

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Excelsior Health Care)	DATE: January 17, 1995
Services, Inc.,)	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-94-009
)	Decision No. CR352
Health Care Financing)	
Administration.)	
)	
)	

DECISION

On July 16, 1993, the Health Care Financing Administration (HCFA) notified Petitioner that it had determined that Petitioner no longer met the requirements for participation as a provider of services under Medicare. HCFA told Petitioner that it based its determination on the results of a complaint investigation survey which was conducted on HCFA's behalf from April 23, 1993 through June 2, 1993, by the Service Facility Regulation Administration, District of Columbia Department of Consumer and Regulatory Affairs (D.C. survey agency). HCFA informed Petitioner that it concurred with a D.C. survey agency finding that Petitioner had failed to comply with a condition of participation in Medicare. Specifically, Petitioner was found not to have met a condition requiring it to protect and promote patient rights. Petitioner was told that HCFA had determined to terminate Petitioner's participation in Medicare based on this finding and in light of Petitioner's history of failing to comply with federal requirements for participating in Medicare.

Petitioner requested a hearing. The case was assigned to Administrative Law Judge Charles E. Stratton for a hearing and a decision. On March 8 and 9, 1994, Judge Stratton conducted an in-person hearing in Washington, D.C. The parties filed post-hearing briefs with Judge Stratton. Unfortunately, Judge Stratton died before he could issue a decision in the case. The case was reassigned to me.

I afforded the parties the option of having a new hearing. I informed the parties that, if they accepted this option, I would not consider any of the exhibits or testimony received by Judge Stratton. Alternatively, I afforded the parties the option of my deciding the case based on the record created at the hearing conducted by Judge Stratton, including the transcript of that hearing, and any exhibits received into evidence at the hearing. As an element of this option, I gave the parties the opportunity to propose to supplement the record with additional exhibits. The parties accepted this alternative option. HCFA has not offered additional exhibits. Petitioner offered additional exhibits, P. Ex. 8 - 12.¹ I have admitted them into evidence in addition to those exhibits admitted by Judge Stratton.²

I have considered the evidence, the applicable law, and the parties' arguments. I conclude that HCFA's termination of Petitioner's participation in Medicare is supported by a preponderance of the evidence and by the law and I sustain it.

I. Issues, findings of fact, and conclusions of law

There are three issues in this case. In resolving these issues, I make findings of fact and conclusions of law. After each finding or conclusion, I cite to the pages of this Decision at which I discuss the finding or conclusion in detail.

A. Did Petitioner fail to comply with a Medicare condition of participation?

¹ I refer to Petitioner's exhibits as P. Ex. (number), (page number); I refer to the Health Care Financing Administration's exhibits as HCFA Ex. (number), (page number); I refer to the transcript of the hearing in this case as Tr. at (page).

² HCFA objected to the admission into evidence of these exhibits, arguing that they contained hearsay and were, thus, prejudicial to HCFA. Response of the Health Care Financing Administration to Petitioner's Proposed Posthearing Exhibits, December 20, 1994. I overrule these objections. Hearsay is admitted routinely in administrative hearings, and the fact that these exhibits contain hearsay is not in and of itself a basis to deny their admission. I do not agree with HCFA's assertion that it is prejudiced by the admission of these exhibits. HCFA had the opportunity to offer exhibits or other evidence to rebut the exhibits. I would have afforded HCFA the opportunity to cross-examine the declarants in Petitioner's exhibits had HCFA requested that opportunity.

1. As a condition of participation in Medicare, Petitioner was obligated to inform patients of their rights and to protect and promote the exercise of those rights. Pages 4 - 5.

2. Petitioner failed to comply with this condition in that it failed to inform a patient, E.R., of her rights, failed to protect her rights, and failed to document the manner in which her rights were being protected. Pages 7 - 14.

B. Was HCFA authorized to terminate Petitioner's participation in Medicare based on Petitioner's failure to comply with the condition of participation concerning patient rights?

