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Federal Oversight of Kansas Facility for the Retarded Inadequate

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The Honorable Tom Harkin
Chairman, Subcommittee on the Handicapped
Committee on Labor and Human Resources
United States Senate

The Honorable Dave Durenburger
Ranking Minority Member, Subcommittee on the
Handicapped
Committee on Labor and Human Resources
United States Senate

This report responds to your request concerning the Health Care Financing Administration's oversight of the Winfield State Hospital and Training Center for the retarded. It contains our analysis of the facility's termination from the Medicaid program and its subsequent reinstatement.

Comments on a draft of this report were sought from the Secretary of Health and Human Services and the Governor of Kansas, but were not received from the Governor in the time allotted.

Copies of the report are being provided to the Secretary of Health and Human Services, the Governor of Kansas, and other interested parties.

The report was prepared under the direction of Janet L. Shikles, Director, Health Financing and Policy Issues. Other major contributors are listed in appendix II.

Lawrence H. Thompson
Assistant Comptroller General

Executive Summary

Purpose

One month after it was terminated from the Medicaid program in 1987 for deficiencies deemed to pose an "immediate and serious threat" to the health and safety of its residents, the Winfield (Kansas) State Hospital and Training Center for the mentally retarded was reinstated as a Medicaid provider. Staff abuse of residents, resident neglect, inadequate medical and nursing services, inadequate dental services, and poor sanitation were the deficiencies cited.

Controversy surrounding the reinstatement of the facility after so short a period of time led the Chairman and Ranking Minority Member of the Subcommittee on the Handicapped, Senate Committee on Labor and Human Resources, to ask GAO to determine whether the regional office complied with Medicaid requirements in its oversight of Winfield.

Background

A state can issue a Medicaid provider agreement only to facilities, including those for the mentally retarded, that have been inspected and certified by the state survey agency. The agency must attest that the facilities adequately comply with Medicaid requirements established by the Health Care Financing Administration (HCFA), a part of the Department of Health and Human Services. A facility can lose its certification and provider agreement if (1) it is no longer in substantial compliance with the Medicaid requirements and (2) the underlying deficiencies jeopardize resident health and safety or seriously limit the facility's ability to provide adequate care.

Although the state has primary responsibility for certifying facilities and issuing provider agreements, HCFA can (1) declare a provider agreement void if the state does not comply with Medicaid requirements or (2) inspect the facility and terminate the agreement if the requirements are not met. HCFA used such authority to inspect Winfield and terminate its agreement with the institution. HHS has not issued regulations regarding this authority.

When HCFA terminates a facility's Medicaid provider agreement, the facility cannot be reinstated until HCFA determines, among other things, that the conditions causing termination have been removed.

HCFA's Kansas City regional administrator allowed (1) federal funding to continue for 30 days after Winfield's termination and (2) Winfield to be reinstated while some of the cited deficiencies still existed, judging that they no longer posed an immediate and serious threat to residents' health and safety. He gave the state until June 30, 1987, to complete

corrective actions. Some Winfield staff alleged that a "political deal" had been arranged between regional and state officials.

Results in Brief

Actions taken by HCFA's Kansas City regional administrator in March 1987 to reinstate Winfield State Hospital and Training Center in the Medicaid program were improper because they did not meet program requirements. Specifically, (1) the deficiencies that led to the facility's termination, while no longer posing an immediate and serious threat, had not been fully corrected; (2) adequate assurances did not exist that the deficiencies would not recur; and (3) the state had not inspected the facility nor issued a new provider agreement. But there was no evidence of a political deal between the regional administrator and the state (see p.35).

Federal Medicaid funding for Winfield operations continued uninterrupted until July 1988. At that time, the Regional Office, at the direction of HCFA's Central Office, discontinued federal funding upon learning that Winfield had not been properly reinstated. Effective August 19, 1988, Winfield was reinstated by HCFA. Subsequently, HCFA initiated action to recover approximately $15.8 million in federal funds for services provided to Winfield residents between termination and reinstatement (Feb. 19, 1987-Aug. 18, 1988).

GAO supports the action to recover these funds, except that funds provided during the first 30 days after the termination should be allowed, assuming Winfield had been making reasonable efforts to relocate patients. The Congress intended that funding be continued for some reasonable time following federal termination of a Medicaid provider agreement, to facilitate relocation of residents. (See ch. 2.)

Principal Findings

Deficiencies Cited in Termination Not Removed

The HCFA regional administrator applied the Medicaid law incorrectly in reinstating the Winfield State Hospital and Training Center in March 1987 because of the following considerations:

- The presence or absence of an immediate and serious threat determines whether a termination will be effective before or after a hearing.

- If deficiencies pose an immediate and serious threat, the termination is effective before a hearing.
- If the deficiencies do not pose an immediate and serious threat, the termination is delayed until after the hearing.

