DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Pennsylvania Department of Public Welfare
Board Docket No. 80-20-PA-HC
Decision No.205

DATE: August 21, 1981

DECISION

This is an appeal of a disallowance by the Health Care Financing Administration (HCFA, Agency) of $2,349,083 in Federal financial participation (FFP), claimed by the State of Pennsylvania, Department of Public Welfare (State or Grantee), under Title XIX (Medicaid) of the Social Security Act (the Act) as costs of intermediate care facility (ICF) services to the mentally retarded. For reasons stated below, we uphold the Agency's disallowance.

This decision is based on the Grantee's application for review; the Agency's response to the application for review; the Record for Reconsideration, ME-PA7401; and the Grantee's response to an Order to Show Cause issued by the Board on February 24, 1981.

BACKGROUND

Title XIX of the Act provides Federal funding for certain types of medical assistance to eligible individuals. Public Law 92-223, enacted December 28, 1971, amended Title XIX of the Act to include as medical assistance intermediate care facility (ICF) services. Section 1905(d) provides that ICF services include services in a public institution (or distinct part thereof) where --

> (1) The primary purpose of such institution (or distinct part thereof) is to provide health or rehabilitative services for mentally retarded individuals and which meet such standards as may be prescribed by the Secretary....

A public institution providing ICF services to the mentally retarded is generally called an ICF/MR.

Section 1905(c) of the Act defines an ICF as follows:

> ... an institution which (1) is licensed under State law to provide, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who because of their mental or physical condition require care and services (above the level of room and board) which can be made

> available to them only through institutional facilities, (2) meets such standards prescribed by the Secretary as he finds appropriate for the proper provision of such care, ...

Prior to the enactment of Public Law 92-223 in 1971, ICF services could be provided under Titles I, X, XIV, and XVI of the Social Security Act. Section 234.130 of 45 CFR, published June 10, 1970 (56 Fed. Reg. 8990), provided standards for ICF services under these titles. When the program was shifted to Title XIX, HEW's Assistance Payments Administration and Medical Services Administration issued, on January 10, 1972, joint Program Instruction APA-PA-72-5/MSA-PI-72-5, addressed to "State Agencies Administering Approved Medical or Public Assistance Programs." This policy transmittal advised the States that 45 CFR 234.130, and an approvable State plan amendment submitted prior to March 31, 1972, would be the interim guidelines to follow for Title XIX ICF services, pending the promulgation of new regulations and supporting standards.

Section 234.130(c) states, in part,

> Federal financial participation is available ... for institutional services provided to individuals ... who are residents in intermediate care facilities.

Section 234.130(d)(3)(i)(b) defines an ICF as an institution (or distinct part thereof) which is licensed to provide the level of services needed by individuals who --

> [d]o not have such an illness ... or other condition as to require the degree of care and treatment which a hospital or skilled nursing home is designed to provide.

In 1974 the HEW (now HHS) Audit Agency made an audit of the level of care provided by nursing facilities in Pennsylvania under Title XIX and the method used by the State to determine the amount of FFP in the cost of skilled and intermediate nursing care for the mentally retarded. The auditors stated that they made a detailed review of invoices, patients' location records, medical records, nursing schedules and invoice billing procedures at Pennhurst and Polk State Schools, as well as at county offices. (Audit Report, p. 2.)

The auditors found four primary defects with respect to the two State Schools providing services to the mentally retarded: (1) the Grantee had violated Federal and State regulations by failing to comply with its own licensing standards for ICFs; (2) the State Agency claimed FFP for intermediate care of patients who had been certified as being medically in need of skilled care; (3) no distinct part of either institution had been designated as an ICF; and (4) claims for Federal reimbursement for

nursing care of patients in the two State Schools prepared by the State Bureau of Finance were not based on an identification of patients that had in fact received ICF care but, instead, on an arbitrary selection of names from a master listing of eligible assistance patients. (Audit Report, pages 3-5.)

As a result of the audit, the Regional Commissioner of the Social and Rehabilitation Service (SRS), then responsible for administering Title XIX, disallowed $2,349,083, the total amount of FFP claimed by the State for ICF/MR services at the two State Schools for the period January 1, 1972 through May 31, 1973.

The HCFA Administrator upheld the disallowance. Based on the auditors' finding that the State's claims for FFP for ICF services included claims for patients requiring SNF care, the Administrator concluded that the State had violated the ICF standards at section 234.130(d)(3)(i)(b) and therefore, FFP was not available based on section 234.130(c). 1/ (Disallowance Letter, p. 7.) The Administrator relied on Program Instruction APA-PA-72-5/MSA-PI-72-5, for applying ICF regulatory standards. He additionally made, based on the audit report, certain findings of fact including that no distinct part of either institution had been identified as an ICF, and that the State Bureau of Finance arbitrarily selected the names of patients who were to be included in the FFP claim. (Disallowance Letter, p. 4.)

