DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Ohio Department of Public Welfare
Docket No. 82-26-OH-HC
Decision No. 368

DATE: December 20, 1982

DECISION

The Ohio Department of Public Welfare (Ohio, State), appealed $634,646 of a disallowance of $2,424,232 by the Health Care Financing Administration (HCFA, Agency). The $2,424,232 had been paid to the State based on reports for the quarters ended March 31 through September 30, 1977 and represented the federal share of payments for services to Medicaid recipients by skilled nursing and intermediate care facilities which had lost their certification. The $634,646 had been paid by the State pursuant to the orders of State courts in actions brought by the facilities seeking to prevent the withdrawal of State support for services to Medicaid recipients.

Background

Title XIX of the Social Security Act and implementing regulations authorize federal financial participation (FFP) in payments to certified facilities (providers).1/ This case involves the interpretation of regulations entitling the State to FFP under certain circumstances in court-ordered payments to facilities which lacked certification.

Pursuant to 45 CFR 205.10(b)(3) (1976), FFP is available for:

> Payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order.

1/ To qualify for FFP under Title XIX of the Social Security Act, a state must have a plan requiring periodic inspections (surveys), a determination that a facility (provider) meets applicable requirements (certification), and an agreement with the provider (provider agreement) that it will keep the necessary records and furnish them to the state upon request. 42 U.S.C. 1396a(19), (26), (27), (31), (33), and (36). Implementing regulations require surveys at least every 12 months, make the period of certification coterminous with that of the provider agreement, and generally limit that term to 12 months or less. 42 CFR 431.107, 442.12, 442.15 (1978 - 1979); 42 CFR Part 449 (1977); and 45 CFR Part 249 (1970 - 1976).

In Ohio Department of Public Welfare, Decision No. 173, April 30, 1981, the Board held that under 45 CFR 205.10(b)(3), promulgated in 1973, and a December 1970 Program Regulation Guide (PRG-11) interpreting the regulations then in effect, FFP was available subsequent to loss of certification where a facility contests the termination or nonrenewal and a court orders the State to continue payments pending the adjudication of the adverse action. Having decided the law, the Board returned the cases to the parties to apply it to the facts, which had not been completely developed. This appeal involved the same facilities and periods of service as one of the cases in Decision No. 173--Docket No. 80-30-OH-HC.

The issues in this appeal were:

(1) Whether the documentation offered by the State for 13 facilities showed that certain payments to those facilities were made pending the kind of adjudication which entitles the State to FFP under PRG-11 and 45 CFR 205.10(b)(3).

We find that the State did make such a showing with respect to 11 of the 13 facilities.2/

(2) Whether FFP is available in payments for services rendered prior to the date of an acceptable court order, where the facility billed the State for the services in a voucher submitted after the court order.

We find that FFP is available for such payments, except where notice of decertification falls between the beginning of the period of covered services and the date of the court order. In that circumstance, FFP runs from the date of notice.

Our holding is based on the parties' submissions, the telephone conferences on August 27, November 22, November 23, and December 6, 1982 (as reflected in the Board summaries of the conferences);

2/ The State appealed HCFA's adverse determination on the documentation on 18 facilities, but in the course of the appeal the State submitted additional documentation and HCFA reversed itself on five facilities. Approximately five months after the notice of appeal, the State attempted to appeal on three other facilities (Cuy-La, Fountain Park, and Woodlawn). The Board rejected this attempt as untimely.

the Notice of Teleconference dated October 7 and the telephone conference of October 15, 1982; the rejection of part of the appeal on November 12, 1982; and the Board's letter dated November 15, 1982.