3. HCFA may terminate a provider's participation in Medicare where that provider fails to comply with a condition of participation. Pages 5 - 7.

4. HCFA is not required to afford a provider the opportunity to correct its failure to comply with a condition of participation before terminating that provider. Pages 5 - 7.

5. HCFA was authorized to terminate Petitioner's participation in Medicare based on Petitioner's failure to comply with the condition of participation concerning patient rights. Page 14.

C. Did HCFA violate its obligation to give Petitioner notice of its determination to terminate Petitioner's participation in Medicare?

6. HCFA is required to give a provider 15 days' notice of a determination to terminate that provider's participation in Medicare. Page 15.

7. In this case, HCFA gave Petitioner approximately 30 days' notice of its determination to terminate Petitioner's participation in Medicare. Page 15.

8. HCFA did not violate its obligation to give Petitioner notice of its determination to terminate Petitioner's participation in Medicare. Pages 14 - 15.

II. Discussion

A. Background facts

The background facts of this case are not disputed. Petitioner has participated in the Medicare program as a Home Health Agency (HHA) under the provisions of sections 1861(o) and 1891 of the Social Security Act (Act) and under regulations contained in 42 C.F.R. Part 484. As an HHA, Petitioner has acted as a provider that is "primarily engaged in providing skilled nursing services and other therapeutic services" to Medicare beneficiaries in their homes. Act, section 1861(o)(1). At all times relevant to this case, Petitioner's place of business has been Washington, D.C.

On June 1, 1989, Petitioner was certified by HCFA to participate in Medicare. HCFA Ex. 1, page 1. Certification included acceptance by HCFA of a provider agreement executed by Petitioner's President, Jane V. Graham. Id. at 2.

Prior to the events which led up to Petitioner's termination from participation in Medicare, Petitioner had been found out of compliance with Medicare conditions of participation during annual surveys conducted by the D.C. survey agency in 1991, 1992, and 1993. Petitioner came into compliance with Medicare conditions of participation only after being threatened with termination as a Medicare provider. Tr. 42, 53 - 55; HCFA Ex. 2 - 3, 10 - 19.

B. Governing law and regulations

1. Criteria for participation in Medicare by an HHA

The Act establishes requirements that an HHA must satisfy in order to be certified as a Medicare provider. Act, sections 1861(o)(6), 1891. The Act gives the Secretary of the United States Department of Health and Human Services (Secretary) authority to establish requirements for participation in Medicare by an HHA, in addition to those specified by the Act, which are related to the health and safety of patients. Act, section 1861(o)(6). Regulations published by the Secretary implement the statutory requirements for participation by an HHA in Medicare. 42 C.F.R. Part 484.

The statutory requirements for participation include specific requirements designed to protect and promote the rights of patients. Act, section 1891(a)(1)(A) - (G). Patients who are cared for by an HHA are entitled to be fully informed in advance about the care and treatment that the HHA intends to provide and about any changes that the HHA may implement in such care and treatment. Act, section 1891(a)(1)(A).

Patients of an HHA are entitled to participate in planning their care and treatment, or any changes in their care and treatment. Id.³ Patients of an HHA are entitled to have their property treated with respect by the HHA. Act, section 1891(a)(1)(D). Patients of an HHA are entitled, in advance of coming under the HHA's care, to be fully informed, both orally and in writing, of: (i) all items and services furnished by (or under arrangements with) the HHA for which payment may be made under Medicare; (ii) the coverage available under Medicare, Medicaid, or any other federal program of which the HHA is reasonably aware; (iii) the HHA's charges for any items or services which it provides which are not covered under Medicare, and any charges that patients may have to pay to the HHA for items or services furnished to them by the HHA; and (iv) any changes in the charges or items and services provided by the HHA. Act, section 1891(a)(1)(E).

