Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Ruth Taylor Institute,	)	DATE: August 21, 1996
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-100
	)	Decision No. CR430
Health Care Financing Administration.	)	
	)	

DECISION

I decide that Petitioner does not have a right to a hearing concerning HCFA's determinations that Petitioner failed to comply substantially with Medicare participation requirements.

I. Background

Petitioner is a skilled nursing facility (SNF) and a participating provider in Medicare. The conditions for participation in Medicare by SNFs are set forth in regulations contained in 42 C.F.R. Part 483. As an SNF, Petitioner is subject to the survey, certification, and remedies provisions of 42 C.F.R. Part 488. Petitioner's right to a hearing concerning an adverse determination by HCFA, made pursuant to 42 C.F.R. Parts 483 and 488, is established by 42 C.F.R. Part 498.

On December 9, 1995, Petitioner requested a hearing concerning determinations that HCFA made on August 23, 1995 and on October 11, 1995, that Petitioner was not complying substantially with Medicare participation requirements. The case was assigned to me for a hearing and a decision. At a prehearing conference which I conducted by telephone, I raised the issue of whether Petitioner had a right to a hearing. The parties agreed that the issue of whether Petitioner had a right to a hearing could be heard and decided without the taking of in-person testimony. The parties submitted briefs, reply

briefs, and exhibits.[1] I base my decision in this case on the exhibits submitted by the parties, the governing law, and the parties' arguments.

II. Issues, findings of fact and conclusions of law

The issues in this case are whether Petitioner has a right to a hearing concerning:

1. HCFA's August 23, 1995 determination; and

2. HCFA's October 11, 1995 determination.

I base my decision on the following findings of fact and conclusions of law (Findings). I discuss my Findings in detail, below.

1. On August 23, 1995, HCFA notified Petitioner that HCFA had determined that Petitioner was not complying substantially with Medicare participation requirements.

2. In the August 23, 1995 determination, HCFA told Petitioner that it must submit a plan of correction to correct the deficiencies that were identified by HCFA.

3. The plan of correction that Petitioner was told to submit is not a directed plan of correction within the meaning of relevant regulations.

4. On October 11, 1995, HCFA notified Petitioner that HCFA had determined that, although Petitioner had corrected some of the deficiencies identified by HCFA on August 23, 1995, Petitioner continued not to

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[1] Petitioner submitted 13 exhibits with its initial brief which it designated "Exhibit A" through "Exhibit M." Petitioner submitted two additional exhibits with its reply brief which it designated "Exhibit N" and "Exhibit O." For purposes of uniformity, I have redesignated these exhibits sequentially, as P. Ex. 1 (which Petitioner submitted as "Exhibit A"), through P. Ex. 15 (which Petitioner submitted as "Exhibit O"). HCFA submitted four exhibits, designated as HCFA Ex. 1 through HCFA Ex. 4. Neither party objected to my admitting into evidence the exhibits that were offered by the other party. I hereby admit into evidence P. Ex. 1 - 15 and HCFA Ex. 1 - 4.

be complying substantially with Medicare participation requirements.

5. In the October 11, 1995 determination, HCFA told Petitioner that HCFA would impose a remedy consisting of denial of payment for new admissions.

6. HCFA did not impose the remedy of denial of payment for new admissions, because, prior to the date that the remedy was to be implemented, HCFA determined that Petitioner had attained substantial compliance with Medicare participation requirements.

7. HCFA did not impose a remedy against Petitioner, either as a consequence of HCFA's August 23, 1995 determination, or as a consequence of HCFA's October 11, 1995 determination.

8. Petitioner is not entitled to a hearing.

9. HCFA may not give a provider a right to a hearing where the provider has no right to a hearing under applicable regulations.

10. HCFA's argument that the case is moot is irrelevant.

III. Discussion

A. The facts (Findings 1, 2, 4 - 6)

On August 11, 1995, the State of New York Department of Health (Department of Health) surveyed Petitioner on behalf of HCFA. P. Ex. 1. On August 23, 1995, HCFA advised Petitioner that the Department of Health had found Petitioner not to be complying substantially with Medicare participation requirements. Id. at 1. HCFA advised Petitioner further that the Department of Health had found the deficiencies to be so severe as to constitute immediate jeopardy to the health and safety of residents at Petitioner's facility. Id. HCFA told Petitioner that it concurred with the findings of the Department of Health. Id. at 3.

