Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Desert Hospital,	DATE: December 13, 1996
Petitioner,	
- v. -	Docket No. C-96-295 Decision No. CR448
Health Care Financing Administration.	

DECISION

I grant the motion of Desert Hospital (Petitioner) for summary disposition on the issue of whether the Health Care Financing Administration (HCFA) had the authority to impose against Petitioner denial of payment for new admissions, effective March 20, 1996. I dismiss Petitioner's request for a hearing as to a civil money penalty imposed by HCFA, in view of Petitioner's assertion that it would withdraw its hearing request concerning the civil money penalty if it prevailed in its motion for summary disposition. I deny as moot HCFA's motion that I amend my prehearing order in this case.

I. Background

On April 16, 1996, HCFA advised Petitioner that it was imposing remedies against Petitioner which included the following:

- Denial of payment for new admissions, effective March 20, 1996.
- A civil money penalty.

HCFA advised Petitioner additionally that it would terminate Petitioner's agreement to participate in the Medicare program, effective August 5, 1996, if Petitioner did not attain substantial compliance with Medicare participation requirements by that date.

On May 23, 1996, HCFA advised Petitioner that it had determined that Petitioner had attained substantial compliance with Medicare participation requirements, effective April 9, 1996. Consequently, HCFA determined not to terminate Petitioner's participation in Medicare. HCFA ended the accrual of the civil money penalty and the denial of payment for new admissions effective April 9, 1996.

Petitioner requested a hearing from HCFA's April 16 1996 determination to impose remedies against it, and the case was assigned to me for a hearing and a decision. Petitioner moved for summary disposition on the issue of whether HCFA could impose against Petitioner denial of payment for new admissions, effective March 20, 1996. In its motion, Petitioner averred that, if it prevailed, it would withdraw its request for a hearing concerning the civil money penalty that HCFA had imposed. Petitioner submitted 10 exhibits (P. Exs. 1 - 10) with its motion for summary disposition.

HCFA opposed Petitioner's motion for summary disposition. HCFA submitted two exhibits with its opposition to Petitioner's motion (HCFA Exs. 1 - 2). Neither Petitioner nor HCFA objected to my receiving into evidence any of the exhibits that were submitted by Petitioner or by HCFA. Therefore, I am receiving into evidence P. Exs. 1 - 10 and HCFA Exs. 1 - 2.

Additionally, HCFA moved that I amend the prehearing order that I issued in this case. Petitioner opposed HCFA's motion.

II. Issue, findings of fact and conclusions of law

The issue is whether HCFA was authorized to impose against Petitioner a denial of payment for new admissions, effective March 20, 1996, and continuing until April 9, 1996, the date on which HCFA found that Petitioner was complying substantially with Medicare participation requirements. I make the following findings of fact and conclusions of law (Findings), which I discuss in detail at Part III. of this decision.

> 1. HCFA is required to give a long term care facility at least 15 days' notice in writing of its intent to impose a remedy against the facility, except in a case where HCFA determines that the facility's noncompliance with Medicare participation requirements poses immediate jeopardy to the health and safety of residents.

2. As part of the notice requirement, HCFA must inform a long term care facility of the participation requirements that HCFA determines that the facility has not complied with, and which are the basis for HCFA's determination to impose a remedy.

3. On February 15, 1996, the California Department of Health Services (California survey agency) advised Petitioner that, based on a survey which the California survey agency conducted of Petitioner on February 6, 1996, Petitioner had been found not to be complying with federal participation requirements for the Medicare and Medicaid programs. The California survey agency told Petitioner that, based on these findings of noncompliance, it would recommend to HCFA that HCFA impose remedies against Petitioner, including denial of payment for new admissions.