The Act provides also that the Secretary has the duty and responsibility to assure that the conditions for an HHA's participation in Medicare are enforced adequately to protect the health and safety of patients. Act, section 1891(b). Regulations published by the Secretary are intended to implement this duty and responsibility. The regulations emphasize the responsibility of an HHA, as a prerequisite to participating in Medicare, to protect and promote the rights of patients. They state that, as a condition of participation, an HHA has the duty to inform patients of their rights and to protect and promote the exercise of those rights. 42 C.F.R. § 484.10. Standards for protecting patients' rights contained in the regulations restate the requirements for protection of patients' rights stated in the Act. 42 C.F.R. § 484.10; see Act, section 1891(a)(1)(A) - (G).

2. Circumstances under which HCFA may terminate an HHA's participation in Medicare

The Act provides that the Secretary may terminate a participation agreement with an HHA where the Secretary finds that the HHA is not complying with the requirements for participation in Medicare. Act, section 1891(e). The Secretary is mandated to take either immediate action to correct a deficiency, or to terminate participation, where she finds that an HHA's failure to comply with

³ An exception exists in the case where a patient is adjudged to be incompetent. Id.

participation requirements immediately jeopardizes the health and safety of patients. Act, section 1891(e)(1).⁴ The Act provides further that, where the Secretary determines that an HHA is no longer complying with requirements for participation and that the failure to comply does not pose immediate jeopardy to the health and safety of patients, then the Secretary may impose intermediate sanctions on the HHA in lieu of terminating the HHA's participation in Medicare. Act, section 1891(e)(2); see Act, section 1891(f). The Secretary must terminate an HHA's participation in Medicare where intermediate sanctions do not correct that HHA's failure to comply with participation requirements. Act, section 1891(e)(2).

Petitioner argues that HCFA should have given it the opportunity to comply with participation requirements before it terminated Petitioner's participation in Medicare, inasmuch as HCFA made no finding that Petitioner's failure to comply with participation requirements posed immediate jeopardy to the health and safety of patients. I interpret Petitioner's argument as being an assertion that HCFA could not terminate Petitioner's participation in Medicare without first imposing intermediate sanctions and evaluating Petitioner's compliance with participation requirements under those sanctions.

The Act plainly permits the Secretary (or HCFA) to terminate an HHA's participation in Medicare based on a finding that the HHA fails to comply with participation requirements and where there is also a finding that this failure poses immediate jeopardy to the health and safety of patients. However, the Act is not so clear in addressing the circumstance where there is a finding that an HHA has failed to comply with a participation requirement, but where there is no finding that the HHA's failure to comply with that requirement poses immediate jeopardy to the health and safety of patients. The language in section 1891(e)(2) authorizing the Secretary (or HCFA) to impose intermediate sanctions in such a case "in lieu" of termination might be read to require the imposition of such sanctions as a prerequisite to terminating an HHA's participation in Medicare. It might be read also to give the Secretary (or HCFA) the option of terminating a provider's participation in Medicare without first imposing intermediate sanctions against that provider.

⁴ HCFA has not alleged that Petitioner's failure to comply with the condition of participation governing patient rights placed the health and safety of patients in immediate jeopardy.

However, it would be inappropriate for me to interpret the relevant statutory language, as the Secretary has established her interpretation of the Act by regulation. The applicable regulation authorizes HCFA to terminate a provider's participation in Medicare based only on a finding by HCFA that the provider is not complying with participation requirements. 42 C.F.R. § 489.53(a)(1). I am bound by that regulation.

The regulation states, in relevant part, that HCFA may terminate a provider's participation in Medicare where the provider is:

not complying with the provisions of title XVIII [Medicare] and the applicable regulations of this chapter or with the provisions of the [provider] agreement.