The Grantee contended in its application for review that the Agency's failure to specifically identify which patients did not receive ICF services violated due process; that certification standards can not be implemented through policy transmittals; that there is a difference between an ICF and an institution providing ICF services, and public institutions are not required to be ICFs; and that a waiver of requirements concerning skilled nursing services at the State Schools

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1/ The Regional Commissioner had determined that the State had failed to adhere to its own regulations establishing criteria for certifying ICFs. The Administrator reasoned that, although the State had violated its own standards under the State plan, this would not in and of itself be sufficient cause to uphold this disallowance, because only Section 234.130(c) contained language upon which a disallowance of FFP could be based. This conclusion appears to be incorrect. Section 1903(a)(1) of the Act provides for payment for medical assistance "under the State plan." Also, to qualify as an ICF under Section 1905(c), an institution must be licensed under State law and meet safety and sanitation standards applicable to nursing homes under State law. Since this decision is based on other grounds, however, we do not reach the issue of the effect of these statutory provisions here.

during the time period in question applied equally to ICF services. In response to the Board's Order, which set forth the Board's preliminary conclusion that the disallowance should be upheld, but on different legal grounds than those specifically discussed by the Administrator, the Grantee further argued that the Board must review the record to determine whether the Administrator's decision is valid and must not substitute an alternate basis for the disallowance. The Grantee also raised certain other peripheral arguments which are discussed below.

DISCUSSION

At the outset, it should be noted that the Grantee disputes the Agency's findings on collateral bases. The auditors and in turn the HCFA Administrator found that the State had not designated any part of the institutions as intermediate care areas. This finding was pointed out in the Board's Order and the State was directed to show cause why this disallowance should not be upheld on the grounds that the State had failed to meet the statutory "distinct part" requirement. 2/

In spite of this clear direction in the Order, the State has not shown or even alleged that it had designated distinct parts of the institutions as intermediate care areas nor denied that this was required by the statute.

With respect to the auditors' findings that the State's methodology for claiming was improper (i.e. that the State's claims were based on arbitrary selection of patients' names), the Grantee has provided no evidence to show that the State's methodology was other than what the auditors stated. 3/

The Grantee stated that it "did not claim such costs for all or even the majority of patients at either facility, but merely for those who were in certified beds." (Grantee's Response to the Order to Show Cause, p. 10.) This statement is somewhat confusing since the auditors had found that the State Agency arbitrarily approved the total bed complements at the State institutions; that the State's "certification" of beds was not based on any survey; and that neither State nor Federal

2/ See 45 CFR 234.130(d)(2) for the regulatory interpretation of the distinct part requirement.

3/ The Agency also takes the position that "FFP could not be provided with respect to ICF services unless the recipient was receiving such services pursuant to an active treatment program," and that if the patients could not be identified the State could not show they were receiving active treatment. (Agency Response, p. 14.) This position has merit, reinforced by the statutory requirement for active treatment, Section 1905(d)(2), but we do not rely on this as a basis for our conclusion.

certification standards were met. (Audit Report, p. 3.) Certainly the State's bare assertion, without any supporting documentation, is not sufficient to show that the claims were proper. As discussed below, the Grantee has the burden to document that its claims were proper and for services actually received.

Although these two bases alone are sufficient to sustain the Agency's disallowance in this case, we address below several collateral and procedural issues raised by the State.

Due Process and Documentation of Costs

The Grantee asserted that the auditors failed to identify which of the patients for whom reimbursement was claimed were not provided with ICF services, and that failure violated the due process clause of the Fifth Amendment to the United States Constitution.

This argument is without merit for two reasons. First, the Grantee's defective methodology effectively precluded the auditors from providing the information the Grantee alleges is required; and secondly, the Grantee does not show how this failure to identify individuals affects its due process rights. The disallowance here relates to the State's total claims for ICF/MR services in the two State Schools, rather than to claims for specific individuals, because the defects identified by the auditors called into question the validity of the methodology as a whole. The Grantee has been provided numerous opportunities to present evidence that these findings were incorrect and has failed to do so.

The Board, in its Order to Show Cause, pointed out that the burden of documentation of costs was with the Grantee and that it appeared that the Grantee could not carry it because of the deficiency of its own recordkeeping. See, e.g., LEGIS/50, The Center for Legislative Improvement, Decision No. 48, September 26, 1978. As the Board stated in California State Department of Health, Decision No. 55, May 14, 1979, "[I]t is the State's responsibility to keep the records and supply them upon request. If it fails to do so or chooses not to do so, some inference that the results if proved would be likely to be adverse seems permissible." (p. 5.)

Policy Transmittal and Public Law 92-223

The record indicates, and the Grantee does not deny, that the Grantee had actual notice of the policy transmittal. The Grantee argues, however, that the application of standards governing the conditions and circumstances under which FFP will be authorized for a particular service can not be implemented through policy transmittals but must be enacted through duly promulgated regulations. The Grantee further alleges that to the extent that the legality of the disallowance depends

on the Program Instruction it is per se invalid for the period January 1, 1971, through January 10, 1972, the date when the Program Instruction was adopted.