4. In its February 15, 1996 notice to Petitioner, the California survey agency did not specify which participation requirements it had found that Petitioner had not complied with. However, a report of the February 6, 1996 survey alleged failures by Petitioner to comply with requirements contained in the following regulations: 42 C.F.R. § 483.10(b)(4); 42 C.F.R. § 483.10(b)(5) - (6); 42 C.F.R. § 483.10(b)(11); 42 C.F.R. § 483.10(n); 42 C.F.R. § 483.10(o); 42 C.F.R. § 483.13(a); 42 C.F.R. § 483.15(f)(1); 42 C.F.R. § 483.15(g); 42 C.F.R. § 483.15(h)(1); 42 C.F.R. § 483.20(a); 42 C.F.R. § 483.20(b); 42 C.F.R. § 483.20(b)(4)(iv); 42 C.F.R. § 483.20(d); § 42 C.F.R. § 483.20(d)(3)(i); 42 C.F.R. § 483.25(c); 42 C.F.R. § 483.25(d)(2); 42 C.F.R. § 483.25(i)(1); 42 C.F.R. § 483.25(k); 42 C.F.R. § 483.25(l)(1), (2); 42 C.F.R. § 483.35(h)(2); 42 C.F.R. § 483.45(b); 42 C.F.R. § 483.60(c)(2); 42 C.F.R. § 483.65(a)(1) - (3); 42 C.F.R. § 483.75; 42 C.F.R. § 483.75(d)(1) - (2); 42 C.F.R. § 483.75(i); 42 C.F.R. § 483.75(l)(1); 42 C.F.R. § 483.75(o)(1); and 42 C.F.R. § 483.75(o)(2) - (3).

5. On February 29, 1996, HCFA advised Petitioner that it concurred with findings by the California survey agency that Petitioner did not comply with two federal participation requirements. These requirements are contained in 42 C.F.R. §§ 483.15(f)(1), and 483.25(c). HCFA did not advise Petitioner that it concurred with other findings of noncompliance made by the California survey agency.

6. The reasonable construction of HCFA's February 29, 1996 notice to Petitioner is that HCFA concurred with the California survey agency's findings that Petitioner failed to comply with participation requirements contained in 42 C.F.R. §§ 483.15(f)(1) and 483.25(c), but did not concur with findings by the California survey agency that Petitioner failed to comply with other participation requirements.

7. In its February 29, 1996 notice, HCFA advised Petitioner that HCFA would impose denial of payment for new admissions and other remedies against Petitioner if Petitioner did not attain compliance with Medicare participation requirements. The notice implied that, in order to avoid imposition of denial of payment for new admissions, Petitioner must attain compliance with participation requirements by March 20, 1996.

8. The California survey agency resurveyed Petitioner on March 20, 1996. The California survey agency found that Petitioner had attained compliance with the two participation requirements cited by HCFA in the February 29, 1996 notice from HCFA to Petitioner. However, the California survey agency found that Petitioner had not attained compliance with other participation requirements that it had found that Petitioner was not complying with at the February 6, 1996 survey of Petitioner.

9. On April 16, 1996, HCFA advised Petitioner that it had determined that, based on the findings made by the California survey agency at its March 20, 1996 survey of Petitioner, Petitioner had not corrected all of the deficiencies that had been alleged previously by the California survey agency. HCFA advised Petitioner that it had determined to impose remedies against Petitioner, which included denial of payment for new admissions, effective March 20, 1996.

10. HCFA's determination to impose denial of payment for new admissions against Petitioner, effective March 20, 1996, was premised on findings by the California survey agency that some of the deficiencies that the California survey agency had identified at its February 6, 1996 survey of Petitioner had not been corrected by Petitioner as of March 20, 1996. However, HCFA did not concur with the California survey agency's initial findings of these deficiencies in HCFA's February 29, 1996 notice to Petitioner.

11. The first notice from HCFA to Petitioner in which HCFA implied that it concurred with findings made at the February 6, 1996 survey by the California survey agency, other than the findings that Petitioner was not complying with participation requirements contained in 42 C.F.R. §§ 483.15(f)(1) and 483.25(c), is HCFA's April 16, 1996 notice to Petitioner.

12. HCFA did not give Petitioner 15 days' notice of its intent to impose denial of payment for new admissions as a remedy for Petitioner's failure to correct deficiencies that the California survey agency identified on February 6, 1996 and which the California survey agency found that Petitioner had not corrected as of March 20, 1996.

13. HCFA is without authority to impose denial of payment for new admissions, effective March 20, 1996, as a remedy for Petitioner's failures to comply with participation requirements, which failures were identified by the California survey agency at the February 6, 1996 and March 20, 1996 surveys, but which were not cited by HCFA in its February 29, 1996 notice to Petitioner.