In the August 23, 1995 notice, HCFA told Petitioner that Petitioner must submit a plan of correction to the Department of Health. P. Ex. 1 at 1 - 2. HCFA identified four specific elements that Petitioner had to

address in the corrective action plan. Id. These consisted of the following:

> 1. The corrective action that Petitioner would implement for those residents found to have been affected by Petitioner's deficiencies;
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> 2. How Petitioner would identify other residents having the potential to be affected by Petitioner's deficiencies, and the corrective action that Petitioner would take to address these potential consequences;
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> 3. The corrective actions that Petitioner would implement to assure that deficiencies did not recur; and
>
> 4. How Petitioner would monitor its corrective action to assure that deficiencies did not recur.

Id. HCFA told Petitioner that if, by September 3, 1995, Petitioner did not resolve the deficiencies causing immediate jeopardy to residents, then HCFA would terminate Petitioner's participation in Medicare. Id. at 3.

In the August 23, 1995 notice, HCFA advised Petitioner that, if it disagreed with HCFA's determination, Petitioner could request a hearing before an administrative law judge. Id. at 2. Petitioner was told that it must request the hearing within 60 days from its receipt of the August 23, 1995 notice letter. Id. Petitioner was advised also that it could question the findings of deficiencies through an informal dispute resolution process. Id.

Petitioner submitted a plan of correction which addressed the deficiencies that were identified in the August 11, 1995 notice. HCFA Ex. 1. Petitioner opted also to engage in the informal dispute resolution process in order to challenge the findings of deficiencies. See P. Ex. 3.

On August 30, 1995, the Department of Health conducted a resurvey of Petitioner. P. Ex. 4. On October 11, 1995, HCFA advised Petitioner that the Department of Health had found that Petitioner had corrected its deficiencies to the extent that there no longer existed deficiencies that posed immediate jeopardy to the health and safety of residents. Id. at 1. HCFA advised Petitioner additionally that the Department of Health had found that

Petitioner continued not to be complying substantially with Medicare participation requirements. Id. HCFA advised Petitioner that it concurred with the Department of Health's findings. Id. at 2.

In the October 11, 1995 notice, HCFA advised Petitioner that it would impose a remedy against Petitioner, consisting of denial of payment for new admissions. Id. The implementation date for this remedy was to be November 9, 1995. Id.

Additionally, HCFA advised Petitioner that, inasmuch as Petitioner's deficiencies included providing substandard quality of care to residents, it would be necessary to send a notice of the finding of substandard care to each attending physician of each resident to whom this finding applied. Id. at 1. HCFA told Petitioner also that, on October 25, 1995, HCFA would publish in a newspaper notice of its determination to deny Petitioner payment for new admissions. Id. at 2.

In the October 11, 1995 notice, HCFA advised Petitioner that, if Petitioner disagreed with the determination stated in the notice, Petitioner had a right to request a hearing before an administrative law judge. Id. at 2 - 3. In a letter to Petitioner dated October 20, 1995, HCFA restated that Petitioner could request a hearing from the determination announced in the October 11, 1995 notice. P. Ex. 5. This letter was in response to a letter from Petitioner's attorney, in which Petitioner's attorney recited that HCFA had agreed that the October 11, 1995 determination superseded the August 23, 1995 determination. P. Ex. 15. In the October 20, 1995 letter, HCFA told Petitioner additionally that the October 11, 1995 notice superseded the information that HCFA had provided to Petitioner in its August 23, 1995 notice. P. Ex. 5; see P. Ex. 1.