42 C.F.R. § 489.53(a)(1). This regulation thus authorizes HCFA to terminate a provider's participation in Medicare based on HCFA's determination that the provider is not complying with participation requirements in the Act and regulations. The authority given to HCFA by the regulation to terminate a provider's participation in Medicare is not contingent on a finding by HCFA that the provider's failure to comply with certification requirements poses immediate jeopardy to the health and safety of patients. There is no requirement in the regulation that HCFA impose intermediate sanctions against a provider as a prerequisite to terminating that provider's participation in Medicare.⁵

C. Petitioner's failure to comply with a condition governing its participation in Medicare

HCFA asserts that Petitioner failed to comply with the condition of participation stated both in the Act and in the implementing regulations requiring that Petitioner protect and promote the rights of patients under its care. This assertion is amply supported by the evidence in this case. The essentially un rebutted evidence is that Petitioner

⁵ In this case, HCFA avers that its determination to terminate Petitioner's participation in Medicare without first affording Petitioner the chance to comply with participation requirements was justified by Petitioner's history of non-compliance with participation requirements. However, under 42 C.F.R. § 489.53, HCFA may terminate a provider's participation in Medicare without regard to that provider's compliance history, if HCFA determines that the provider is not complying with a condition governing that provider's participation in Medicare.

failed, in several ways, to respect the rights of a patient, E.R. Petitioner's failures to respect E.R.'s rights constitute violations of standards of care established by the regulation (42 C.F.R. § 484.10) which implements section 1891(a)(1) of the Act. I conclude that, when considered individually and collectively, these violations are so serious as to constitute a violation of the condition of participation that an HHA protect and promote patient rights.

1. The investigation by the D.C. survey agency and its findings

E.R., an elderly, female, Medicaid recipient, was admitted to Petitioner's care on November 15, 1991 and remained under Petitioner's care until April 23, 1993. Tr. at 125, 146, 154, 382; HCFA Ex. 8, page 1; HCFA Ex. 23, page 1. During this period, E.R. lived alone and was totally dependent on Petitioner for her care. On April 22, 1993, a social worker from the Adult Protective Services of the District of Columbia Department of Human Services filed a complaint against Petitioner, alleging that Petitioner's President exercised undue influence over E.R. Tr. at 378; HCFA Ex. 24.

Between April 23 and June 2, 1993, the D.C. survey agency investigated the complaint. HCFA Ex. 8, page 1. The principal investigator for the D.C. survey agency was Ms. Ellen Yung-Fatah. Tr. at 107, 263.

During the investigation, Ms. Yung-Fatah and her staff reviewed E.R.'s medical records, the clinical records Petitioner maintained on E.R., records of personnel assigned by Petitioner to care for E.R., and records of E.R.'s expenditures, *i.e.*, cancelled checks and receipts made available by Petitioner. Either Ms. Yung-Fatah or her staff interviewed Ms. Graham, E.R., four home health aides, E.R.'s former physicians, social workers from Adult Protective Services and In-Home Support Services, the chief of the Home Care Services Bureau of the District of Columbia Department of Human Services, a homemaker, and the manager of a homemaker agency from which E.R. received services prior to her admission by Petitioner. HCFA Ex. 8, pages 1 - 2.

At the hearing of this case, Petitioner called Ms. Yung-Fatah as its principal witness to support the findings HCFA made based on the extensive investigation which Ms. Yung-Fatah conducted. Tr. at 84 - 322. HCFA buttressed Ms. Yung-Fatah's testimony with exhibits, which included documents which Ms. Yung-Fatah obtained during the course of the investigation, and Ms. Yung-Fatah's investigative report, which memorialized the results of the investigation. HCFA

Ex. 4, 8. I find that Ms. Yung-Fatah testified credibly, and that her testimony is supported by the exhibits.⁶

Petitioner challenges Ms. Yung-Fatah's credibility and denies that her investigative findings are accurate. Petitioner's assertions include the allegation that Ms. Yung-Fatah committed perjury during her testimony at the hearing. However, Petitioner has not offered any evidence which contradicts significantly the findings made by Ms. Yung-Fatah or her testimony.⁷ There is nothing in the record to support Petitioner's argument that Ms. Yung-Fatah testified untruthfully.⁸