14. HCFA's motion that I clarify my prehearing order in this case is moot.

III. Discussion

A. Governing law (Findings 1 - 2)

Petitioner is a provider of long-term care whose participation in Medicare is subject to the requirements contained in 42 C.F.R. Part 488 which govern providers of long-term care.[1] The regulations in this Part contain notice requirements that HCFA must adhere to before imposing a remedy against a long-term care provider that HCFA determines is not complying with participation requirements.

Where HCFA determines to impose a remedy, HCFA must give the provider advance notice of its determination. 42 C.F.R. § 488.402(f)(1). The notice must tell the provider: the nature of the provider's noncompliance with

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[1] The parties agree that Petitioner is subject to the requirements which govern providers of long-term care contained in 42 C.F.R. Part 488.

participation requirements; which remedy HCFA has determined to impose; the effective date of the remedy; and the provider's right to appeal HCFA's determination to impose a remedy. 42 C.F.R. § 488.402(f)(1)(i) - (iv). The regulation's requirement that HCFA tell the provider the nature of the provider's failure to comply with participation requirements, as a prerequisite to imposing a remedy against the provider, means that HCFA may not, as a predicate to imposing a remedy, rely on a general statement that the provider is not complying with participation requirements. Nor may HCFA give the provider an incomplete statement of the provider's deficiencies, and then, at a later date, impose a remedy based on the presence of deficiencies that were not cited by HCFA in its notice to the provider. The regulation requires nothing less than a complete disclosure by HCFA to the provider of the deficiencies for which HCFA may be imposing a remedy at a later date. Id.

HCFA must give the provider 15 days' written notice of its intent to impose a remedy in any case where the provider's noncompliance with participation requirements does not pose immediate jeopardy to the health and safety of residents, except in the instance where HCFA determines to impose a civil money penalty or to impose monitoring of the provider's performance by a State. 42 C.F.R. § 488.402(f)(4). The 15-day notice period begins to run on the date that the notice is received by the provider. 42 C.F.R. § 488.402(f)(5). However, the remedy will become effective no later than 20 days from the date that HCFA mails to the provider its notice of intent to impose a remedy.

The regulations in Part 488 which apply to providers of long-term care were published in order to implement those sections of the Social Security Act (Act) which govern the participation of such providers in the Medicare program and State health care programs. In particular, the Part 488 regulations are intended to implement the parts of sections 1819, 1919, and 1866 of the Act, which authorize the Secretary of the United States Department of Health and Human Services (the Secretary) and the States to impose remedies on providers of long-term care who do not comply with federal requirements which govern participation in the Medicare and State health care programs. In the Part 488 regulations, the Secretary has delegated authority to HCFA and to the States to impose remedies that are consistent with the requirements of the Act.

The purpose of remedies imposed pursuant to the regulations in Part 488 is to encourage providers of long-term care that are not complying with participation requirements to correct their deficiencies. The authority to impose remedies is not intended to be a mechanism by which to punish such providers for failing to comply with participation requirements. It would be inconsistent with the requirements of both the Act and the Part 488 regulations, and punitive, to impose a remedy under circumstances where the remedy did not serve a remedial purpose.

Where HCFA imposes a remedy without first satisfying the notice requirements, that remedy becomes a punishment that is inconsistent with the Act's remedial purpose. The notice requirements of 42 C.F.R. § 488.402(f)(4) and (5) must be read consistent with the remedial purpose of the Act and regulations. The purpose of the notice requirements is to give a long-term care provider an opportunity to correct its deficiencies in order to forestall the imposition of a remedy. If a long-term care provider is not given adequate notice of its deficiencies and of HCFA's intent to impose a remedy based on HCFA's determination that the provider manifests those deficiencies, then the provider will not be encouraged to correct the deficiencies in order to forestall the imposition of a remedy.