HCFA did not implement the remedy of denial of payment for new admissions. On October 24, 1995, the Department of Health conducted a resurvey of Petitioner. HCFA Ex. 4; P. Ex. 12. On November 7, 1995, the Department of Health advised Petitioner that it had determined that Petitioner was in substantial compliance with Medicare participation requirements. HCFA Ex. 4 at 1. The Department of Health advised Petitioner that it would notify HCFA that Petitioner had achieved substantial compliance with participation requirements. Id. The Department of Health told Petitioner, additionally, that it would withdraw any recommendations that it had made previously to HCFA that HCFA impose a remedy against Petitioner. Id.

The record contains no communication from HCFA to Petitioner in which HCFA states that it would not be imposing the remedy of denial of payment for new admissions. It is evident, however, that HCFA did not impose this remedy against Petitioner.

There is no evidence of record to establish whether, on October 25, 1995, or on any other date, HCFA published in a newspaper a notice of its determination that Petitioner was not substantially complying with Medicare participation requirements. Nor is there evidence of record to establish whether HCFA or the Department of Health ever sent notices to individual physicians that residents who were the patients of these physicians were receiving substandard care from Petitioner. For purposes of this decision, however, I am assuming that HCFA may have taken both of these actions.

Petitioner avers that, as an additional consequence of HCFA's determination that Petitioner was not complying substantially with Medicare participation requirements, its nurse aide training program will be suspended. Petitioner's Brief (P. Br.) at (unnumbered page) 9. Also, according to Petitioner, a record of HCFA's finding of noncompliance will be retained for up to four years. Id.

The record does not contain evidence which proves that these averred additional consequences will occur. On the other hand, HCFA has not denied that these asserted additional consequences will occur. For purposes of this decision, therefore, I am concluding that the consequences of HCFA's finding of deficiencies averred by Petitioner, consisting of maintenance by HCFA of a record of its findings of Petitioner's failure to comply with participation requirements, and suspension of Petitioner's nurse aide training program, may occur.

B. Whether Petitioner has a right to a hearing (Findings 3, 7, 8)

At issue in this case are two determinations by HCFA that Petitioner was not complying substantially with Medicare participation requirements. HCFA communicated its first determination to Petitioner on August 23, 1995. P. Ex. 1. HCFA communicated its second determination to Petitioner on October 11, 1995. P. Ex. 4. In the notice of each determination, HCFA announced that it intended to impose a remedy against Petitioner. Each of the notices advised Petitioner that it had a right to a hearing concerning the determination announced in the notice.

HCFA now argues that Petitioner is not entitled to a hearing concerning either determination. According to HCFA, no remedy was ever imposed against Petitioner. HCFA asserts that Petitioner has no right to a hearing where HCFA determines Petitioner to be deficient in complying with Medicare participation requirements, but where HCFA does not impose a remedy against Petitioner. Furthermore, according to HCFA, the issues which might be heard and decided in this case are moot, inasmuch as Petitioner is now complying substantially with Medicare participation requirements and no remedy was imposed against Petitioner.

Petitioner argues that each determination by HCFA included the imposition of a remedy. Petitioner argues additionally that the issues raised by these determinations are not moot.

This case raises issues that coincide with those I heard and decided in Fort Tryon Nursing Home, DAB CR425 (1996). In the Fort Tryon case, the provider, an SNF, made a hearing request concerning a determination by HCFA that the provider was not complying substantially with Medicare participation requirements. In the notice of its determination, HCFA told the provider that HCFA was going to impose remedies against it, consisting of denial of payment for new admissions and termination of that provider's participation in Medicare. Prior to the dates that the remedies were to go into effect, the provider satisfied HCFA that it had attained substantial compliance with Medicare participation requirements. Based on that, HCFA imposed no remedies against the provider.

In Fort Tryon, I held that an SNF's hearing rights concerning a determination made by HCFA are defined by two regulations. These regulations are 42 C.F.R. § 488.408(g)(1), and 42 C.F.R. § 498.3(b)(12). The language of the two regulations is similar, but not identical.[2] The Fort Tryon decision reconciles the language differences between the two regulations and decides what the regulations mean.