Petitioner attacks the evidence obtained by Ms. Yung-Fatah by arguing also that she did not conduct her investigation professionally and that she was prejudiced against Petitioner. Petitioner's assertions include allegations that Ms. Yung-Fatah pressured Petitioner's staff unreasonably, causing employees to resign, and that she failed to keep

⁶ I was not present at the hearing conducted on March 8 - 9, 1994. Therefore, I make no findings as to Ms. Yung-Fatah's credibility based on her demeanor as a witness. My finding that Ms. Yung-Fatah testified credibly is based solely on a review of the transcript and the exhibits. I would note, however, that Petitioner has not argued that Ms. Yung-Fatah's credibility was impeached by her demeanor as a witness. Furthermore, I offered Petitioner the opportunity to have a new hearing in this case and Petitioner decided not to proceed in this manner.

⁷ In its posthearing brief, Petitioner makes a number of allegations concerning E.R. and the manner in which she was treated by Petitioner. These allegations are intermingled with Petitioner's arguments that it did not contravene standards governing its duty to protect and promote patients' rights. Petitioner's Post-Hearing Brief at 2 - 13. These allegations are not supported by exhibits or by testimony.

⁸ The gravamen of Petitioner's assertion that Ms. Yung-Fatah committed perjury is that Ms. Yung-Fatah gave inconsistent testimony concerning the statements made to her by E.R. Petitioner's Post-Hearing Brief at 7 - 8. I am not persuaded that Ms. Yung-Fatah's testimony is materially inconsistent. Furthermore, Ms. Yung-Fatah made it plain in her testimony that E.R. was a confused individual who at times made inconsistent statements to Ms. Yung-Fatah. The inconsistencies asserted by Petitioner appear to be inconsistent statements made by E.R. and not by Ms. Yung-Fatah.

Petitioner informed about the progress of her investigation. I find no support in the record of this case for these assertions. Even if it is true that Ms. Yung-Fatah may have been aggressive in pursuing her investigation into the allegations concerning E.R., that is not a basis for finding the results of her investigation, or her testimony, to be less than credible.

The findings made by the D.C. survey agency, which I conclude are substantiated by the preponderance of the evidence, are as follows:

○ On eleven occasions, E.R. made checks payable to an employee of Petitioner, totalling \$690. HCFA Ex. 4, pages 32 - 33. Two of these checks were for sums in excess of \$100. Id.; Tr. at 166. There is no evidence to show that Petitioner ever authorized its employee to accept checks from E.R. Petitioner did not maintain records documenting the purpose of the checks.⁹ When Petitioner learned that its employee had accepted checks from E.R., it discharged the employee. Tr. at 169. However, Petitioner did not reimburse E.R. for the checks which E.R. had written to Petitioner's employee. Id. Nor did Petitioner document that it had learned that its employee had accepted checks from E.R., or that it had discharged the employee. Tr. at 177 - 178.

○ Between November 1992 and April 1993, Petitioner arranged to have persons live in Petitioner's home without paying rent to E.R. HCFA Ex. 4, pages 9 - 13. Petitioner's decision to have persons reside in E.R.'s home was motivated by its conclusion that Petitioner was unable to care for her needs without around-the-clock assistance. Tr. at 122 - 125. Petitioner did not obtain written permission from E.R. for persons to reside in her home. Tr. at 123 - 124.¹⁰ It did

⁹ Seven of the checks on their face were labeled "food" and one check on its face was labeled "cab fare." HCFA Ex. 4, pages 32 - 33. Although the record does contain copies of food store receipts purporting to be for food purchased for E.R. (HCFA Ex. 25, pages 1 - 7, 9 - 10), Petitioner did not maintain records documenting that this money was used for the purpose indicated on the face of the checks or for the food indicated by the receipts. Thus, there is no way to tell whether the funds represented by these checks were used for the purposes indicated.