The requirement of adequate notice is made more compelling by the fact that the Part 488 regulations give the States and HCFA independent authority, in some circumstances, to make determinations of deficiencies and to impose remedies based on those determinations. See 42 C.F.R. § 488.400. In some circumstances, a State may make a determination of a deficiency and impose a remedy against a provider of long-term care without seeking HCFA's concurrence or approval. In other circumstances, as in this case, the State will make a recommendation to HCFA, and HCFA will make the ultimate determination of a deficiency and whether to impose a remedy. The parallel authority to impose remedies makes it imperative that the provider know which authority (State or HCFA) it must satisfy in order to avoid the imposition of a remedy.

B. The relevant facts (Findings 3 - 12)

The parties do not dispute the relevant facts. The undisputed facts are as follows.

On February 6, 1996, the California survey agency conducted a survey of Petitioner to determine whether Petitioner was complying with federal participation

requirements governing nursing homes participating in Medicare and Medicaid. P. Ex. 1 at 1. The surveyors who conducted the survey concluded that Petitioner was not complying substantially with several participation requirements. The requirements which the surveyors concluded that Petitioner was not complying substantially with are stated in: 42 C.F.R. § 483.10(b)(4); 42 C.F.R. § 483.10(b)(5) - (6); 42 C.F.R. § 483.10(b)(11); 42 C.F.R. § 483.10(n); 42 C.F.R. § 483.10(o); 42 C.F.R. § 483.13(a); 42 C.F.R. § 483.15(f)(1); 42 C.F.R. § 483.15(g); 42 C.F.R. § 483.15(h)(1); 42 C.F.R. § 483.20(a); 42 C.F.R. § 483.20(b); 42 C.F.R. § 483.20(b)(4)(iv); 42 C.F.R. § 483.20(d); § 42 C.F.R. § 483.20(d)(3)(i); 42 C.F.R. § 483.25(c); 42 C.F.R. § 483.25(d)(2); 42 C.F.R. § 483.25(i)(1); 42 C.F.R. § 483.25(k); 42 C.F.R. § 483.25(l)(1), (2); 42 C.F.R. § 483.35(h)(2); 42 C.F.R. § 483.45(b); 42 C.F.R. § 483.60(c)(2); 42 C.F.R. § 483.65(a)(1) - (3); 42 C.F.R. § 483.75; 42 C.F.R. § 483.75(d)(1) - (2); 42 C.F.R. § 483.75(i); 42 C.F.R. § 483.75(l)(1); 42 C.F.R. § 483.75(o)(1); and 42 C.F.R. § 483.75(o)(2) - (3). HCFA Ex. 1 at 1 - 66.

On February 15, 1996, the California survey agency sent a notice to Petitioner. P. Ex. 1. The notice recited that a survey had been conducted of Petitioner on February 6, 1996. Id. at 1. It stated that Petitioner had been found not to be complying with participation requirements. Id. The notice did not state specifically which participation requirements Petitioner had been found not to be complying with, except that it referred Petitioner to the finding of the surveyors that Petitioner had not complied with the requirements of 42 C.F.R. § 483.25, and, therefore, had provided care of a substandard quality. Id. at 3. Nor did the notice specifically incorporate by reference the findings which the surveyors reported separately. However, it appears that the California survey agency furnished Petitioner a copy of the surveyors' report. See HCFA Ex. 1.

The notice instructed Petitioner to submit a plan of correction to the California survey agency. P. Ex. 1 at 1. In addition, the notice advised Petitioner that the California survey agency was recommending to HCFA that HCFA impose remedies consisting of the following: a civil money penalty, to be imposed effective January 30, 1996; denial of payment for new admissions, to be imposed effective March 5, 1996; and directed in-service training to be imposed effective March 5, 1996. Id. at 2.

On March 4, 1996, the California survey agency sent an amended notice to Petitioner. P. Ex. 2. The amended notice differs from the February 15, 1996 notice only in the following respect: it stated that Petitioner had also not complied with the requirements of 42 C.F.R. § 483.15, and therefore, had provided care of a substandard quality.