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[2] Pursuant to 42 C.F.R. § 488.408, a provider may request a hearing concerning "a certification of noncompliance leading to an enforcement remedy." Pursuant to 42 C.F.R. § 498.3(b)(12), an SNF may request a hearing concerning "the finding of noncompliance leading to the imposition of enforcement actions specified in § 488.406 of this chapter, ..."

I held that the two regulations have the same meaning. Fort Tryon, DAB CR425, at 5. Under either 42 C.F.R. § 488.408(g)(1) or § 498.3(b)(12), a provider may request a hearing concerning a determination by HCFA that the provider is not complying substantially with Medicare participation requirements, only where HCFA actually imposes a remedy against that provider. Id. The word 'remedy' is defined in 42 C.F.R. § 488.406. An action taken by HCFA against a provider is a 'remedy' if that action constitutes one of the remedies enumerated under 42 C.F.R. § 488.406. The provider does not have hearing rights from an action by HCFA unless the action is defined to be a remedy under 42 C.F.R. § 488.406. Furthermore, a provider does not have a right to a hearing from a threat by HCFA to impose a remedy as defined in 42 C.F.R. § 488.406, if the remedy is not implemented by HCFA. Id. at 5 - 6.

In Fort Tryon, there was no dispute that the remedies proposed by HCFA, but never imposed, denial of payment for new admissions and termination, would, if implemented, be remedies within the meaning of 42 C.F.R. § 488.406. My decision in Fort Tryon that the provider had no right to a hearing was based on the fact that the proposed remedies were not imposed.

Petitioner does not dispute that the remedy that HCFA proposed to implement in its October 11, 1995 notice, denial of payment for new admissions, was not implemented. Nor does Petitioner appear to be arguing that, in the absence of a remedy, it would have a right to a hearing. To that extent, then, Petitioner seems to agree with the holding in Fort Tryon. Instead, Petitioner argues that HCFA imposed remedies against Petitioner, thereby giving Petitioner a right to a hearing concerning HCFA's determinations. According to Petitioner, HCFA imposed the remedy of a directed plan of correction with its August 23, 1995 determination. And, according to Petitioner, the actions which may have been taken by HCFA pursuant to the October 11, 1995 determination, consisting of publication of HCFA's findings of deficiencies, notification of individual providers by HCFA of findings of deficiencies, maintenance of a record of HCFA's findings that Petitioner was deficient, and suspension of Petitioner's nurse aide training program, are remedies.

I do not find that HCFA imposed any remedies, as described in 42 C.F.R. § 488.406, against Petitioner, either as a consequence of the August 23, 1995 determination, or as a consequence of the October 11,

1995 determination. Therefore, Petitioner has no right to a hearing.

1. The August 23, 1995 notice and determination

I do not find that HCFA imposed any remedies against Petitioner as a consequence of its August 23, 1995 determination. In the notice of that determination, HCFA threatened to impose the remedy of termination of Petitioner's participation in Medicare. P. Ex. 1 at 3. However, HCFA never imposed that remedy. In that same notice, HCFA told Petitioner that Petitioner must develop and submit a plan of correction which addressed specific concerns identified by HCFA. Id. at 1 - 2. Petitioner characterizes the plan that it developed in response to the notice as being a directed plan of correction, which is one of the remedies identified in 42 C.F.R. § 488.406. I do not find that the plan of correction was a directed plan of correction as is described in relevant regulations.

One of the remedies described in 42 C.F.R. § 488.406 is a directed plan of correction. 42 C.F.R. § 488.406(a)(7). The phrase 'directed plan of correction' is not defined in 42 C.F.R. § 488.406. It is described by another regulation, 42 C.F.R. § 488.424. Under that regulation:

> HCFA, the State survey agency, or the temporary manager (with HCFA or State approval) may develop a plan of correction and HCFA, the State, or the temporary manager require a facility to take action within specified time-frames.[3]

It is apparent from 42 C.F.R. § 488.424 that a directed plan of correction is a plan of correction in which the specifics are first developed by HCFA or by an agent of HCFA. HCFA then directs the facility to implement the plan. Development of the specifics of the plan by HCFA or its agents distinguishes a directed plan of correction from a plan of correction that is developed by a facility and is approved by HCFA. A plan of correction is not a directed plan of correction within the meaning of the regulations -- even assuming that HCFA tells a facility that the facility must develop an acceptable plan of

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[3] Under circumstances defined by the regulations, HCFA or a State survey agency may appoint a temporary manager of a facility. 42 C.F.R. §§ 488.406(a)(1), 488.415. Those circumstances do not apply here.

correction as a precondition to avoiding the imposition of a remedy such as termination -- where HCFA or its agents do not develop the specifics of the plan.