Discussion

1. FFP is not available to reimburse the State for court ordered payments where a facility is merely seeking more time to achieve compliance.

a. The parties' arguments

HCFA argued that FFP was not allowable in payments to decertified facilities which had obtained the court orders in question for the purpose of obtaining more time to achieve compliance, or to try to compel the State to grant a waiver of long-term care facility requirements. HCFA also refused FFP if it could not determine that the purpose of the court action was to appeal an adverse certification decision. HCFA cited the Board's statement in Ohio that an Appendix (offered by way of guidance to the parties) did not include facilities which had obtained court orders "intended merely to give the facility more time to achieve compliance." Decision No. 173, p. 15. HCFA contended that it was not sufficient that a facility be in the procedural posture of contesting its decertification by filing an action in court; it must either contend full compliance or deny the existence of any defects.

The State argued that it was sufficient if the facility in question was contesting its decertification. The State contended that the Board should not examine the motives of a facility seeking court review of its decertification, citing Pennsylvania Department of Public Welfare, Decision No. 217, September 30, 1981, and Wisconsin Department of Health and Social Services, Decision No. 276, March 31, 1982. State submission 7/22/82, pp. 3, 4.

b. The Board cases

The State quoted Pennsylvania as holding (Decision, p. 4):

> . . . the sentence (referring to page 15 of Decision No. 173) emphasized that the order staying termination must not be intended merely to give a facility more time to achieve compliance. The Agency asks us to make circumstantial inferences concerning the motives of the

> facility and the State in maintaining an appeal, but we decline to do so . . . we assume that when a facility takes an appeal it is primarily contesting the State's decision and is not merely seeking time to achieve compliance. (Emphasis added by Ohio)

The State's reliance on Pennsylvania is weakened by its failure to acknowledge that the Board distinguished that case from Ohio. The complete statement includes the qualifier that "[t]he facility took advantage of a statutory right [of appeal] . . . Given such a statutory provision, we assume . . ." Ohio does not have a statutory provider appeal process. Gilbride, Telephone Conference 10/15/82. In Wisconsin also there was a statutory appeal process, although the Board did not specifically mention that factor in its decision.

Even so, in New York Department of Social Services, Decision No. 181, May 29, 1981, the Board held that "[i]t is not a bar [to the application of 45 CFR 205.10(b)(3)] that the order [to continue payments] was pending [appeal] hearings on the issue of transfer trauma, rather than the provider's deficiencies." (Emphasis added) (p. 19)3/ Thus, New York is authority for allowing FFP where a court order is obtained in a case involving neither a claim of compliance nor a denial of deficiencies. And although it may be argued that the patients wanted the court to give the facility more time to achieve compliance, the main thrust of the action was to obtain a hearing on the relative risk of transfer trauma versus the risk of harm from the type of deficiency which occasioned the decertification.

We conclude that it is not necessary to decide whether the Board's holdings in Pennsylvania and Wisconsin apply only to states with statutory appeal provisions. As indicated in the first Ohio decision, we hold that where the pleadings showed on their face that a facility was merely seeking additional time to come into compliance--essentially a plea to the court to use its powers of equity--there was no provider appeal within the meaning of PRG-11 and 45 CFR 205.10(b)(3). And, as indicated in the New York decision, we hold that where the pleadings showed on their face that the court was asked to

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3/ That part of the New York decision involved a court order obtained in an action brought by patients. As the Board pointed out, 45 CFR 205.10(b)(3) is part of a regulation requiring FFP during hearings on recipient-instituted actions.

determine whether the State had a proper legal and factual basis to decertify, there was a provider appeal. Thus, based on the pleadings without making circumstantial inferences concerning the motives of the facilities, we uphold HCFA on two of the facilities (Mary Grove and Sarah's Rest Haven) and reverse on the remaining 11. As our discussion of the individual facilities below shows in more detail, we also conclude that the inclusion of an appeal from the denial of a waiver did not bar the availability of FFP (this was a subissue). We find that a waiver appeal, at least where it is one of several grounds for appeal, is sufficiently similar to issues which both the Board and HCFA have decided entitle the State to FFP pending appeal.

c. Mary Grove and Sarah's Rest Haven

HCFA defended its denial of FFP with respect to Mary Grove by pointing to the admission in paragraph 3 of the facility's complaint. This paragraph stated that some of the corrections required for certification had been contracted for but not completed (due to the inability to secure materials). Telephone Conference (Teleconference) 10/15/82. Ohio countered by noting the facility's characterization of "so-called deficiencies" in paragraph 4 of the complaint. Id. We find that such a vague general reference without more is not a denial of deficiencies and not sufficient to constitute a provider appeal entitling the State to FFP.