On February 29, 1996, HCFA sent a notice to Petitioner. P. Ex. 3. The notice recited that the California survey agency had surveyed Petitioner on February 6, 1996, and that it had found that Petitioner was not complying substantially with federal participation requirements. Id. at 1. HCFA told Petitioner that:

> As a result of the survey findings listed on the Statement of Deficiencies and Plan of Correction (Form HCFA-2567) which was forwarded to you after the survey, the [California survey agency] notified you that it would recommend to . . . (HCFA) that remedies be imposed. We concur with the survey findings which indicate that the following Medicare requirements were out of compliance:
>
> 42 C.F.R. 483.15(f)(1) Quality of Life
> 42 C.F.R. 483.25(c) Quality of Care

Id.

HCFA informed Petitioner that, as a result of its "current and past noncompliance with Medicare requirements," HCFA would impose remedies against Petitioner. Id. These remedies included denial of payment for new admissions, effective March 20, 1996. Id. at 1 - 2.

Petitioner prepared a corrective action plan. HCFA Ex. 1 at 1 - 66. The corrective action plan addressed all of the findings of noncompliance that were made by the California survey agency surveyors, and not just those that were recited in the February 15 and March 4, 1996 notices from the California survey agency to Petitioner, or in HCFA's February 29, 1996 notice to Petitioner. HCFA Ex. 1 at 1 - 66; see P. Ex. 1 - 3. The corrective action plan is dated March 11, 1996, and is signed by Petitioner's Administrative Director. HCFA Ex. 1 at 1; see P. Ex. 4 at 2.

It is not clear from the exhibits in this case whether Petitioner sent the completed corrective action plan to the California survey agency or to HCFA. In any event,

on March 13, 1996, Petitioner informed HCFA that it had attained compliance with Medicare participation requirements. P. Ex. 4. In this letter, Petitioner asserted that it had completed required corrective actions as of March 2, 1996. Id. at 1. Petitioner asserted that it was ready to be resurveyed in order to demonstrate that it was complying substantially with participation requirements. Id. at 1 - 2.

On March 20, 1996, the California survey agency resurveyed Petitioner. P. Exs. 5, 6. On April 3, 1996, the California survey agency notified Petitioner that, based on the resurvey, the California survey agency concluded that Petitioner remained noncompliant with participation requirements contained in 42 C.F.R. §§ 483.20, 483.45, and 483.75. P. Ex. 6 at 1. The California survey agency advised Petitioner that it would recommend to HCFA that HCFA impose against Petitioner the remedy of directed in-service training. Id. The California survey agency advised Petitioner, additionally, that HCFA might determine to impose a civil money penalty against Petitioner. Id. at 1 - 2.

On April 9, 1996, Petitioner submitted a plan of correction to the California survey agency. P. Ex. 7. The plan of correction addressed the deficiencies that the California survey agency identified at its March 20, 1996 survey of Petitioner. P. Ex. 7 at 2 - 8.

On April 16, 1996, HCFA notified Petitioner that HCFA was imposing remedies against Petitioner. P. Ex. 8. HCFA announced that its determination to impose remedies was based on findings by the California survey agency at the March 20, 1996 resurvey of Petitioner, that Petitioner continued to manifest failures to comply with participation requirements, and that Petitioner had not corrected all deficiencies that were identified previously by the California survey agency. The remedies imposed by HCFA included denial of payment for new admissions "effective March 20, 1996 as stated in our February 29, 1996 letter." Id. at 1; see P. Ex. 3. Other remedies that were imposed included a civil money penalty and continuation of directed in-service training. Id. at 1.

Petitioner's April 9, 1996 plan of correction, which addressed the deficiencies identified by the California survey agency at the March 20, 1996 resurvey of Petitioner, was accepted by the California survey agency as being credible evidence that Petitioner had corrected those deficiencies. HCFA Ex. 2 at 2. Based on that acceptance, HCFA determined that Petitioner complied with

all federal participation requirements, effective April 9, 1996. Id. HCFA determined to rescind the remedies of denial of payment for new admissions, civil money penalty, and directed in-service training, effective April 9, 1996. Id. However, the consequence of HCFA's determination to impose denial of payment for new admissions, effective March 20, 1996, and its subsequent rescission of that determination, effective April 9, 1996, is that HCFA denied Petitioner payment for new admissions occurring between March 20, 1996 and April 9, 1996.