Indeed, the regulations distinguish between a directed plan of correction that is developed by HCFA or its agents, which is a remedy, and a plan of correction that may be developed by a provider to address substantial deficiencies that are found by HCFA. A provider which is found to be substantially deficient must submit for approval by HCFA a plan of correction that the provider develops, regardless which remedy is implemented by HCFA. 42 C.F.R. § 488.402(d)(1). Where a provider submits such a plan, the plan of correction is not a directed plan of correction, it is an action by the provider that augments any remedy that might be imposed by HCFA.

In the August 23, 1995 notice, HCFA told Petitioner to submit a plan of correction to the Department of Health within 10 days of Petitioner's receipt of the form which specified the deficiencies identified by the Department of Health. P. Ex. 1 at 1. Petitioner was told by HCFA that the plan must describe specified remedial actions which would be taken by Petitioner to address the deficiencies identified by the Department of Health. Id. at 1 - 2.

The plan which Petitioner submitted in response to this instruction is not a directed plan of correction. HCFA Ex. 1, P. Ex. 14. Although HCFA told Petitioner that it had to submit a plan, and told Petitioner also what items must be addressed by the plan, HCFA did not tell Petitioner specifically what the plan must say. Neither HCFA nor the Department of Health developed the specifics of the plan of correction. Petitioner developed the plan that it submitted in response to HCFA's requirement, including the specific elements of that plan. HCFA Ex. 1; P. Ex. 14.

During the course of the parties' briefing of this case, I expressed a concern to the parties that, assuming the plan that Petitioner developed in response to the August 23, 1995 notice from HCFA was a directed plan of correction and, thus, a remedy within the meaning of 42 C.F.R. § 488.406, then Petitioner might nonetheless not have a right to a hearing concerning the determination contained in that notice. That is because Petitioner did not request a hearing until December 9, 1995, more than 60 days after it received the August 23, 1995 notice. In its reply brief, Petitioner argued that its request was timely or that, alternatively, good cause existed for Petitioner not making its request timely.

I do not decide the issues of whether Petitioner made a timely request for a hearing from the August 23, 1995 notice, or whether it had good cause for not making a request timely. It is unnecessary for me to do so, because Petitioner had no right to a hearing concerning the determination in the August 23, 1995 notice.

2. The October 11, 1995 notice and determination

In its October 11, 1995 notice to Petitioner, HCFA threatened that it would impose a denial of payment for new admissions by Petitioner unless Petitioner complied substantially with Medicare participation requirements. P. Ex. 4 at 2. However, HCFA never imposed that remedy. I do not find that HCFA imposed any other remedy as a consequence of the October 11, 1995 notice.

The other actions which HCFA may take against Petitioner -- publishing a notice of Petitioner's deficiencies, notifying individual physicians of Petitioner's deficiencies as they affected patients of those physicians, maintenance of a record of HCFA's findings that Petitioner was deficient, and suspension of Petitioner's nurse aide training program -- are not remedies described in 42 C.F.R. § 488.406. The fact that HCFA may take these actions against Petitioner does not give Petitioner any right to a hearing. Furthermore, 42 C.F.R. § 498.3(d)(11) specifies that the loss of nurse aide training is not an initial determination by HCFA. Thus, as to the loss of nurse aide training, the regulation is explicit that it is not subject to administrative review.