¹⁰ In an affidavit, E.R. states that the arrangement to have individuals reside in her home was made with her consent. P. Ex. 7. However, I find this statement to be of little probative value, because E.R. had been determined to
(continued...)

not obtain instructions from a physician to have persons reside in E.R.'s home. Tr. at 122 - 125. In at least one instance, Petitioner did not document the arrangement it made with an individual to reside in E.R.'s home. HCFA Ex. 4, page 12; Tr. at 232 - 239.

○ Petitioner did not supervise the activities of the persons whom it authorized to reside in E.R.'s home. HCFA Ex. 4, pages 11 - 12.

○ Occasionally, Ms. Graham, Petitioner's President, would bring E.R. to her home to reside on weekends. HCFA Ex. 4, page 11. Petitioner did not obtain written permission from E.R. to remove her from her home.

○ E.R. complained to an employee of Petitioner that other employees of Petitioner were eating her food. Although Petitioner was aware of this complaint, there is no documentation showing that Petitioner investigated it. HCFA Ex. 4, pages 11 - 12; Tr. at 112 - 113, 175 - 180.

○ On several occasions, changes were made by Petitioner in the manner in which it provided care to E.R. Tr. at 194 - 247; HCFA Ex. 23, pages 9, 11, 13, 15, 17, 19, 21, 23. For example, Petitioner did not: 1) document that it informed E.R. that her physician had ordered additional HHA services; 2) document that it informed E.R. what HHA services were ordered; and 3) document that it informed E.R. concerning what the cost of the additional HHA services would be to her. Tr. 194 - 197; HCFA Ex. 23, page 9. Petitioner did not inform E.R. about the changes in the care it was providing. Tr. 194 - 247. Moreover, there is no evidence that Petitioner solicited E.R.'s advice or consent concerning the changes it was implementing in her care.

○ Petitioner did not provide E.R. with notice in advance of the charges for some of the services which it was providing to her. Tr. at 196 - 197.

I do not infer from the investigation conducted by the D.C. survey agency, or from the evidence which HCFA offered in this case, that Petitioner was exploiting its relationship with E.R. for financial gain. It may be, as Petitioner asserts, that its actions with respect to E.R. were motivated by concern for her well-being. However, the record of this case portrays a relationship between Petitioner and E.R. which was, to say the least, unprofessional. Petitioner's

¹⁰(...continued)

be incompetent at a date earlier than the date of her affidavit. Tr. at 381 - 382.

President, Ms. Graham, appears to have treated E.R. more like an aged relative in need of care than as a patient. The arrangements which Petitioner made to care for E.R. were informal, undocumented, and verged at times on a conflict of interest.

Additional examples of this informal relationship include: 1) Ms. Graham's taking E.R. out of her house and into her own home on weekends; 2) Ms. Graham obtaining a power of attorney from E.R. which gave her authority to manage E.R.'s assets. HCFA Ex. 4, pages 25 - 27; 3) Ms. Graham arranging to have signing authority on E.R.'s checking account. HCFA Ex. 4, pages 30 - 31; Tr. at 135 - 136; and 4) Ms. Graham writing checks on this account payable to Petitioner's employees. HCFA Ex. 4, page 30.

2. Petitioner's failure to protect and promote E.R.'s rights

As I find above, the regulation which requires an HHA to protect and promote the rights of patients implements an identical statutory requirement. 42 C.F.R. § 484.10; see Act, section 1891(a)(1). The importance of this requirement is apparent when it is considered in the context of the functions performed by HHAs. An HHA is entrusted with the unique responsibility of caring for aged and ill Medicare beneficiaries in their homes. The individuals who are under the care of an HHA may be frail and dependent on the HHA to protect their rights and property. They are especially vulnerable to exploitation. Where, as in this case, the patient lives alone, that patient is not only dependent on the HHA for care, but is utterly at the mercy of the HHA and its employees.