In other words, the presence of deficiencies provides the reason for termination, while the presence of an immediate and serious threat resulting from those deficiencies causes the termination to take effect before a hearing. Because the deficiencies still existed at the time the regional administrator authorized reinstatement, the facility should not have been reinstated regardless of whether they no longer posed an immediate and serious threat. (See pp.21-23.)

Reasonable Assurance Not Provided

Because Winfield had a history of serious deficiencies, the facility should have been required to demonstrate compliance with Medicaid requirements for 180 days before being reinstated, under HCFA guidelines. During such a "reasonable assurance period," federal Medicaid funds are not available to the facility.

Although the guidelines allow regional officials flexibility in establishing the length of the assurance period, the regional administrator exceeded his discretionary authority in authorizing reinstatement of Winfield with an assurance period of 0 days. According to the guidelines, 0 days generally is appropriate only when the facility has deficiencies in its physical plant (for example, lack of fire sprinklers) that, once corrected, are unlikely to recur. Such deficiencies were not found in the Winfield case.

At the time the regional administrator authorized Winfield's reinstatement, members of the Regional Office's inspection team believed deficiencies in four of the five areas cited in the termination letter still were significant enough to pose an immediate and serious threat to residents. Further, the state had not even submitted a plan for correcting the deficiencies.

Accordingly, no reasonable assurance existed that the deficiencies would be corrected, much less that they would not recur. (See pp.23-27.)

New Provider Agreement Not Issued

The State of Kansas did not inspect or certify the Winfield State Hospital and Training Center between the time of its termination from the Medicaid program and its reinstatement by HCFA's regional administrator. Nor did the state Medicaid agency issue a new provider agreement. Such actions are required after HCFA determines that the reasons for termination of a provider agreement have been removed and that there are reasonable assurances that they will not recur. (See pp.27-28.)

Weaknesses in Internal Controls Contributed to Situation

Winfield had no valid Medicaid provider agreement after February 18, 1987, and therefore was ineligible to receive federal funds. However, weaknesses in HCFA's internal controls contributed to (1) the state continuing to claim federal matching funds for payments it made to Winfield and (2) HCFA continuing to approve claims until July 1988.

On the basis of a memorandum from a HCFA official stating that Kansas had been authorized by the regional administrator to issue a new provider agreement to Winfield, HCFA's Regional Office approved the state's claims for federal matching funds without verifying that the state had issued a valid provider agreement. (See p.29.)

Recommendations

GAO recommends that the Secretary of Health and Human Services issue regulations implementing the department's authority to inspect Medicaid facilities and terminate provider agreements. GAO also recommends that the Secretary strengthen internal controls for the approval of federal Medicaid payments. (See p.32.)

Agency Comments

GAO requested comments on a draft of this report from HHS and the State of Kansas. No comments were received from the state. HHS agreed that it should issue regulations implementing its authority to inspect Medicaid facilities and terminate provider agreements and that it should strengthen internal controls over approval of federal Medicaid payments. HHS disagreed, however, with our recommendation that it issue regulations authorizing continued funding for 30 days following a federal termination.

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Abbreviations

HCFA	Health Care Financing Administration
HHS	Department of Health and Human Services
ICF-MR	intermediate care facility for the mentally retarded
OIG	Office of Inspector General

Introduction

In February 1987, the Kansas City Regional Office of the Health Care Financing Administration (HCFA) terminated the provider agreement for Winfield State Hospital and Training Center to participate in the Medicaid program.[1] This action was taken because Winfield, an intermediate care facility for the mentally retarded (ICF-MR), did not comply with the federal requirements for participation. A month later, the HCFA regional administrator reinstated Winfield into the program. Controversy over the appropriateness of this reinstatement led the Chairman and the former Ranking Minority Member of the Subcommittee on the Handicapped, Senate Committee on Labor and Human Resources, to request that we determine whether HCFA's regional office was complying with Medicaid requirements in its oversight of ICFs-MR.

ICFs-MR

In 1972, the Congress authorized states to use federal Medicaid funding for ICFs-MR,[2] facilities that provide health-related services to the mentally retarded. To help residents become as independent as possible, an ICF-MR also provides training in such areas as personal care and community living skills, prevocational activities, and counseling.

To qualify for federal funding as an ICF-MR, a facility must (1) have as its primary purpose the provision of health or rehabilitative services to the mentally retarded, (2) meet standards established by the Secretary of Health and Human Services (HHS), and (3) provide "active treatment" to its residents.[3] In fiscal year 1987, the federal share of Medicaid payments for services provided by the approximately 3,660 ICFs-MR was about $5.5 billion, about 12 percent of total federal Medicaid payments.

HHS regulations do not allow an ICF-MR to admit the mentally retarded unless their needs can be met by the ICF-MR or through contracts with

[1]Medicaid, authorized under title XIX of the Social Security Act, is a federally aided, state-administered medical assistance program for low-income people. Depending on a state's per capita income, the federal government pays from 50 to 79.65 percent of Medicaid costs for health care.