From the foregoing recitation, certain key facts emerge, which are central to my decision in this case. They are the following:

- HCFA's February 29, 1996 notice to Petitioner states that HCFA concurs with only two of the findings of deficiencies that the California survey agency made at the February 6, 1996 survey of Petitioner. P. Ex. 3 at 1. HCFA did not concur with or ratify the additional findings of deficiencies that the California survey agency made at its February 6, 1996 survey of Petitioner. Id. The reasonable implication of this notice is that HCFA concurred with the California survey agency's findings that Petitioner did not comply with the requirements of 42 C.F.R. §§ 483.15(f)(1) and 483.25(c), but that HCFA did not concur with other findings of deficiencies made by the California survey agency.

- The three continuing deficiencies that the California survey agency identified at its March 20, 1996 resurvey of Petitioner did not include either of the two deficiencies that HCFA identified in its February 29, 1996 notice to Petitioner. P. Ex. 6 at 1; see P. Ex. 3 at 1.

- The California survey agency did not recommend that HCFA impose against Petitioner denial of payment for new admissions as a remedy for the three remaining deficiencies that the California survey agency identified at its March 20, 1996 resurvey of Petitioner. P. Ex. 6 at 1.

- Petitioner corrected all of the three remaining deficiencies, effective April 9, 1996. P. Ex. 7; HCFA Ex. 2 at 2.

- The two findings of deficiencies that HCFA concurred with in its February 29, 1996 notice to Petitioner were not a basis for HCFA's determination to impose against Petitioner denial of payment for new

admissions, effective March 20, 1996, inasmuch as Petitioner corrected these deficiencies on or before March 20, 1996. P. Ex. 7.

- Notwithstanding, HCFA determined to impose against Petitioner denial of payment for new admissions, effective March 20, 1996. P. Ex. 8 at 1. HCFA's basis for determining to impose denial of payment for new admissions was the California survey agency's determination that, as of March 20, 1996, Petitioner remained out of compliance with three participation requirements that the California survey agency had found Petitioner to be out of compliance with at its February 6, 1996 survey. P. Ex. 8 at 1; see P. Ex. 6; see HCFA Ex. 1. None of these three participation requirements comprise either of the two requirements that HCFA cited in its February 29, 1996 notice to Petitioner. Id.

- HCFA did not give Petitioner 15 days notice of the basis for its determination to impose against Petitioner denial of payment for new admissions.

- Prior to April 16, 1996, the only participation requirements which HCFA had advised Petitioner that it found Petitioner not to be complying with are those contained in 42 C.F.R. §§ 483.15(f)(1) and 483.25(c). P. Ex. 3.

C. Application of the law to the facts (Finding 13)

As I find at Part III.A., 42 C.F.R. § 488.402(f)(1) requires HCFA to state with particularity the basis for its determination to impose a remedy against a provider of long-term care. HCFA failed to comply with this requirement in imposing denial of payment for new admissions against Petitioner, effective March 20, 1996.

The plain meaning of HCFA's February 29, 1996 notice to Petitioner is that HCFA agreed with the California survey agency's findings that Petitioner was not complying substantially with participation requirements only to the extent that HCFA concurred with the California survey agency's findings that Petitioner was not complying substantially with the participation requirements contained in 42 C.F.R. §§ 483.15(f)(1) and 483.25(c).[2]

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[2] I make no finding in this decision whether HCFA concurred with all, or only some, of the California survey agency's findings, because it is not necessary that I do so. My decision in this case is based on the

(continued...)

HCFA linked its warning to Petitioner that it would impose denial of payment for new admissions, effective March 20, 1996, unless Petitioner attained compliance with participation requirements by that date, to the determination that, as of February 6, 1996, Petitioner was not complying with 42 C.F.R. §§ 483.15(f)(1) and 483.25(c). There is nothing in HCFA's February 29, 1996 notice that suggests that HCFA might impose denial of payment for new admissions, effective March 20, 1996, based on continued failures by Petitioner to comply with other participation requirements that the California survey agency had found Petitioner not to be complying with at the February 6, 1996 survey.