I find that, in providing care to E.R., Petitioner contravened the requirement that it protect and promote E.R.'s rights in several significant respects. Petitioner failed to treat E.R.'s property with respect. It failed to investigate and document complaints voiced by E.R. concerning alleged misuse of her property. It failed to apprise her of changes in her treatment, or to obtain her consent before implementing changes in her treatment. It failed to document the care which it was providing to E.R.

The regulation which mandates that an HHA protect and promote patient rights establishes as a standard that the patient has the right to exercise his or her rights as a patient of the HHA. 42 C.F.R. § 484.10(b). One element of this standard is that the patient has the right to have his or her property treated with respect. 42 C.F.R. § 484.10(b)(3). Another element of this standard is that an HHA is obligated to investigate complaints by a patient regarding any alleged

failure to respect that patient's property. 42 C.F.R. § 484.10(b)(5). This element requires an HHA that receives a complaint concerning the abuse of a patient's property to document specifically the complaint and its resolution. Id.

The evidence establishes plainly that Petitioner failed to comply with the elements cited above and with the standard that protected E.R.'s right to exercise her rights as a patient. Petitioner's decision to authorize persons to reside in E.R.'s home without obtaining E.R.'s written consent constituted a violation of the element requiring that it treat a patient's property with respect. Petitioner's knowledge of its employee's acceptance of 11 checks from E.R. is an additional violation of this element, insofar as Petitioner failed to document the facts of the incident or that it conducted any investigation of the incident. Petitioner's failure to document the expenditures made by its employees with checks written by E.R. constitutes another violation of this element. Furthermore, Petitioner's failure to investigate and document E.R.'s complaint that its employees were eating her food is a violation of the element requiring it to investigate complaints from a patient regarding alleged failures to respect that patient's property.

The regulation specifies as an additional standard that a patient of an HHA has a right to be informed, in advance, of the care to be furnished by an HHA and of any changes in that care. 42 C.F.R. § 484.10(c). A specific element in this standard requires an HHA to advise a patient in advance of implementing a change in the patient's care. 42 C.F.R. § 484.10(c)(1). Another element provides that a patient has a right to participate in the planning of his or her care. 42 C.F.R. § 484.10(c)(2). Petitioner failed to comply with this standard by implementing changes in E.R.'s care without providing her with notice and without obtaining her participation in decisions to change her care. This is particularly evident in Petitioner's decision to authorize persons to reside in E.R.'s home.

The regulation provides as a standard also that an HHA has an obligation to provide a patient, in advance of the initiation of care, with information on the extent to which payment for the care may be expected from Medicare or other sources, and the extent to which payment for the care may be expected from the patient. 42 C.F.R. § 484.10(e). Petitioner contravened this standard by failing to advise E.R., in advance of the implementation of care, as to what the charges for her care would be.

The regulation governing patient rights does not state specifically under what circumstances violations of standards

or elements of standards may constitute a violation of the condition of participation requiring an HHA to protect and promote patient rights. However, it is apparent that where, as is the case here, an HHA violates multiple elements or standards of a condition, these violations in the aggregate constitute a failure to comply with the condition. I conclude that Petitioner's casual regard for E.R.'s rights was so egregious as to constitute a violation of the condition of participation requiring it to protect and promote patient rights.

D. HCFA's authority to terminate Petitioner's participation in Medicare

As I found at Part B of this discussion, HCFA may terminate an HHA's participation in Medicare where it is established that the HHA is not complying with the requirements of Title XVIII and regulations governing its participation. 42 C.F.R. § 489.53(a)(1). HCFA is not obligated to afford the HHA an opportunity to correct its deficiency before terminating the HHA's participation.

Here, Petitioner engaged in conduct which materially violated both the requirement of the Act and the regulations that it protect and promote patient rights. Thus, Petitioner has failed to comply with a statutory condition of participation in Medicare. On that basis, HCFA is authorized to terminate Petitioner's participation in Medicare.

