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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

A. Parsons

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FILE: B-193099

DATE: December 26, 1978

MATTER OF: Medicaid - Utilization Control-State of Colorado

[State of Colorado Failure to Satisfy The Utilization Control Provisions of The Medicaid Program]

DIGEST: Under section 1903(g) of the Social Security Act, 42 U.S.C. § 1396b(g), as amended, the Secretary may waive otherwise required reductions in Medicaid payments to a State if he finds that the State's showing for the last quarter of calendar year 1977 was (1) on its face, satisfactorily in compliance with specified statutory requirements and (2) valid (i. e., actually in compliance with those requirements). In order to have a satisfactory showing, subsection 1903(g)(1)(D) requires an annual on site evaluation by the State. Even though the State of Colorado may have complied with the other requirements, the Secretary has no authority to grant it a waiver of reductions since he has been unable to validate the State's compliance with that subsection.

This decision responds to a request by the Secretary of Health, Education, and Welfare (HEW) for an opinion as to whether, under the circumstances he presents, he must reduce the payments made to the State of Colorado as a result of its failure to satisfy the utilization control provisions of the Medicaid program set forth in section 1903(g) of the Social Security Act (42 U.S.C. § 1396b(g) (1976)), as most recently amended by section 20(a) of the Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. No. 95-142, 91 Stat. 1205, October 25, 1977.

Section 1903(g) of the Social Security Act, as amended, provides in pertinent part as follows:

"(g) Decrease in Federal medical assistance percentage.
(1) Subject to paragraph (3), with respect to amounts paid for the following services furnished under the State plan after June 30, 1973 (other than services furnished pursuant to a contract with a health maintenance organization as defined in section 1876), the Federal medical assistance percentage shall be decreased as follows: After an individual has received care as an inpatient in a hospital (including an institution for tuberculosis), skilled nursing

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facility or intermediate care facility on 60 days, or in a hospital for mental diseases on 90 days (whether or not such days are consecutive), during any fiscal year, which for purposes of this section means the four calendar quarters ending with June 30, the Federal medical assistance percentage with respect to amounts paid for any such care furnished thereafter to such individual in the same fiscal year shall be decreased by a per centum thereof (determined under paragraph (5)) unless the State agency responsible for the administration of the plan makes a showing satisfactory to the Secretary that, with respect to each calendar quarter for which the State submits a request for payment at the full Federal medical assistance percentage for amounts paid for inpatient hospital services (including tuberculosis hospitals), skilled nursing facility services, or intermediate care facility services furnished beyond 60 days (or inpatient mental hospital services furnished beyond 90 days), there is in operation in the State an effective program of control over utilization of such services; such a showing must include evidence that--

* * * * *

"(D) such State has an effective program of medical review of the care of patients in mental hospitals, skilled nursing facilities, and intermediate care facilities pursuant to section 1902 (a)(26) and (31) whereby the professional management of each case is reviewed and evaluated at least annually by independent professional review teams." (Emphasis supplied.)

* * * * *

It is the requirement for an annual review and evaluation which gives rise to the instant problem. While Colorado's showing under the above-quoted provision was "facially satisfactory," the Secretary, under subsection 1903(g)(2), 42 U.S.C. § 1396b(g)(2), is required to validate, in a timely manner, the State's showing. Colorado was the only State which the Secretary found lacking. In essence, he found that Colorado was probably in compliance with most requirements within the last calendar quarter of 1977 but that he could not validate the State's compliance with the annual review requirement of subparagraph (D), quoted above except for reviews completed in the last calendar quarter. (We note that the new subparagraph (4)(B) of subsection 1903(g), added by section 20(a) of

the Medicare-Medicaid Anti-Fraud and Abuse Amendments, supra, in effect defines the annual review requirements, but the refinements of this new subparagraph are not an issue in this case.)

The Secretary asks specifically:

"May I find Colorado's showing for the quarter ending December 31, 1977, valid and thus waive reductions for prior 1977 quarters even though I have been unable to validate Colorado's pre-October 1 review dates?"