[2]The American Association on Mental Deficiency (an organization of physicians, educators, social workers, psychologists, psychiatrists, and others interested in the welfare of the retarded) defines mental retardation as subaverage general intelligence (IQ below 70) existing concurrently with deficiencies in adaptive behavior (the way people carry out tasks expected of them at a given age) appearing before the age of 18. Retarded people generally have more trouble feeding or dressing themselves, advancing in school, developing social relationships, and managing money than others their age.

[3]Active treatment is generally defined as a series of programs and therapies to help the mentally retarded progress to their optimal level of independent functioning. Specifically, active treatment is the process of identifying a retarded person's need for services and implementing a plan of care that requires the person to participate in specific programs and receive specific therapies.

another provider. HHS can refuse state claims for federal matching funds when it finds that an ICF-MR has not provided active treatment.

Requirements for Participation in Medicaid Set by HCFA

To participate in Medicaid, an ICF-MR must have a provider agreement with the state Medicaid agency. HHS regulations (1) limit provider agreements to 12 months and (2) specify that the agreements cannot be renewed unless the facility has been inspected and certified by the state as adequately complying with Medicaid requirements. The federal government will pay from 50 to 79.65 percent of the cost of covered services provided by ICFs-MR having valid Medicaid provider agreements.

HCFA, an agency within HHS, administers the Medicaid program, provides oversight, and establishes the requirements for ICF-MR participation. An ICF-MR must meet over 110 Medicaid requirements covering such areas as medical, nursing, and dental services; resident rights; and safety and sanitation.[4] Approximately one-third of the requirements deal with (1) required client services and professional evaluations and (2) adequacy of staff and facilities to provide active treatment services. The other two-thirds deal with things such as administrative practices, physical environment, and nutrition.

Survey and Certification Done by State

Under agreement with HCFA and the state Medicaid agency, inspections to determine compliance with the requirements are made by state health agencies or other appropriate agencies. The inspecting agencies, referred to as state survey agencies, usually also are responsible for enforcing state licensure requirements. Federal regulations require that ICFs-MR have a state license in order to participate in Medicaid. The state survey agencies usually carry out inspections for federal certification and state licensure concurrently and receive federal funding from HCFA to support the federal portion of this activity. The state survey agencies, as well as HCFA, have authority to terminate certification under certain circumstances.

States Can Terminate Certification

A state survey agency must terminate an ICF-MR's certification if (1) it is no longer in substantial compliance with the requirements for participation and (2) the underlying deficiencies jeopardize resident health and

[4]The requirements described above were in effect at the time of the actions against Winfield. On June 3, 1988, HHS published a final rule (53 F.R. 20448) establishing new ICF-MR requirements for participation, beginning October 3, 1988.

safety or seriously limit the ability to provide adequate care.[5] Certification also can be lost if an ICF-MR cannot adequately justify why it had certain types of repeat deficiencies. Apart from these conditions, a facility with uncorrected deficiencies can be certified if it submits a plan of correction considered acceptable to the state survey agency.

When an ICF-MR with uncorrected deficiencies is certified on the basis of a plan of correction, the survey agency is responsible for carrying out follow-up inspections and determining whether the deficiencies were, in fact, corrected.

HCFA Provides Oversight Through Regional Offices

HCFA's 10 regional offices provide federal oversight of state survey and Medicaid agency activities. To assure that a state complies with federal requirements, the regional offices primarily use

- review of survey and certification documents submitted by the state survey and Medicaid agencies to assure that federal regulations are followed and that certification decisions are supported by the findings,
- on-site surveys of selected participating facilities conducted by HCFA regional personnel, and
- visits to the state survey agency to evaluate compliance with federal requirements.

The regional offices prepare periodic reports evaluating the activities of each state survey and Medicaid agency and any problems identified. The state agencies submit action plans for dealing with the problems, and the regional offices follow up on those plans. HCFA Central Office, in turn, periodically evaluates the oversight activities of each region.

State Medicaid agencies establish the eligibility of an ICF-MR to participate in the Medicaid program. HCFA, however, has authority, under HHS regulations (42 C.F.R. 442.30), to declare a provider agreement void and to deny federal matching funds for state payments to a facility. It can do so for any periods in which the state agencies did not comply with federal requirements in making a certification decision or issuing a provider agreement (known as "old look-behind" authority). Under the Medicaid law (sections 1902(a)(33)(B) and 1910(c) of the Social Security Act), HCFA has authority to (1) inspect a facility and make an independent and

[5]When an ICF-MR is not in substantial compliance but resident health and safety are not jeopardized, the state can allow the facility to work toward correction of the deficiencies and continue participation for up to 11 months. Any state payments for services provided to those admitted to the facility during the correction period are ineligible for federal matching funds.

binding determination as to whether it meets the requirements for participation and (2) terminate the provider agreement if the requirements are not met (known as "new look-behind" authority). Essentially, HCFA's authority was expanded to permit direct inspection of facilities to determine both the adequacy of the inspection and the appropriateness of the certification decision.