Sarah's Rest Haven had been sold in 1973, apparently on the condition that the new owners would install a sprinkler system. Administrative Record (AR), Tab 2 1. HCFA relied on admissions in the facility's complaint that the new owners failed to complete the sprinkler system and several other needed improvements, resulting in the facility's decertification. Teleconference 10/15/82. The complaint recites that the original owners reacquired the facility and wanted to maintain the status quo until they could complete the improvements. When asked how this situation could be distinguished from the Ohio guidance omitting court orders "intended merely to give the facility more time", the attorney for the State admitted this was a "tough one." Id. We find it cannot be distinguished and uphold HCFA's disallowance pertaining to this facility.

d. Park Avenue

There were two court actions by this facility. Our decision is based on the one which resulted in the temporary restraining

order dated January 7, 1977, prohibiting the Ohio Department of Public Welfare from relocating Medicaid recipients or stopping payments for the care of recipients. AR Tab 2 i. HCFA argued that FFP is not available because the Complaint (specifically paragraph 5) failed to allege that the facility was in compliance. Id., Teleconference 10/15/82. Ohio contended that the allegation in paragraph 5 that decertification was in violation of the facility's rights under federal law was sufficient. Id. We note also that the facility alleged in paragraph 5 that it had taken "every step requested by the State . . . to comply . . ." AR Tab 2 i. We find this facility was engaged in a provider appeal entitling the State to FFP.

e. Royal Haven (Tuscarawas County)

This facility also filed two court actions. Our decision is based on the filing which resulted in a court order dated September 14, 1977, staying the decertification. AR Tab 2 k. HCFA argued that the State was not entitled to FFP because in asking the court to stay the decertification "at least until new facilities [due to be completed April 1, 1978] are available", the facility was merely asking for time. Id., Teleconference 10/15/82. The State relied on allegations by the facility that the decertification decision was "contrary to law", and "manifestly against the weight of the evidence", and the decertification as well as the regulations were "unreasonable, capricious, and impossible to perform". Id. We find these allegations constituted a provider appeal entitling the State to FFP.4/

f. Sturges

This facility also filed two court actions. Our decision is based on the January 18, 1977 filing and the resulting February 1, 1977 temporary restraining order. As its basis for denying FFP, HCFA pointed to the statement (in paragraph five of the complaint) that the facility had filed a plan

4/ HCFA approved FFP in payments to a companion facility, Royal Plantation (Carroll County), which made similar allegations to those relied on by the State here. Royal Plantation also alleged that certain structural changes (fire doors, outdoor escape cover, patient cubicle curtains) required by the Ohio Department of Health were being installed and asked for a resurvey upon completion.

of correction for minor environmental deficiencies. Id.5/ Attached to the January 18 action is an affidavit by the Administrator of Sturges attesting that the facility "is in full compliance with all regulations which affect the health, safety, and welfare of the patients." Attachment 22 to Ohio submission 7/22/82.

