board in effect called upon Ohio to demonstrate where any overlap had occurred, but Ohio did not respond on this point. Accordingly, we find that an overlap has not been shown to exist with the other disallowance.

c. Ohio alleged that it continued payments to some of the facilities, despite the absence of provider agreements, because of court orders. The Board has held that under certain circumstances FFP is available in payments to nursing homes appealing the State's termination of or refusal to execute a renewal of a provider agreement. Ohio Department of Public Welfare, Decision No. 173, April 30, 1981.

The Board repeatedly requested Ohio to provide copies of the court orders, but Ohio has produced court orders dealing with only one facility -- Convalescent Care, Inc. Although similar in name, that facility is not identified as one of those involved in this disallowance. 20/ Even if it were, the orders relied on by Ohio do not direct the State to continue payments; to the contrary, the Court of Appeals of Franklin County held that it was not a denial

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20/ Convalescent Center is one of the SNFs found not to have had a provider agreement.

of due process to discontinue payments pending a hearing on the renewal of the provider agreement. Ohio Response to Order to Show Cause, Exhibit A-3, p. 1104.

Accordingly, we find that Ohio has failed to make the necessary showing.

d. Ohio contended that various policy and equitable considerations justified its continued payments to facilities lacking provider agreements, and that the 30-day limit for transferring Medicaid recipients from such facilities abridged the rights of those recipients. February 1980 submission. With respect to the first point, this Board has held that such arguments do not outweigh the regulatory requirements. Ohio, supra, p. 5. As for the second, even if this were the proper forum for attacking a regulation on constitutional grounds (HCFA contended it was not), the parties at interest would be the recipients, not the State. We find these two points without merit and hold against the State on them.

B. Overpayments due to adjusted retrospective rates

HCFA disallowed \$1,974,676 (\$1,058,631 FFP) identified as the equivalent of amounts owed to the State by nursing homes as a result of adjustments in per diem rates. The nursing homes had been paid in advance based on interim rates. The homes submitted cost reports at the end of the period and on the basis of these reports the rates were adjusted downward. The nursing homes allegedly are required under Ohio law to refund the difference to the State. Agency Audit Report, p. 7.

Ohio's principal argument is that "good logic and reason" compel a delay by the Agency in seeking reimbursement from the State until completion of administrative hearings on State audits which were conducted in September 1980. February 1981 Response to Order to Show Cause, p. 10. 21/ In addition, Ohio relied on a 1977 Agency "Action Transmittal" (AT 77-85) as a basis for the State not accounting for overpayments until the nursing homes have had the opportunity to exhaust all administrative remedies. Id. at p. 11; and Exhibit B-2.

HCFA cited section 1903(d) of Title XIX of the Social Security Act, 42 U.S.C. §1396b(d), as authority for its right to disallow, contending that the Secretary lacked the discretion to delay

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21/ Ohio initially contended it had collected and credited \$1,138,141 to the Agency, but subsequently abandoned that contention. See Ohio submission dated March 1980; HCFA submission dated August 25, 1980, Exhibit 1; Order to Show Cause.

effecting a disallowance based on an overpayment. 22/ HCFA argued that AT 77-85 did not apply to this situation because the disallowance was not based on a State audit, much less one almost a year after the disallowance. AT 77-85 interprets a similarly worded predecessor to 42 C.F.R. §447.296, a regulatory provision on which HCFA initially relied. HCFA later agreed with Ohio that §447.296 was inapplicable to this case because the disallowance was not based on a State audit. 23/ HCFA submission of August 1980, p. 4; Ohio submission of February 1981, p. 8; HCFA submission of June 1981, p. 7.

We find that the State has pointed to no authority to justify delaying the State's accounting for this overpayment. The auditor's findings were based on the State's review of "cost proposals" and "cost reports" supplied by the nursing homes themselves. Audit Report, p. 8. Ohio did not allege that any of the homes had appealed the State's efforts to collect. Whatever bearing AT 77-85 may have on the September 1980 audits, it is of no relevance to this disallowance. Accordingly, we uphold the disallowance.

22/ That section states, in pertinent part:

(d)(1) Prior to the beginning of each quarter, the Secretary shall estimate the amount to which a State will be entitled ...

(2) The Secretary shall then pay to the State, in such installments as he may determine, the amounts so estimated, reduced or increased to the extent of any overpayment or underpayment which the Secretary determined was made under this section to such State for any prior quarter and with respect to which adjustment has not already been made under this subsection.

HCFA conceded, however, that under certain circumstances (not shown to be present here) Agency regulations permit a State to pay by installments. August 1980 submission, p. 4.

23/ 42 CFR §447.296 (1979) states:

The agency must account for overpayments found in audits on the quarterly statement of expenditures no later than the second quarter following the quarter in which the overpayment was found.

AT 77-85 interprets "the quarter in which found" as "the quarter during which the administrative hearing procedures of the State have been exhausted and a determination of overpayment has been sustained."

C. Other overpayments

HCFA disallowed \$55,988 (\$30,157 FFP) because the State had included in its payments to nursing homes the cost of "life care" contracts and also had failed to subtract applicable patient income and resources. <sup>24/</sup> Prior to its response to the Order to Show Cause, Ohio did not contest this disallowance, asking only that repayment be deferred until the State had collected from the nursing homes. Since that Response, Ohio has by reference applied its argument on the other overpayment issue to this one.

We find that the State has not shown any basis for overturning or even delaying this disallowance. Accordingly, we uphold it.

Conclusion

We uphold the disallowance in this case for \$5,106,764 and overturn it in the amount of \$888,387. These amounts include both the federal and State shares, because we could not determine the FFP on the reduced provider agreement amount. The effect of our decision in the amount of \$1,675,925 of the disallowed amount is suspended for 25 days to give the State time to decide whether to pursue the 100 percent audit or sample alternatives and then for an additional 35 days if the State elects to do so. Page 9, supra. If HCFA is going to issue a new or modified disallowance to recoup more than \$5,106,764, it must do so within 60 days of the date of this decision or the matter of the quantum will be res judicata.

/s/ Cecilia Sparks Ford

/s/ Norval D. (John) Settle

/s/ Donald F. Garrett, Panel Chair

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<sup>24/</sup> Life care contracts are arrangements whereby patients agree to turn over to nursing home operators the patients' property in return for care for the rest of their lives. The cost of such contracts may be eligible for FFP under certain conditions, but those conditions were not met here. Nursing homes are required to deduct, for each patient, Social Security benefits and other income in excess of \$25 per month and any liquid assets in excess of \$300. Audit Report, pp. 2, 27.