When a Medicaid provider agreement is terminated by a federal action, the facility is ineligible to be reinstated in the Medicaid program until two requirements are met:

1. HCFA determines that the reasons for termination have been removed and there are reasonable assurances that they will not recur.

2. The state survey agency, after establishing that the facility is again in compliance with requirements, certifies it, and the state Medicaid agency issues a new provider agreement.[6]

Quality-Of-Care Requirements Difficult to Meet

During the 1970s, such advocates as the Association for Retarded Citizens filed numerous lawsuits on behalf of the retarded in large state institutions. The advocates claimed that the facilities were not providing needed services, including active treatment, and that living conditions were not adequate. Because of these suits, the states agreed to improve living conditions and to provide residents with needed services. According to a HCFA official, 30 states were involved in at least one consent decree covering residents in state-operated ICFs-MR.[7]

Despite these actions, an April 1985 staff report from the Subcommittee on the Handicapped, Senate Committee on Labor and Human Resources, and the Subcommittee on Labor, Health and Human Services, Senate Committee on Appropriations, stated that state institutions continued to have trouble meeting Medicaid quality-of-care requirements.

[6]According to section 1910(c), the Secretary of HHS has the authority to terminate Medicaid provider agreements and subsequently determine whether the conditions for reinstatement have been met. The Secretary's authority has been delegated to the Administrator of HCFA and within HCFA to the 10 regional administrators. The Kansas City regional administrator redelegated this authority to the associate regional administrator, health standards and quality.

[7]Consent decrees resulted from lawsuits filed on behalf of retarded in state facilities. According to the decrees, the states and retarded citizens' organizations resolved that the states would provide specific services.

Winfield State Hospital Terminated, Then Reinstated

Between January 26 and February 6, 1987, HCFA's Kansas City Regional Office conducted an inspection of the Winfield State Hospital and Training Center. Winfield, operated by the Division of Mental Health and Retardation Services of the Kansas Department of Social and Rehabilitation Services, had 551 beds certified for the Medicaid program. Winfield was selected for a direct federal inspection because (1) an earlier HCFA inspection, in 1985, had identified serious deficiencies and (2) the regional office's review of a May 1986 inspection by the state survey agency indicated problems in active treatment, resident grooming, resident rights, and staff training.

By letter (Feb. 12, 1987), the associate regional administrator, health standards and quality,[8] notified the commissioner, Kansas Mental Health and Retardation Services, that the inspection established that Winfield did not meet the ICF-MR requirements for participation. Five broad areas of deficiencies were cited as posing an immediate and serious threat to the health and safety of residents. These areas were: (1) staff abuse of residents, (2) resident neglect, (3) inadequate medical and nursing services, (4) inadequate dental services, and (5) poor sanitation. Among the specific deficiencies cited were failure to

- thoroughly investigate and effectively resolve instances of staff abuse of residents;
- protect residents from harm and provide for their basic needs;
- monitor reports of harm to residents;
- assess and monitor the health status of residents;
- provide and maintain the dental health of residents;
- maintain sanitary standards in kitchen, food preparation, food serving, dining, and utensil and warewashing areas; and
- meet general sanitation requirements.

The state was given 6 days to correct deficiencies posing an immediate and serious threat to the health and safety of Winfield residents, or HCFA would terminate approval for Winfield's participation in the Medicaid program.

When the regional office's February 16-18, 1987, follow-up inspection showed that Winfield had not adequately corrected the deficiencies in four of the five areas (sanitation was corrected), the associate regional

[8]Hereafter referred to as the associate regional administrator.

administrator notified the commissioner that Winfield's Medicaid provider agreement was being terminated, effective the close of business, February 18, 1987.

The deputy regional administrator decided that the state could continue to claim federal matching funds for up to 30 days (that is, through Mar. 20, 1987) while the state was attempting to relocate Medicaid recipients. Following a reinspection of Winfield, March 16-20, 1987, the regional administrator concluded that no immediate and serious threat existed in any of the five areas and advised the secretary, Kansas Department of Social and Rehabilitation Services,[9] by letter (Mar. 25, 1987), that the state could issue a new provider agreement to Winfield covering the period March 21-June 30, 1987. Subsequent actions and decisions by HCFA allowed the state to continue claiming such funds after June 30, 1987 (see p.46).

In a letter (July 7, 1988), however, the regional office notified the state that (1) Winfield had not been properly reinstated in the Medicaid program and had not held a valid Medicaid provider agreement since February 18, 1987, and (2) state claims for reimbursement would not be allowed until Winfield again held a valid provider agreement. Finally, the regional office indicated that the state had to pay back amounts previously claimed.