This question grows out of section 2D(a) of the Medicare-Medicaid Anti-Fraud and Abuse Amendments, supra, to section 1903(g) of the Social Security Act, as amended, which added the following provision to subsection 1903(g):

"(3)(A) No reduction in the Federal medical assistance percentage of a State otherwise required to be imposed under this subsection shall take effect--

"(i) if such reduction is due to the State's unsatisfactory or invalid showing made with respect to a calendar quarter beginning before January 1, 1977;

"(ii) before January 1, 1978;

"(iii) unless a notice of such reduction has been provided to the State at least 30 days before the date such reduction takes effect; or

"(iv) due to the State's unsatisfactory or invalid showing made with respect to a calendar quarter beginning after September 30, 1977, unless notice of such reduction has been provided to the State no later than the first day of the fourth calendar quarter following the calendar quarter with respect to which such showing was made.

"(B) The Secretary shall waive application of any reduction in the Federal medical assistance percentage of a State otherwise required to be imposed under paragraph (1) because a showing by the State, made under such paragraph with respect to a calendar quarter ending after January 1, 1977, and before October 1, 1977, is

determined to be either unsatisfactory under such paragraph or invalid under paragraph (2), if the Secretary determines that the State's showing made under paragraph (1) with respect to the calendar quarter ending on December 31, 1977, is satisfactory under such paragraph and is valid under paragraph (2)."

The Secretary describes the problem with the Colorado utilization control program as follows:

"All States made a facially satisfactory showing with respect to the December quarter, including all twenty-two penalty-liable States. However, when we attempted to validate those showings by examining review reports on file at the State agencies for all reported calendar 1977 reviews, we were unable to validate the pre-October 1, 1977, review dates reported by Colorado on its December showing. Due to the methodology used by Colorado in its pre-October reviews, we were able to validate only review dates during the December quarter (October 1, 1977, through December 31, 1977). We were able to validate all 1977 review dates reported by all other States on their December 31, 1977, showings, and have accordingly waived the 1977 reductions of the other twenty-one penalty-liable States.

"I am deeply distressed by these findings concerning Colorado. Section 1903(g)(3)(B) appears to authorize a waiver of 1977 reductions only if I determine that a State's showing with respect to the quarter ending December 31, 1977, is satisfactory and valid. Because I have been unable to validate the pre-October 1 review dates reported by Colorado, I have been unable to validate its December showing with respect to the annual onsite review requirement.

"However, it is also apparent that, beginning in the December, 1977 quarter, Colorado has made great efforts to implement a review process that meets Federal requirements, and I have been able, based on evidence presented by the State during the validation survey, to validate all but two of the review dates reported by Colorado for reviews completed during the December quarter. It seems to me that any reasonable postulation of the intent of the conditional waiver provision has therefore been served, and I have no desire to penalize Colorado if I am not required by statute to take these reductions."
(Footnote omitted.)

The Secretary apparently has concluded that he is required by section 1903(g) to reduce Colorado's Medicaid payment. His argument against doing so appears to rest upon a theory that Colorado, although not in strict compliance with the requirements of subsection 1903(g), as amended, has made satisfactory progress and should not be penalized. He provides the following summary of his reading of subsection 1903(g), as amended:

"Thus, to be satisfactory under the statute, a State's showing for the quarter ending December 31, 1977, would apparently need to demonstrate that the State conducted the required inspection sometime during calendar 1977 in every facility requiring inspection by December 31, 1977, (or alternatively, that the State met the conditions specified in 1903(g)(4)(B) for excusing failures to perform 100 percent of required inspections)."

We agree with the Secretary's reading of section 1903(g), as amended by section 20(a) of the Medicare-Medicaid Anti-Fraud and Abuse Amendments. Further, we are unable to find any support in the legislative history of this amendment for the conclusion that Colorado's utilization control compliance posture at the end of 1977 as described by the Secretary met the conditions set by the Congress in passing the Medicare-Medicaid Anti-Fraud and Abuse Amendments for waivers of Medicaid payment reductions otherwise necessary.

