DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Minnesota Department of Public Welfare
Docket No. 79-213-MN-HC
Decision No. 215

DATE: September 24, 1981

DECISION

Introduction

On November 1, 1979, the Minnesota Department of Public Welfare (State) requested review of the October 2, 1979 determination by the Health Care Financing Administration (HCFA, Agency) disallowing $83,466 in Federal financial participation (FFP) in payments made to thirteen intermediate care facilities for the mentally retarded (ICF/MRs). HCFA determined that there were no valid provider agreements in effect between the facilities and the State and disallowed FFP for the quarter ended March 31, 1979 for services rendered during that quarter. 1/

This decision is based on the State's application for review, the Agency's response to the appeal, two Orders to Show Cause (one of which also encompassed a number of appeals brought by other States), the State's response to the Orders, the transcript of an informal conference held February 11-12, 1981 in which Minnesota and eight other states participated, the State's post-conference brief, the Agency's response to the State's post-conference brief, and supplementary documents sent by the State on August 4, 5, and September 4, 1981.

As will be discussed below, we find that Minnesota law does provide for the continued validity of a provider agreement pending appeal from its nonrenewal after expiration and therefore brings this appeal within the scope of MSA-PRG-11. The disallowance is only partially overturned, however, based on the facts involved in the appeal.

Statement of the Case

Between 1975 and 1978, the thirteen ICF/MRs involved in this appeal were surveyed by the State survey agency and cited for various Life Safety Code (LSC) violations. They were: Nekton on Springvale, Nekton

1/ The notification of disallowance did not indicate when the services were rendered. After consulting both Central and Regional Offices. the attorney for HCFA has stated that the services were rendered during the quarter in question. The attorney for the State was informed of this by telephone and has not disputed it.

on London, Nekton on Greysolon, Nekton on Stillwater Lane, Nekton on Frost, Nekton on Minnehaha Park, 2/ Nekton on Queen, Nekton on William, Nekton on Mississippi, Nekton on Wyoming, Nekton on Imperial Court, Uptown Group Living Project. After receiving a "Statement of Deficiencies," each facility requested a hearing to appeal the survey agency's interpretation of the LSC. When the facilities' certifications and provider agreements expired, they were not renewed.

After "prolonged debate" (State's Response to Order to Show Cause, p. 3) between the survey agency and the facilities over proper interpretation of the LSC, the survey agency requested interpretations from HEW and the National Fire Protection Association (NFPA) in July 1978. In January 1979, having heard nothing from NFPA, the survey agency "decided...to proceed to hearing." (Id.)

In early April 1979, the survey agency "released" all the survey data it had been accumulating from the periodic inspections conducted after the initial citations of deficiencies and issued certifications for the periods during the appeals. On May 10, 1979, the survey agency noticed a hearing for July, but the hearing was continued for discovery purposes.

On August 7, 1979, NFPA sent its interpretation of the relevant LSC standards and, according to the State, "found the [survey agency's] interpretation of the LSC to be incorrect." (Id. p. 4.) As a result, the survey agency notified the State Office of Hearing Examiners on February 6, 1980 that it had accepted plans of correction pertaining to one of the deficiencies and that the remaining existing deficiencies should be dismissed without prejudice to the survey agency's right to reinspect. The Hearing Examiner dismissed the appeals on February 7, 1980.

Discussion

1. MSA-PRG-11

MSA-PRG-11 (PRG-11), a December 1971 Program Regulation Guide issued by the predecessor of HCFA, sets out the basic rule that FFP is not available if a facility does not have a currently effective provider agreement, but notes two exceptions:

2/ In a telephone conversation on August 4, 1981, the attorney for the State notified the Board that this is the current name of the facility called Nekton on 49th Street in the notification of disallowance.

1) [If] State law provides for continued validity of the provider agreement pending appeal; or
2) [If] the facility is upheld on appeal and State law provides for retroactive reinstatement of the agreement.

HCFA has contended that even if the State is required by State law to continue payments, FFP is not authorized because the first part of PRG-11 has been superceded by subsequent regulations. However, in Ohio Department of Public Welfare, Decision No. 173, April 30, 1981, the Board held (p. 14) that PRG-11 had not been nullified, repealed, or amended. The Board applied the first exception set forth in PRG-11 where a facility appealed the termination or nonrenewal of its provider agreement and a court ordered the state to continue payments. The effect of this exception is limited in duration, as discussed in the second part of this discussion. In Colorado Department of Social Services, Decision No. 187, May 31, 1981, the Board concluded (p. 7) that its holding in Ohio also applied to an appeal under the Colorado Administrative Procedure Act. See also, Georgia Department of Medical Assistance, Decision No. 192, June 30, 1981.

Based on the analysis below, we conclude that the Minnesota state law does provide for continued validity of a provider agreement pending appeal. The second exception set forth in PRG-11 will be be examined in the third part of this discussion, "The Outcome of the Appeals Process."