Objectives, Scope, and Methodology

Because of controversy surrounding the continuation of federal funding after termination of the Medicaid provider agreement with Winfield and its subsequent reinstatement, the Chairman and Ranking Minority Member, Subcommittee on the Handicapped, Senate Committee on Labor and Human Resources, asked us to determine whether the Kansas City Regional Office was violating federal laws or ignoring HCFA Central Office and regional office requirements in operating its look-behind programs for ICFs-MR. In addressing the above issues, we identified two areas of noncompliance with federal laws and regulations.

The requesters also asked that we address certain specific questions, primarily dealing with various aspects of the Winfield case. These included the propriety of the regional administrator's decisions relative to the March 16-20, 1987, inspection findings; the need for regional

[9]The Kansas state Medicaid agency, which is responsible for issuing Medicaid provider agreements, is a part of the Kansas Department of Social and Rehabilitation Services.

intervention on behalf of certain residents; and oversight of investigations relating to resident deaths. In May and August 1987, subsequent to the Subcommittee's request, a HCFA special survey team organized by the Central Office made additional inspections at Winfield. As agreed with the Subcommittee staff, we included in the scope of our review inspections and other actions that occurred subsequent to the request. The specific questions included in the request and details as to the associated objectives, scope, methodology, and findings are addressed in appendix I.

We did our work at the HCFA Central Office in Baltimore, Maryland; the Kansas City (Missouri) Regional Office; and the Kansas Department of Health and Environment (Topeka, Kansas). To meet our objectives, we

- analyzed Medicaid laws and regulations and HCFA Central Office and regional office policies, guidelines, and procedures;
- analyzed information gathered by the Kansas City Regional Office and the Central Office on Winfield and the actions taken, beginning with the January 26, 1987, survey through November 1988;
- analyzed information in the regional office files concerning the 1985 federal and 1986 state surveys of Winfield;
- interviewed all Kansas City Regional Office personnel involved in the Winfield case (to supplement information reflected in regional files and developed by the HHS/Office of Inspector General [OIG], Office of Investigations);
- interviewed selected members of the HCFA special survey team (to obtain additional information on the scope of work and findings in the May and August 1987 inspections);
- analyzed, with the assistance of our chief medical advisor, the survey team's findings relating to (1) medical, nursing, and dental services at Winfield and (2) allegations of physician neglect or malpractice concerning deaths of three Winfield residents;
- determined (1) the statutory and regulatory requirements relating to certification of ICFs-MR and (2) HCFA's compliance with those requirements in specific cases; and
- discussed observations about the Winfield case and the Kansas City Regional Office's oversight activities with the director of the Health Standards and Quality Bureau, and the director of the Office of Survey and Certification, in the Health Standards and Quality Bureau (HCFA Central Office).

Our review was limited to analysis of the appropriateness of the actions taken in response to reports prepared by the regional office and special

federal survey teams. We did not attempt to evaluate the accuracy of the teams' inspection findings or independently assess its findings.

OIG was investigating the Winfield case at the time we began our field work. Because we had some common objectives and to prevent duplication of effort, we coordinated our reviews. OIG staff provided us with records of their interviews, written comments of the regional administrator, and affidavits taken. OIG's overall findings have been considered in the preparation of this report.

We carried out our work between May 1987 and November 1988 in accordance with generally accepted government auditing standards.

HCFA Policy on Funding After Federal Termination of Provider Agreements Unwarranted

HCFA treats temporary funding after federal terminations differently from temporary funding after state terminations. Medicaid regulations explicitly permit federal funding to be continued for up to 30 days following a state-initiated termination of an ICF/MR to allow for relocation of the residents. HCFA has issued guidance, however, stating that such funding is not available following a federal termination. There appears to be no valid legal or policy reason for treating state and federal terminations differently. Furthermore, there are indications in pertinent legislative history that continued federal funding should be made available.

Following its guidance on the nonavailability of federal funds for such a purpose, HCFA initiated action to recover federal funds provided for Winfield residents during the first 30 days following the termination. We believe this action is unwarranted.

Policy on State/ Federal Terminations Differs

HCFA allows federal funding to continue for 30 days under certain conditions where the state terminates an ICF-MR Medicaid provider agreement. But HCFA does not similarly allow federal funding to continue where it has exercised its "new look-behind" authority to terminate the Medicaid agreement.

The Medicaid law is silent on the issue of temporary federal funding following either a state- or federally (HCFA) initiated termination of a Medicaid provider agreement. HCFA has used its rulemaking authority, however, to authorize such funding following a state-initiated termination.

To help in relocation of residents, HHS issued a regulation allowing federal funding to continue for 30 days after "a Medicaid agency terminates or fails to renew" a provider agreement with an ICF/MR. At the time the regulation was issued, only the state was authorized to terminate a provider agreement. Not until the Omnibus Reconciliation Act of 1980 amended the law was HCFA authorized to terminate provider agreements on its own. That act, like the original statute, did not address the issue of continued funding after termination.