Petitioner argues also that, if at some date in the future HCFA finds that Petitioner is again deficient, it might impose a more stringent remedy against Petitioner than it would otherwise impose. According to Petitioner, HCFA could base its determination to impose a remedy against Petitioner in the future not just on a future finding of a deficiency, but on the findings which are at issue here, as well. Because of this potential, Petitioner argues that these deficiencies will lead to the imposition of enforcement actions within the meaning of the regulations. Therefore, according to Petitioner, it would be a denial of due process for Petitioner not to be given a hearing concerning the deficiencies that are at issue here.

The provider in the Fort Tryon case made the same assertion in that case. I concluded that, if HCFA were ever to base a remedy on the deficiencies that were at

issue in Fort Tryon, then the provider would be entitled to a hearing as to those deficiencies. Fort Tryon, DAB CR425, at 7 - 8. I reach the same conclusion here.[4]

C. Whether HCFA may give a provider a right to a hearing where the provider has no right to a hearing under applicable regulations (Finding 9)

In both the August 23, 1995 notice and the October 11, 1995 notice, HCFA told Petitioner that it had a right to a hearing concerning the determination that was announced in the notice. In doing so, HCFA raises the question whether it can confer on a provider a right to a hearing where no right exists under applicable regulations. I conclude that a provider's right to a hearing in any case is defined by the applicable regulations. HCFA may not confer on a provider a right to a hearing where that right does not exist under the regulations.

HCFA did not intend to give Petitioner a right to a hearing beyond whatever rights Petitioner had under the regulations. It is evident from the context of the hearing rights language in the August 23, 1995 and October 11, 1995 notices, that the hearing right that HCFA was advising Petitioner of in each notice was

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[4] Petitioner argues that it will not be entitled to contest the findings of deficiencies from the 1995 surveys if it is again found deficient in future years. P. Br. at 8. Petitioner cites the State Operations Manual (SOM), section 7320, which provides:

> A hearing about the current finding of substandard quality of care will not examine the previous 2 survey cycles' findings of substandard quality of care.

This provision does not alter my conclusion that Petitioner would have a right to a hearing if, in the future, HCFA imposes remedies based, in part, on Petitioner's 1995 deficiencies. First of all, it is not clear that HCFA would interpret the SOM provision to deprive Petitioner of a right to a hearing under those circumstances. However, if HCFA were to argue that Petitioner would not have a right to a hearing, based on this provision, I would reject that argument. The SOM is an interpretive guideline issued by HCFA. It is not a regulation, and it does not have the force and effect of law. Therefore, if the provision were applied in contravention of 42 C.F.R. §§ 488.408 and 498.3(b)(12), I would give no force or effect to the SOM provision.

predicated on the imposition by HCFA of the remedies that were described in each notice. HCFA never imposed a remedy.

However, even if HCFA had intended the notices to serve as unconditional announcements to Petitioner of a right to a hearing, the notices would not confer hearing rights where none existed under the regulations. The regulations are a statement by the Secretary of the Department of Health and Human Services of the universe of circumstances under which a provider has a right to a hearing. HCFA has no authority to create hearing rights beyond that which is explicitly stated in the regulations.

In Fort Tryon, I observed that I and other administrative law judges were receiving many requests for hearings in cases involving HCFA that were either premature, or where, in fact, no hearing rights existed. DAB CR425, at 9. The reason for that is the timing of the proposed remedies announced in HCFA's notices to providers. Under the regulations, a provider must request a hearing within 60 days from receipt of notice of an adverse determination by HCFA. 42 C.F.R. § 498.40. However, frequently, HCFA's notice to a provider announces HCFA's intent to impose a remedy more than 60 days from the date of the notice. In that situation, the provider has no choice but to request a hearing before the date that the remedy may be imposed.

D. Mootness (Finding 10)

HCFA contends, as it has in other cases, that Petitioner's request for a hearing is moot, inasmuch as HCFA imposed no remedy against Petitioner. I conclude here, as I did in Fort Tryon, that it is unnecessary for me to decide this issue, inasmuch as Petitioner has no right to a hearing. Fort Tryon, DAB CR425, at 9.

IV. Conclusion

I conclude that Petitioner does not have a right to a hearing. I dismiss Petitioner's request for a hearing.

/s/

Steven T. Kessel
Administrative Law Judge