It is the Agency's position that, since the Program Instruction did not institute new regulations, there were no changes in rules which were already binding on the states, and repromulgation of these regulations was not necessary.

In any event, the Board need not rely on the Program Instruction as a basis for the disallowance. Even if the State's contention were correct regarding publication, the disallowance is proper based on the statutory "distinct part" requirement and the Grantee's lack of sufficient documentation that its claims were proper.

Since the Board need not rely on the Program Instruction as a basis for upholding the disallowance, the Grantee's argument concerning the time period requires no further consideration. We note, however, that the disallowance period is from January 1, 1972 to May 31, 1973, so the Grantee's argument concerning the effective date would, at most, encompass only a ten day period.

Definition of Intermediate Care Facility Services

The Grantee contends that there is a difference between an ICF and a public institution providing ICF services. The Grantee stated, "The plain wording of Public Law 92-223 indicates that Congress did not intend to force public institutions providing care to mentally retarded persons to become intermediate care facilities as the arbitrary and unauthorized application of the definition of 'intermediate care facility' to Pennhurst and Polk by HEW accomplishes." (Application for Review, p. 4.)

The Agency, in its response, stated that what could be paid for was ICF services, not some other group of services, and services could not be ICF services unless provided in an ICF. Congress did not provide for FFP in all services in public institutions for the mentally retarded but only in "intermediate care facility services." The Agency relies on legislative history and the captions of Public Law 92-223 for its position. (See Agency Response, p. 12.) It appears that the Agency's interpretation is reasonable. However, even given differences as asserted by the Grantee, there is nothing in the statute that would preclude the Secretary from prescribing as standards for public institutions providing intermediate care to the mentally retarded the same standards as he prescribes for general ICFs. Also, and perhaps most important in the context of this case, even if the Grantee were correct, this would not provide a basis for overturning the disallowance unless the Grantee had submitted documentation showing that its claims met the statutory standards and were for services actually provided.

Board Authority

The Grantee argued that the Board must review the record to determine whether the Administrator's decision was supported by substantial evidence in the auditors' report, and may not substitute alternate bases for the disallowance.

The Board is not precluded from reviewing any document in the record and making findings to support the disallowance in addition to the findings asserted by the Agency. In fact, the Board regulations at 45 CFR 16.8(a) require that the Board be bound by all applicable laws and regulations. The Grantee has had ample opportunity to respond to the Board's analysis, since it was set forth in the Order to Show Cause and the Grantee was invited to respond specifically to the Board's proposed findings and conclusions.

Additionally, we find that the Administrator's decision was not based solely on his legal conclusion that 45 CFR 234.130 had been violated, but also on findings of fact in the audit report which clearly related to failure to meet the distinct part and documentation requirements. Public Law 92-223, which amended Section 1905, was cited as an applicable law.

Waiver

Grantee's argument that ICF requirements were waived for these State Schools is also without merit (we note that the Grantee did not further address the issue in response to the Board's Order to Show Cause). The Grantee was given a waiver until September 1, 1973 to certify skilled nursing facilities (SNFs), because of the damages to the State inflicted by Hurricane Agnes. The Grantee contends that the circumstances which supported a waiver concerning SNF services applied equally as well to ICF services.

The waiver, by the State's own admission, concerned only SNFs (Application for Review, page 4). Furthermore, as indicated above, even if the waiver applied to State Schools, that would not excuse any failure to document that individuals for whom FFP was claimed actually received such services.

Other Arguments

While the Agency has, in its correspondence with the State on this audit, shifted its emphasis from the originally cited legal basis to others, this is partly because the State has continued to raise new issues during the course of the proceedings.

The Grantee argued for the first time in response to the Board's Order that the auditors had based their report on nonverified observations. On the contrary, the audit report shows that the auditors reviewed a number of Grantee's records, including invoices, patients' location records and medical records, and also spoke with personnel at the State Schools and the State Agency. The Grantee has provided no evidence to contradict this.

The Grantee further stated that the Administrator's decision should be reversed because no finding was made by the auditors that persons designated as in need of skilled care did not receive skilled care. The Administrator's decision does state, at one point, that "the State has diluted patient services by providing ICF care to SNF-certified patients," (p. 7) and this may be a mischaracterization of the auditors' findings. The crux of the Administrator's decision was, however, the finding that the State claimed FFP in ICF services for patients needing skilled care. Thus, the State was not prejudiced by the misstatement in the Administrator's decision.

CONCLUSION

Based on the grounds that (1) the State was unable to identify a "distinct part" of the State Schools where patients were receiving ICF services, and (2) that the State's method of claiming was defective and the State has failed to document that its claims were for allowable costs, we conclude that the costs claimed for FFP by the Pennsylvania Department of Public Welfare were unallowable. Accordingly, the appeal of the State of Pennsylvania is denied.

/s/ Alexander G. Teitz

/s/ Donald F. Garrett

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