Although HCFA never issued regulations on HCFA terminations, it did provide some guidance. HCFA's Health Standards and Quality Bureau issued a memorandum (July 1, 1987) in response to a question from HCFA's Seattle Regional Office. That office had inquired about the continuation of federal funding following HCFA's termination of the Medicaid provider agreement with a facility in Oregon. In reply, the memorandum states

that (1) the Medicaid regulation permitting continued funding is applicable only when a facility is terminated by a state Medicaid agency, and (2) continuation of federal funding is inappropriate when HCFA terminates the agreement with a facility on the basis of deficiencies that pose an immediate and serious threat to resident health and safety.

This position was explained further in a January 26, 1988, memorandum from HCFA's Associate Administrator for Operations. It advised the regional offices that Medicaid laws and regulations do not provide HCFA with authority to continue funding after any federally initiated termination action.

HCFA Authority to Continue Funding After Federal Terminations Adequate

Although we agree that existing laws and regulations do not specifically authorize continued federal funding following a federal termination, we believe HCFA has adequate authority to authorize such funding, with or without a regulation, for a reasonable period to facilitate relocation of residents.

HCFA has authority to promulgate a regulation authorizing continued federal funding in cases of federal terminations under the same circumstances for which current regulations authorize continued funding in cases of state terminations. The existing regulation was established under HHS's general authority to promulgate necessary rules and regulations. Relying on this same authority, HCFA could issue similar regulations that would apply to federally initiated terminations.

Further, HCFA may have authority to continue federal funding to transfer patients out of terminated facilities without having a regulation in effect. Although the law is silent on continued funding, relevant legislative history indicates that the Congress expected HCFA to allow temporary funding of federally terminated facilities making reasonable efforts to relocate patients. According to the conference report for the 1980 act (H.R. Rep. No. 96-1479):

"[I]t is intended that Federal financial participation could be continued with respect to Medicaid patients of a facility decertified by the Secretary [HCFA] during such reasonable time as is required to effect the transfer of medicaid patients from the facility."

Temporary Funding Provided After Winfield Termination

The deputy regional administrator authorized continued federal funding for 30 days following HCFA's termination of the Medicaid provider agreement with Winfield. Given the guidance available at the time of his decision, he acted responsibly. But in July 1988, HCFA initiated action to recover federal funds claimed by the state for payments made to Winfield after the February 18, 1987, termination of the provider agreement. This included the 30-day period in question. HCFA did so on the basis of subsequent headquarters guidance not to allow continued federal funding following federal terminations.

Recovery of the federal funds provided during the first 30 days after Winfield's termination is unwarranted, assuming Winfield had been making reasonable efforts to relocate patients. As the deputy regional administrator's decision was consistent with legislative intent, we see no compelling reason to treat federal terminations differently from state terminations.

Conclusions

Although HCFA has authority to discontinue federal funding immediately after federally initiated terminations, it is not legally required to and doing so is inconsistent with legislative intent. Federal and state terminations should be treated similarly. HHS should issue regulations that would allow for temporary federal funding following a federally initiated termination. Further, HCFA should not pursue efforts to recover temporary funding provided to Winfield during the first 30 days following termination, assuming Winfield had been making reasonable efforts to relocate patients.

Recommendation

We recommend that the Secretary of Health and Human Services issue a regulation that authorizes state claims for federal matching funds for 30 days (or some other reasonable period) after the date on which the Secretary terminates a Medicaid provider agreement with a facility, as long as the facility is making reasonable efforts to relocate residents.

Agency Comments and Our Evaluation

HHS did not agree that federal matching funds should be available for 30 days after a federal termination under section 1910(c). The agency said it believes the policies stated in the July 1, 1987, and January 26, 1988, memorandums (see pp.16-17) should continue to be followed. If a facility's participation is terminated as a result of a federal survey, there is an indication, HHS stated, that the state survey agency was deficient in applying the requirements for certification in its prior surveys. Denial of

federal funds during a period of relocating patients will, according to HHS, be additional incentive to the survey agency to use all the remedies at its disposal short of termination for multiple deficiencies. Such remedies include a certification for less than 12 months or with an automatic cancellation date, or denial of payment for new admissions pending correction of deficiencies.

HHS provides no compelling argument for ignoring Congressional intent and treating federal funding after federally initiated terminations differently from state-initiated terminations. We agree that federal termination action indicates a deficiency in the state survey agency's oversight of the facility. But we do not believe that denying federal funding for services provided to Medicaid recipients during a relocation period is an appropriate way to penalize the state survey agency. A more appropriate approach would be to reduce federal funding provided for survey agency operations under the administrative services portion of Medicaid.

The State of Kansas was given the opportunity to comment on a draft of this report but had not done so when the report was finalized.