HCFA cites, as an additional basis for terminating Petitioner's participation, Petitioner's history of failing to comply with conditions of participation. HCFA asserts that, based on Petitioner's poor performance as a provider, it is not required to afford it now with the opportunity to correct its deficiencies. Although this may be a legitimate policy basis for HCFA's determination to terminate Petitioner's participation at this juncture, it is not a legal prerequisite. The regulation which authorizes HCFA to terminate an HHA's participation for failure to comply with the requirements of the Act and the regulations does not require HCFA to prove a history of noncompliance as a prerequisite to terminating an HHA's participation in Medicare.

E. HCFA's compliance with notice requirements

Petitioner argues that HCFA failed to provide it with adequate notice of the findings of the D.C. survey agency's investigation and HCFA's determination to terminate

Petitioner's participation in Medicare.¹¹ In its argument, Petitioner focuses on the alleged failure of Ms. Yung-Fatah to discuss with Petitioner the conclusions of the D.C. survey agency's complaint investigation. Petitioner's Post-Hearing Brief at 15.

Ms. Yung-Fatah contradicts this assertion. She testified that, on June 2, 1993, she informed Ms. Graham, Petitioner's President, of the results of the complaint investigation. Tr. at 160. However, it is not necessary for me to decide whether Ms. Yung-Fatah discussed the results of the investigation with Ms. Graham. HCFA was under no obligation to provide Petitioner with such information where, as is the case here, HCFA determined to terminate Petitioner's participation in Medicare.

The regulation which governs termination of a provider's participation in Medicare imposes no obligation on HCFA to discuss investigative findings with a provider before communicating to the provider its determination to terminate that provider's participation in Medicare. The regulation states only that HCFA must give a provider at least 15 days' notice before terminating its participation in Medicare. 42 C.F.R. § 489.53(c)(1). The notice of termination which HCFA sent to Petitioner on July 16, 1993 advised Petitioner that its participation in Medicare would terminate on August 15, 1993, 30 days from the date of the notice.¹² HCFA Ex. 7, page 2. Thus, Petitioner received the notice to which it was entitled under the regulation.¹³

¹¹ I note that the D.C. survey agency attempted to notify Petitioner, by certified letter dated July 9, 1993, that it was recommending to HCFA that Petitioner be terminated. This letter enclosed the statement of deficiencies for the complaint investigation (as well as the statement of deficiencies for the June 1993 follow-up survey). The letter was sent to Petitioner's correct address. However, Petitioner did not pick up the letter at the post office, and the letter was returned to the D.C. survey agency. HCFA Ex. 6. Had Petitioner picked up this letter, it would have received notice of the D.C. survey agency's recommendation prior to receiving HCFA's notice of termination.

¹² Petitioner does not deny receiving the notice.

¹³ HCFA's Regional Office Manual suggests that HCFA employ a process which covers a 90-day period, from the conclusion of an initial survey of a provider to termination of that provider's participation in Medicare, in a case where
(continued...)

III. Conclusion

I conclude that Petitioner failed to comply with the Medicare condition of participation requiring it to protect and promote the rights of patients. HCFA was justified in terminating Petitioner's participation in Medicare, and I sustain HCFA's determination to do so.

/s/

Steven T. Kessel
Administrative Law Judge

¹³(...continued)

termination may be an appropriate remedy. HCFA Ex. 21, pages 3 - 4. This process is applicable to the case where HCFA seeks to have a provider remedy a deficiency, in lieu of terminating the provider's participation in Medicare. The Regional Office Manual does not mandate a 90-day process in the case where, based on the outcome of a survey or investigation, HCFA determines that termination of a provider's participation is appropriate and that no attempts should be made to remedy the deficiency prior to termination. Indeed, the Regional Office Manual states specifically that termination may be accomplished in less than 90 days, so long as the requirements of the regulations are met. Id. Equally, the State Operations Manual referenced by Petitioner (P. Ex. 12) contemplates a 90-day termination process only in the case where a State survey agency seeks to have a provider remedy a deficiency.