As to the first exception set forth in PRG-11, the State argues that the Minnesota Administrative Procedures Act, Minn. Stat. §§ 15.0411 to 15.052 (1980), "makes clear that the decision of the officials of a state agency are merely proposed decisions or orders that are not final until after a state Hearing Examiner issues a report to the parties." (State's Response to Order to Show Cause, p. 5.) In particular, the State cites §15.0421 which states in part:

Proposal for decision in contested case

> In all contested cases the decision of the officials of the agency who are to render the final decision shall not be made until the report of the hearing examiner... has been made available to parties...and an opportunity has been afforded to each party... to file exceptions and present argument.... 3/

3/ The language of this provision replaced different language in 1975 which conveyed the same principle but specifically included wording in the body of the section that the pre-final decision was a "proposal for decision."

There is also a definition of "final decision" in Minn. Stat. §15.0424 which states that it:

> shall not embrace a proposed or tentative decision until it has become the decision of the agency either by express approval or by the failure of an aggrieved person to file exceptions thereto within a prescribed time under the agency's rules.

The State asserts, and the Agency does not deny, that all the providers' appeals here were "contested cases."

> Thus, the initial determination of the [survey agency] that deficiencies in LSC standards exist and that an ICF/MR should be decertified is merely a proposed decision that is not final until completion of the contested case hearing procedures. (State Response to Order to Show Cause, p. 6.)

The State asserts that the Statements of Deficiencies were such proposed decisions and that the appeals were taken from these proposed decisions. Given the ordinary meaning of the word "propose", we cannot say that, under Minnesota law, the "proposed" decision was in any way binding at that point, and certainly not once it was appealed.4/ Implicit in the Minnesota scheme is the concept that since there is no actual binding decision until there is a "final" decision, the provider agreement would remain in effect in the absence of such a "final" decision.

The case before us can be distinguished from the facts in Nebraska Department of Public Welfare, Decision No. 174, April 30, 1981. In Nebraska, the Board held that the provisions of PRG-11 did not apply to a Nebraska law which provides for the continued validity of state licenses, but is silent as to certifications. The Board found that the Nebraska appeals pertained solely to specific state licensing requirements and were not regarded as appeals of Medicaid decertifications. In this appeal, however, the applicable State statute is broad enough on its face to encompass Medicaid decertifications, and the facilities were clearly appealing proposed decisions affecting their Medicaid provider agreements.

We find, therefore, that Minnesota law meets the requirements of a State law for the purposes of the first exception set forth in PRG-11.

4/ According to the American Heritage Dictionary of the English Language, for example, to "propose" is to "put forward for consideration, discussion, or adoption; suggest."

2. The Effect of Annual Surveys

The Ohio decision stated that if the first exception set out in PRG-11 is applicable, the rule for providing FFP following the expiration date of a provider agreement is that "the period of reimbursable services may not exceed 12 months... except that if within the aforesaid 12 months a state surveys the facility and makes a new determination on certification, FFP may not be available beyond the date of that determination..." (p. 14). See also, Colorado Department of Social Services, Decision No. 187, May 31, 1981, p. 8.

The disallowance in question is for services rendered during the quarter ended March 31, 1979. Analyzing the rule in light of the expiration dates of the provider agreements as set out in the Notification of Disallowance, the disallowance period falls outside of the twelve month period following expiration dates of the provider agreements for nine of the facilities (Nekton on Greysolon, Nekton on Stillwater Lane, Nekton on Minnehaha Park, Nekton on Queen, Nekton on William, Nekton on Wyoming, Nekton on Imperial Court, Uptown Group Living Project, and Sur La Rue de Skillman). No FFP therefore is available, regardless of the applicability of PRG-11 or the existence of survey determinations. Four facilities, whose provider agreements expired in 1978, remain to be considered.

On September 4, 1981, the State provided the Board with survey and survey determination data for Nekton on Springvale, Nekton on Mississippi, Nekton on Frost, and Nekton on London. An analysis of this documentation for each facility indicates that there is no evidence that a survey determination was made that was within twelve months following the expiration of the provider agreement and would have an effect on the disallowance period. Therefore, under the rule enunciated in our Ohio decision, FFP should be available for services rendered by Nekton on Springvale and Nekton on London between January 1, 1979 and March 31, 1979 and for services rendered by Nekton on Mississippi and Nekton on Frost between January 1, 1979 and January 31, 1979. These periods begin with the start of the quarter covered by the disallowance and end with either (a) the end of the quarter (if the twelve months under PRG-11 had not yet run out) or (b) the end of the twelve month period under PRG-11 (if that happened prior to the end of the quarter).

3. The Outcome of the Appeals Process

The second exception set forth in PRG-11 allows for FFP following expiration of a provider agreement if "the facility is upheld on appeal and State law provides for retroactive reinstatement of the agreement." This exception is not relevant to this appeal because, as discussed below, none of the ICF/MRs were upheld on appeal.

The State has argued that, after having received the LSC interpretations from NFPA, it realized that it had made incorrect determinations as to the thirteen facilities and asked that the appeal hearings be dismissed, and the appeals were dismissed. It has also asserted that the facilities were surveyed annually during the appeals process, and except for the LSC questions, were found to be certifiable. The State has admitted, however, that plans of correction were accepted from the facilities after the LSC interpretations were received.