Regional Administrator Exceeded Authority in Reinstating Winfield

HCFA's Kansas City regional administrator authorized reinstatement of the Winfield State Hospital and Training Center in the Medicaid program, although none of the requirements for reinstatement had been met. Because of this decision, as well as weaknesses in internal controls over the approval of federal funding, the regional administrator allowed the state to continue to claim federal matching funds until July 1988. At that time, HCFA decided that Winfield did not have a valid provider agreement. HCFA Central Office provided additional guidance on the reinstatement process and directed the regional administrator to initiate action to recover the estimated $15.8 million in federal funds inappropriately provided to the state for Winfield residents.[1] However, HHS still needs to (1) identify and correct the weaknesses in internal controls that allow Medicaid payments to be made without adequate documentation and (2) issue regulations implementing the new look-behind authority.

Reinstatement Depends on Certain Conditions Being Met

Reinstatement of a federally terminated Medicaid provider agreement involves both HCFA and the state. First, HCFA must determine whether the basic requirements for reinstatement have been met. Second, the state survey agency must establish and certify that the facility meets the requirements for participation. Third, the state Medicaid agency must issue a Medicaid provider agreement.

Section 1910(c) of the Social Security Act specifies provisions for reinstatement after a Medicaid provider agreement with a facility is terminated by a federal action. The Secretary of HHS must find that (1) the reason(s) for termination have been removed and (2) there is reasonable assurance that it will not recur (see p.11). Viewing the section as self-implementing (regulations were not needed to make it effective), HHS did not publish regulations. HCFA Central Office, however, issued guidelines to its regional offices specifying that when an agreement with a facility is terminated by a federal action, the facility cannot be reinstated until

- the reasons for termination no longer exist,
- the facility meets all applicable statutory and regulatory requirements, and
- there is reasonable assurance that the deficiencies that caused the termination will not recur.

[1]This estimate includes the amount claimed by the state for the first 30 days after termination (Feb. 19-Mar. 20, 1987), discussed in ch. 2.

The first two requirements were not elaborated upon further. But additional instructions were provided on how to establish whether there is reasonable assurance that the reasons for termination will not recur (see p.23).

Section 1902(a)(33)(B) of the Social Security Act specifies that states will make the determination as to whether facilities meet the applicable requirements for participation. Medicaid regulations (42 C.F.R. 442) require state survey agencies to inspect facilities to determine whether they meet Medicaid requirements. The regulations permit certification of facilities with deficiencies when

- the deficiencies, individually or in combination, do not jeopardize the health and safety of residents or seriously limit the facility's capacity to give adequate care;
- the facility submits to the state survey agency an acceptable written plan for correcting the deficiencies; and
- the facility provides adequate justification for certain types of repeated deficiencies.

According to Medicaid regulations, the state Medicaid agency may issue a provider agreement for the period specified in the certification, with a maximum period of 12 months. HCFA guidance further specifies various procedures states are to follow in conducting inspections, reporting deficiencies, reviewing plans of correction, and reporting certification and provider agreement decisions.

Medicaid regulations (42 C.F.R. 442.30) provide that federal matching funds for state expenditures for ICF-MR services are available only if the ICF-MR has been certified as meeting the requirements for Medicaid participation, as evidenced by a provider agreement. For example, they further provide that federal matching funds will be disallowed if HCFA establishes that the provider agreement is invalid because the state survey agency failed to (1) apply the applicable requirements for participation or (2) use the forms, methods and procedures prescribed by HCFA. (See p.10 for a discussion of this old look-behind authority.)

Reasons for Termination Not Removed

The regional administrator incorrectly applied the requirement that the reasons for termination be removed before a facility could be reinstated in the Medicaid program; he authorized Winfield's reinstatement once the deficiencies had been corrected to the point that they no longer, in his opinion, posed an immediate and serious threat to resident health

and safety. The reinstatement should not have been authorized until the deficiencies that led to the termination had been fully corrected.

To discuss the requirements for reinstatement of Winfield, regional officials met with officials of the Kansas Department of Social and Rehabilitation Services on February 25, 1987. According to the regional administrator, he told the Kansas officials that they were expected to correct ". . . the problems that caused cancellation of approval to participate in the first place. . ." The regional administrator told us that, in his opinion, the immediate and serious threat conditions were the only reason for termination. Once those conditions were corrected to the point that they no longer posed an immediate and serious threat, he felt, the facility could be reinstated. The regional administrator said he told the Kansas officials that once the problems leading to the termination had been corrected he would authorize immediate reinstatement (for a period of 60-90 days). This would give the facility time to achieve compliance with all ICF-MR requirements, including those dealing with active treatment.