We note that the circumstances here are similar to those of the Valley View facility, where HCFA agreed to pay FFP. Valley View alleged it had completed all improvements that would affect the safety of the patients and had remaining only six minor improvements. AR, Tab 2 o. The court action by Sturges also constituted a provider appeal (entitling the State to FFP) because Sturges alleged that it was in full compliance with certain regulations and had a plan of correction for minor deficiencies.

g. Starkey

The complaint filed in court by Starkey alleged that its decertification resulted from the disapproval of a plan for correction of its deficiencies. AR, Tab 2 m. HCFA argued that the State was not entitled to FFP because the facility was merely asking for more time to achieve compliance because its plan of correction was based on the construction of a new facility. Id., Teleconference 10/15/82. We find that this request for judicial review of the disapproval of a plan of correction was a provider appeal, not a mere request for time, and entitled the State to FFP.

h. Marshall

There were four Marshall nursing homes in this case. Three of them (Marshall No. 2, Marshall No. 6, and Marshall, Inc.) brought one court action and Marshall No. 5 brought another. Actually, there were several court actions in each set, but our decision is based on the action which resulted in a court order of October 6, 1977 for the first three homes and the action which resulted in a court order of January 13, 1977 for Marshall No. 5.

The complaints in the two actions contained similar allegations. Both alleged that the facilities had made a majority

5/ The complaint to which HCFA referred actually was filed in the other court action.

of the required corrections and had submitted plans of correction (which were disapproved) and requested waivers (which were denied) for the remaining deficiencies. AR, Tab 2 f; Exhibit 1, Ohio submittal 10/1/82; and Ohio submittal 10/25/82. HCFA argued that the facilities were merely seeking more time. Id., Teleconference 10/15/82. We find, as in the instance of Sturges, supra, that the pleadings constituted a provider appeal, not a mere request for time, and entitled the State to FFP.

i. Carson Convalescent and Hilltop

These facilities also alleged that they had made a majority of the required corrections and had submitted plans of correction (which were disapproved) and waivers (which were denied) for the remaining deficiencies. AR, Tab 2 b; AR, Tab 2 d. As with the Sturges and Marshall situations, we find this constituted a provider appeal entitling the State to FFP.

j. Bond Manor

Bond Manor alleged in its Complaint that it had objected to a referee's report of deficiencies, although it admitted that it needed more time to complete installation of a needed sprinkler system. Exhibit 8, Ohio submittal 10/1/82. It contended that it had not been given adequate notice prior to decertification and thus was deprived of its right to due process. Id. HCFA argued that because the facility did not deny the existence of a deficiency, the State was not entitled to FFP. Id., Teleconference 10/15/82. We find that the facility's contention that it was denied due process because of a lack of adequate notice lifts this case out of the category of a mere request for more time and makes it a provider appeal entitling the State to FFP.

2. The State is entitled to FFP for payments made under court order, even for services prior to the date of the order, but not prior to the date of a decertification notice.

In addition to the 13 facilities discussed above, the State also appealed HCFA's decision disallowing FFP in payments for services provided by Mayfair between April 1, 1977 and May 10, 1977, the date of the court order.6/ HCFA argued that to allow FFP prior

6/ HCFA allowed FFP in payments to Mayfair for services rendered May 10 - June 22, 1977.

to the date of a court order would give greater effect to a court-revived certification than if the State had renewed the certification, a result which HCFA contended was proscribed by the Board in Decision No. 173, supra. HCFA submission 9/29/82, pp. 3-6.

The State pointed out that under the system by which it reimbursed nursing homes, claims were presented on the 15th of each month for services rendered during the preceding month. That is, a court order entered on or before the 15th would affect payment for services from the first of the preceding month. Ohio submission 4/26/82.

As the Board indicated in its September 8, 1982 Invitation to Brief and in its October 7, 1982 Notice of Teleconference, we conclude that FFP is available for all payments affected by a court order, even payments for services rendered prior to the date of the order, except where the State gave a facility notice of cancellation or nonrenewal during the period covered by the order. Then FFP is available only from the date of the notice.7/

This is consistent with the Board's holding in Ohio limiting the effect of a court order to payments within the scope of the Medicaid program. There the Board held that FFP is available for a maximum of 12 months following decertification, because of the requirement of an annual survey. Here, except for the situations involving notice given during the period affected by the court order, there is no requirement for FFP other than the one of certification itself, and a court order which affected payments for services rendered the preceding month constructively certified the facility as of the first of that month.