The Agency, in its response to the State's conference and post-conference briefs, contests the State's assertion as to the contents of NFPA's interpretations and argues that certifications were not warranted. As part of its evidence, it has submitted what it calls "the Respondent's response to the State's inquiry concerning the Life Safety Code" (p. 3), which is a memorandum dated August 22, 1978 that appears to be from one Agency official to another. We need not determine the relative merits of the August 22, 1978 memorandum versus NFPA's interpretations, however, because we find that the State's own evidence contradicts its assertions.

The State's assertion that NFPA's interpretations indicated that the survey criteria were incorrect is not supported. The documents indicate that with regard to a question concerning manual fire alarms (whether standard toggle switches were acceptable), the State's original determination that the facilities did not comply was correct. See Exhibit 4 of the State's Response to Order to Show Cause. The State even admitted in a letter to the Agency dated July 14, 1981, that NFPA agreed with the State on the fire alarm question.

When the State received NFPA's interpretation, it even accepted plans of correction for the fire alarms from the facilities which had that deficiency (all except Uptown Living Group and Nekton on Springvale). This action was in response to NFPA's statement that standard toggle switches were not acceptable (Id., Exhibits 4 and 5). These facilities cannot be considered to have been upheld on appeal. Therefore, for those facilities with at least that deficiency or a comparable one, the second exception set forth in PRG-11 does not apply. The deficiency cited for Uptown Living Group pertained to proper floor separation, and after NFPA's interpretation was received, a plan of correction was accepted from the facility. Our analysis pertaining to the effect of the manual fire alarm deficiency, therefore, applies as well to Uptown.

According to the State's submission giving a "More Definite Statement" (Id., Exhibit 2), Nekton on Springvale was originally found by the State not to be in compliance with five sections of the LSC because "there is only one safe means of exit with protected vertical openings

and a safe path of travel to the outside from every sleeping room above street level." The questions presented by the State to NFPA that are relevant to this facility are 1-5 and possibly 6 and 7. 5/ NFPA's answers refer only to 3 and 4. NFPA states that "questions #1, #2, and #5 were not answerable as asked" (Id., Exhibit 4). NFPA's answer to 7 was that windows do not qualify as an approved second exit for second floor sleeping rooms in lodging and rooming houses. The State has not provided evidence showing that the possible answers to 1, 2, and 5 were not relevant to the certification of Nekton on Springvale. Moreover, it appears that the answer to 7 would have had a negative impact on that certification. The State merely asserts that "NFPA submitted...its interpretation of the relevant LSC standards finding the [survey agency's] interpretation of the LSC to be incorrect." (State Response to Order to Show Cause, p. 4.) Yet, as discussed above, the evidence provided by the State contradicts its general assertion. With respect to its specific decision to decertify Nekton on Springvale, moreover, the State has not provided any affirmative evidence that this decision was incorrect, and its is a reasonable implication from the record that the facility had deficiencies, even under NFPA's interpretations.

5/ Question #1: Is the intent of paragraph 11-5211 to require that the interior stairway leading down from 2nd floor be enclosed and provide for direct exit discharge at ground level?
Question #2: Is the intent of the Committee that the interior stairway need not be enclosed if the path of exit travel does not transverse the open stairway?
Question #3: Is it the intent of the Committee that the interior stairway need not be enclosed if an outside stair escape is provided from the 2nd floor level?
Question #4: Is it the intent of the Committee that the sleeping rooms be provided with two stair-type exits from the 2nd floor?
Question #5: Assuming that the answer to question #4 is No, is it the intent of the Committee that the Code allow a single dead end type means of exit access (which includes bedroom corridor and stairway) from 2nd floor and down to two exits located at 1st (ground) floor level?
Question #6: Is it the intent of the Code that the referenced requirements in Section 11-6 for 1- and 2-family dwellings are considered additional requirements and not to be used as optional standards for substitution in Section 11-5 for lodging or rooming houses?
Question #7: Assuming that the answer to question #6 is YES, is it the intent of the Committee that paragraph 11.5212 not permit windows to qualify as an approved second exit for 2nd floor sleeping rooms in lodging and rooming houses?
(Id., Exhibit 4.)

Therefore, Nekton on Springvale also does not fit under the second exception set forth in PRG-11.

Conclusion

For the reasons stated above, we conclude that Minnesota law meets the requirements of a State law for the first exception set forth in MSA-PRG-11. No facilities were successful on appeal so that the second exception set forth in PRG-11 is not applicable. The disallowance for nine of the facilities is unaffected because the time period covered by the disallowance comes after the running of the twelve month period following provider agreement expiration. The disallowed amounts for these facilities total $37,634.27. The disallowance is partially overturned as to Nekton on Springvale, Nekton on Mississippi, Nekton on Frost, and Nekton on London. The amount of FFP appropriately paid for services at these facilities in accordance with our determination should be calculated by the parties. If the parties are unable to reach an agreement, the Board will consider an appeal on the amount involved at that time.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

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