In this case, HCFA failed, on February 29, 1996, to give Petitioner the requisite notice of the specific basis, later relied on by HCFA, for imposing against Petitioner the remedy of denial of payment for new admissions. HCFA did not give Petitioner 15 days notice, as is required by 42 C.F.R. § 488.402(f)(4), of its intent to impose denial of payment for new admissions effective March 20, 1996, based on Petitioner's continued failure to comply with participation requirements <u>other</u> than those stated in 42 C.F.R. §§ 483.15(f)(1) and 483.25(c). Such notice was not provided by HCFA until April 16, 1996, and thus cannot be a basis for imposing denial of payment for new admissions effective March 20, 1996.

It is true that HCFA's notice of February 29, 1996 told Petitioner that HCFA would impose a denial of payment for new admissions if Petitioner did not attain compliance with participation requirements by March 20, 1996. However, that notice explicitly refers only to Petitioner's failure to comply with the participation requirements contained in 42 C.F.R. §§ 483.15(f)(1) and 483.25(c). By stating only that HCFA concurred with the California survey agency's findings concerning these two requirements, the notice creates the impression that HCFA did <u>not</u> concur with the California survey agency's findings that Petitioner was deficient in other respects. Given that, the February 29, 1996 notice was inadequate notice of HCFA's intent to impose denial of payment for new admissions, effective March 20, 1996, for continued failure by Petitioner to comply with the participation

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[2](...continued)
adequacy of the notice that HCFA gave Petitioner of its determination to impose denial of payment for new admissions, effective March 20, 1996. It is not based on the actual findings that HCFA may have made concerning Petitioner's compliance with participation requirements.

requirements that the California survey agency found that Petitioner had not complied with as of February 6, 1996 but which were not mentioned in HCFA's February 29, 1996 notice.

I do not dispute the fact that the California survey agency gave Petitioner notice of the deficiencies that were identified at the February 6, 1996 survey.[3] Petitioner's understanding of what the California survey agency had found is demonstrated by the fact that Petitioner submitted a plan of correction which addressed all of the deficiencies that were identified on February 6, 1996, and not just the two findings of deficiencies that HCFA concurred with in its February 29, 1996 notice to Petitioner. But, the notice of deficiencies which the California survey agency gave to Petitioner is not notice of HCFA's determination, or of the remedies that HCFA might impose. Under 42 C.F.R. § 488.402(f), where HCFA determines to impose a remedy against a provider of long-term care, then HCFA must give that provider notice of the determination, including the specific basis for the determination.

D. HCFA's motion that I amend my prehearing order (Finding 14)

HCFA's motion that I amend my prehearing order is moot. HCFA premised its motion on an assertion that I had not stated with sufficient clarity the issues to be heard and decided at an evidentiary hearing of the merits of this case. However, I do not reach the merits of this case, inasmuch as I find that HCFA provided Petitioner with inadequate notice of its intent to impose the remedy of denial of payment for new admissions.

IV. Conclusion

I conclude that HCFA provided Petitioner with inadequate notice of its intent to impose against Petitioner the remedy of denial of payment for new admissions effective March 20, 1996. Consequently, HCFA is without authority

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[3] That is not to say that the California survey agency stated its findings to Petitioner with absolute clarity. Neither the February 15, 1996 notice nor the amended notice of March 4, 1996 recites the specific findings of noncompliance. P. Ex. 1; P. Ex. 2. Petitioner was left to assume that the California agency had accepted all of the findings made by the surveyors who conducted the February 6, 1996 survey.

to impose against Petitioner the remedy of denial of payment for new admissions, effective March 20, 1996. I conclude further that Petitioner has withdrawn its request for a hearing as to HCFA's imposition of a civil money penalty against Petitioner. However, that withdrawal is conditioned on my ruling in favor of Petitioner on Petitioner's motion for summary disposition on the issue of HCFA's authority to impose against Petitioner the remedy of denial of payment for new admissions, effective March 20, 1996. In the event that HCFA should appeal my disposition of that issue, and should it succeed in its appeal, then Petitioner could choose to renew its hearing request at that time. To do so, Petitioner would have to notify this office within 45 days of receipt of the decision on appeal. Finally, I conclude that HCFA's motion that I amend my prehearing order in this case is moot.

/s/

Steven T. Kessel
Administrative Law Judge