The annual inspection requirement for all cases to which such subsection 1903(g) applies requires that compliance be determined for each quarter. Inspections may be conducted in a single quarter or spread out over a year. From the Secretary's letter, it appears that none of Colorado's reported inspections conducted in the first three quarters of 1977, could be validated due to the methodology used. Accordingly, Colorado would have had to redo all inspections in the last quarter to be in compliance at the end of 1977. This it did not do. The statutory system established by Congress in section 1903(g) does not authorize the Secretary to waive the reductions unless the State's showing is both satisfactory and valid. If, as in this case, the Secretary cannot validate the showing by the end of the final quarter, he must impose the reductions.

The legislative history of the amendments to section 1903(g) provides no support for a contrary reading. The reasons for adding the paragraph providing a waiver of the reduction of State payments are described in H. R. Rep. No. 95-393 (II), July 12, 1977, at pp. 84-85:

"The 'Social Security Amendments of 1972' Public Law 92-603) added section 1903(g) to the Social Security Act. This section requires a one-third reduction in Federal matching payments under medicaid for long-term stays in institutional settings, unless a State demonstrates that it has an adequate program of control over the utilization of institutional services. The program must include a showing that:

"(1) The physician certifies at the time of admission and recertifies every 60 days that the patient requires inpatient institutional services.

"(2) The services are furnished under a plan established and periodically reviewed by a physician.

"(3) The State has a continuous program of utilization review whereby the necessity for admission and continued stay of patients is reviewed by personnel not directly responsible for care of the patient, not financially interested in a similar institution, or, except in the case of a hospital, employed in the institution.

"(4) The State has a program of independent medical review for SNF's, ICF's, and mental hospitals whereby the professional management of each case is subject to independent annual review. The section further requires the Secretary to conduct sample onsite surveys of institutions as part of his validation procedures.

"The committee notes that this section was to go into effect on July 1, 1973, as an incentive payment for States showing a satisfactory program of utilization control. States which did not make the requisite showings were automatically to be subject to the reduced Federal matching rate. Despite the clear intent of the law and extensive evidence developed by the Subcommittee on Oversight and Investigations as well as the Comptroller General of the United States, that a large number of States failed to meet the requirements, HEW indicated that it was reluctant to impose the reductions. The first reduction actually to be imposed under this authority was announced to take effect July 1977. During the intervening four-year period the committee has on a number of occasions, both during hearings and in a report prepared

by the committee, indicated its concern that HEW had failed to fulfill its responsibilities.

"On June 8, 1977, HEW announced that it would reduce July 1977 Medicaid payments to 20 States by a total of \$142 million (actual application of these announced reductions was delayed by Public Law 95-59 until October 1977). These reductions were to take effect, because the States failed, during the first quarter of 1977, to conduct annual medical reviews of patients in long-term care facilities. The Department further announced that it had under review the potential disallowance of \$378 million of fiscal year 1975 funds for failure to have adequate utilization controls in place, based upon validation requirements. The committee is encouraged that the Department has begun to aggressively implement the congressional mandate. However, in view of past inaction on the part of HEW, it feels that the sudden reduction in Federal funds for past years activities could have a severe and unanticipated impact on affected State Medicaid programs." (Emphasis supplied.)

The House and Senate versions of the bill that went to conference on the Medicare-Medicaid Anti-Fraud and Abuse Amendments had two different approaches to lessen the "severe and unanticipated impact" of the then pending reductions in State Medicaid payments. The conference committee report (H.R. Rep. 95-673 at 47) describes the Senate version as an "unconditional waiver" of reductions through 1977; the House version is described as providing additional time for States to achieve compliance by the end of 1977:

"29 CONDITIONS FOR WAIVER OF PAST PENALTIES FOR FAILURE TO PERFORM REQUIRED REVIEW OF INSTITUTIONAL CARE (SECTION 20)

"House bill. -- The House bill allows States additional time to meet the requirements of the current law concerning review of care delivered in long-term care institutions, by providing that if a State is in compliance for the calendar quarter ending December 31, 1977, the Secretary shall waive all previously assessed reductions which would otherwise be imposed on those States that failed to fulfill the requirements of the law during previous periods.