A notice which falls between the beginning of the payment period and the date of the court order is an exception because the availability of FFP is conditioned on there being an appeal, whether it be in the form of an administrative proceeding provided by statute or regulation or, as here, in the form of judicial review. The Board held in Michigan Department of Social Services,

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7/ This would apply to the cases of Mayfair, the other five facilities which HCFA agreed during the appeal entitled the State to FFP (Danridge, Little Forest, Queen City, Royal Plantation and Valley View), and the 11 facilities which we found above to have provider appeals entitling the State to FFP.

Decision No. 290, April 30, 1982 (p. 17) and in Tennessee Department of Public Health, Decision No. 267, March 25, 1982 (p. 4), that a state is not entitled to FFP for a period of time prior to the date the State notifies the facility of the cancellation or nonrenewal of its certification, because that notice signifies the beginning of the review process. Thus, here a facility could not even constructively have been in appeal status and have this status entitle the State to FFP prior to the date the State notified the facility of its proposed decertification. As the Board noted in Michigan "[t]o hold otherwise would be to reward the State for its lack of promptness in notifying a facility of adverse action." p. 18.

Conclusion

Based on the foregoing discussion, we uphold the disallowance in part and reverse it in part. The attached Appendix lists the facilities for which the State is entitled to FFP and shows the dates of covered services. From this the parties should be able to calculate the amount of FFP, within the limits of the claims covered by the disallowance.

Cecilia Sparks Ford

Alexander G. Teitz

Donald F. Garrett
Presiding Board Member

APPENDIX

FACILITY	EXPIRATION	NOTICE	COURT ORDER	FFP FROM	TO	
Bond Manor	9/30/76	10/14/76	10/25/76	10/14/76 -	9/30/77	
Carson Convalescent	10/31/76	12/27/76	2/15/77	1/01/77 -	10/31/77	
Danridge	3/31/77	6/30/77	7/29/77	7/01/77 -	3/31/78	
Hilltop	2/29/76	3/16/76	9/03/76	8/01/76 -	11/24/76	1/
Little Forest	12/31/76	1/31/77	3/24/77	3/01/77 -	12/31/77	
Marshall #2	2/28/77	8/15/77	10/06/77	9/01/77 -	2/28/78	
Marshall #5	11/30/76	12/01/76	1/13/77	12/01/76 -	11/14/77	1/
Marshall #6	6/30/77	9/09/77	10/06/77	9/01/77 -	6/30/78	
Marshall, Inc.	4/30/77	9/09/77	10/06/77	9/01/77 -	4/30/78	
Mary Grove (Stark)	12/15/76	12/03/76	6/16/77	N O N E		
Mayfair	2/29/76	3/29/77	5/10/77	4/01/77 -	6/22/77	1/
rk Avenue	2/29/76	1/?/77	1/07/77	1/07/77 -	2/28/77	2/
Queen City	2/29/76	8/10/76	8/25/76	8/10/76 -	2/28/77	
Royal Haven	1/31/77	9/09/77	9/14/77	9/09/77 -	1/31/78	
Royal Plantation	1/31/77	9/09/77	9/15/77	9/09/77 -	1/31/78	
Sarah's Rest Haven	11/30/76	12/27/76	1/18/77	N O N E		
Starkey	12/01/76	3/09/77	3/29/77	3/09/77 -	5/24/77	3/
Sturges	1/15/77	1/03/77	2/01/77	1/16/77 -	1/15/78	
Valley View	12/31/76	3/02/77	3/30/77	3/02/77 -	11/18/77	1/

1/ Date of dismissal or expiration of court order.

2/ In the absence of a specific notice date, we find that the court order date is the appropriate one to use.

3/ Throughout the appeal the State maintained that the temporary restraining order must have been continued after that date, but admitted the court cuments showed only that the order expired May 24, 1977. December 15, 82 Summary of Teleconference.