"Senate amendment. -- The Senate amendment provides for unconditional waiver of all reductions in medicaid payments due to an unsatisfactory or invalid showing made with respect to a calendar quarter beginning prior to January 1, 1978."

The conference committee went on to explain its reconciliation of these two provisions (see subsection 1903(g)(3)(A) as quoted supra) as follows [id. at 47] :

"Conference agreement. --The conference agreement provides that all penalties assessed against States for unsatisfactory or invalid showings made with respect to calendar quarters beginning prior to January 1, 1977, shall be waived unconditionally. It further provides that if a State is in compliance with the requirements of the law for the calendar quarter ending December 31, 1977, the Secretary shall waive all penalties for unsatisfactory or invalid showings for quarters occurring in 1977; if the State is not in compliance on December 31 and past penalties are imposed, the penalty will be determined by taking into account the proportion of medicaid patients in homes that were not reviewed to all medical patients in homes to be reviewed."

Congress incorporated the absolute waiver objective of the Senate-passed bill for all quarters prior to 1977, while the House approach was used to reward compliance by the end of 1977. The Secretary's question concerns his inability to validate the State's showings in 1977, the period to which the House approach applies. The House Committee report (id. at 85) describes this approach as requiring "full compliance."

"The committee has approved an amendment which would give States an additional 6 months to demonstrate full compliance with the law. The committee emphasizes that this is in no way to be viewed as a retrenchment or a lack of resolve on its commitment to effective utilization control and medical audit programs. It fully expects and intends that during this extension period all States will take the necessary actions to bring them into full compliance.

* * * * *

"The Secretary is required to waive application of all or part (as is appropriate) of any decrease otherwise

required to be imposed with respect to cases of noncompliance occurring prior to October 1, 1977, if he determines that the State makes a satisfactory showing, and the showing is valid, that it is in full compliance with the law for the last quarter of calendar year 1977. The committee has left to the Secretary's discretion the amount of the decrease which may be waived. It fully expects that where previous violations of the law have been of sufficient magnitude, the Secretary may impose a portion of the penalty. In cases where the State is not able to show a satisfactory program that is validated by the Secretary, the committee expects that all previous reductions will be taken." (Emphasis supplied.)

We read carefully the correspondence, dated August 16, 1978, enclosed with the Secretary's letter, from Senators Herman E. Talmadge, Chairman of the Senate Subcommittee on Health, and Floyd K. Haskell and Representative Paul G. Rogers, Chairman of the House Subcommittee on Health and the Environment, to Representative Timothy E. Wirth about the congressional intent behind the penalty waiver provision of Pub. L. No. 95-142, supra. They all indicate that the Congress intended "to wipe the slate clean" of deficiencies in the first three quarters of 1977 as long as the State conducted "regularly scheduled" inspections during the last quarter of 1977. All agree that no State was expected to review all the facilities in the State in only one quarter. It therefore appears that the writers feel that the Secretary need not require reviews for any facility for which an inspection could not be performed during the last quarter of 1977.

All these Congressmen participated in writing the waiver amendment in question and of course their views are entitled to great respect. However, the official legislative history, quoted previously, which was written contemporaneously with congressional consideration of the waiver amendment, gives a very different picture of congressional intent. The concept of an unconditional waiver, originally proposed by the Senate, was rejected, except for quarters ending prior to calendar year 1977. As the House committee report explains, and the Conference report reiterates, (both quoted supra), "The Committee has approved an amendment which would give States an additional 6 months to demonstrate full compliance with the law." It appears that the only way for Colorado to "wipe the slate clean" of previously assessed reductions was to demonstrate conclusively by the end of 1977 that it had completed reviews of all of its facilities to which the review requirement applies.

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We therefore conclude, on the basis of the statute and the legislative history, that the Secretary must make all the statutory reductions if he finds that Colorado did not complete all required reviews during 1977. Colorado does not qualify for the waiver of previously assessed reductions if it was not in compliance by the end of calendar 1977.

Accordingly, the Secretary's specific question is answered in the negative.

R. F. Kistner
Acting Comptroller General
of the United States