HCFA made a follow-up inspection of Winfield, at the facility's request, from March 16 to 20, 1987. On March 20, 1987, a regional official notified the secretary of the Kansas Department of Social and Rehabilitation Services of the regional office's preliminary conclusion. It was that (1) corrective action was inadequate and (2) immediate and serious threat conditions still existed in four of the five areas. The regional administrator was briefed on the findings, held a meeting with Kansas officials, and discussed the situation with subordinate managers. After this, he concluded that none of the conditions at Winfield constituted an immediate and serious threat to resident health and safety.[2]

In evaluating the deficiencies, the regional administrator did not, he said, compare them with the deficiencies cited in the February 12, 1987, notification letter. This was because, in his opinion, it was necessary, not to establish whether the facility had fully corrected all the deficiencies associated with the immediate and serious threat, but merely to determine whether a threat was still present. Although not all deficiencies had been corrected, he said, the absence of any threat meant that the facility had removed the reasons for termination and therefore was eligible for reinstatement.

[2]Although regional staff disagreed over whether an immediate and serious threat still existed (see p.37), all agreed that the deficiencies had not been fully corrected.

The regional administrator incorrectly cited the presence of an immediate and serious threat as the reason for Winfield's termination, we believe. The presence of an immediate and serious threat affects the timing of a termination, but does not constitute the reason for it. Under section 1910(c) of the Social Security Act, a decision by HCFA to terminate a facility must be based on a determination that the facility fails to meet the requirements for participation in the Medicaid program. The deficiencies cited in the termination letter as constituting failure to meet the requirements for participation therefore must be construed to be the reasons for termination.

In a February 12, 1987, letter to the Kansas commissioner for mental health and retardation services, the associate regional administrator stated that (1) the facility did not meet the requirements for participation in the Medicaid program and (2) certain deficiencies posed an immediate and serious threat to the health and safety of residents. To avoid immediate termination before a hearing, the facility had to correct the immediate and serious threat by February 18, 1987. Because all the conditions posing a threat had not been corrected fully by February 18, 1987, the termination became effective on that date.

HHS has not issued guidance on the extent of the correction of deficiencies necessary to remove the reason for termination. According to an official in HCFA's Health Standards and Quality Bureau, however, HCFA construes section 1910(c) to require a facility to correct only deficiencies identified as the basis for termination. HCFA's construction of the law is reasonable.

Although the regional administrator concluded that an immediate and serious threat no longer existed, he agreed that the deficiencies cited in the termination letter had not been fully corrected. Therefore, in our opinion, the reason for termination had not been removed. Using HCFA's interpretation, we believe the facility needed to fully correct the deficiencies associated with the immediate and serious threat to remove the reason for termination.

Reasonable Assurance Period Inadequate

Once the reasons for termination are removed, HCFA is required to establish a "reasonable assurance" period during which the facility must demonstrate its ability to maintain compliance. HCFA guidelines allow regional officials flexibility in establishing the length of this period. Although it may be appropriate in some cases for a regional administrator to establish a 0-day reasonable assurance period, we believe the

regional administrator exceeded his discretionary authority in establishing such a period for reinstatement of Winfield. At the time this decision was made, the follow-up inspection had not been carried out and no plan of correction had been submitted. Thus, even if the reasons for termination had been removed, Winfield would not have been eligible for readmission to the Medicaid program because the facility had not demonstrated that the deficiencies would not recur.

HCFA Guidelines on Reasonable Assurance Period

Section 1910(c) of the Social Security Act does not define "reasonable assurance." But HCFA guidelines require that before a terminated facility can be reinstated, it must demonstrate that it can achieve and sustain compliance over a period of time to be set by the regional office. The HCFA guidelines specify that, in establishing the reasonable assurance period, a regional administrator should consider compliance history. This would include such factors as whether the facility is repeatedly cited for the same kinds of deficiencies, timeliness of corrections, and previous enforcement actions initiated or carried out. Because the facility cannot be reinstated until after the reasonable assurance period is completed, the longer the assurance period, the longer the period before state payments to the facility are eligible for federal matching payments.

HCFA's guidelines include examples of situations in which it would be appropriate to establish a reasonable assurance period of from 0 to 180 days. Physical plant corrections, the guidelines state, are the only situations in which a 0-days reasonable assurance period is appropriate. For example, if a facility lacked fire sprinklers and smoke barriers but then installed them, there is reasonable assurance that the problem would not recur. The immediate and serious threat at Winfield included matters other than physical plant deficiencies.

The guidelines indicate that when a facility has deficiencies beyond its control (such as nursing vacancies it had been unable to fill) but a generally exemplary compliance history, a 30-day reasonable assurance period is appropriate. When a facility has been cited repeatedly for the same deficiencies, a 60-day period is appropriate. According to the guidelines, a 180-day period is appropriate when (1) a facility's provider agreement is terminated for deficiencies posing an immediate and serious threat and (2) the facility has a history of serious deficiencies.

Longer Reasonable Assurance Period Would Have Been Appropriate

The 180-day assurance period in the guidelines would appear most appropriate in the Winfield case. First, HCFA terminated the provider agreement for failure to correct deficiencies creating an immediate and serious threat. Second, Winfield had a history of serious deficiencies.[3]

The regional office's February 18, 1987, termination notice stated that as part of the reinstatement process, Winfield would be subject to a 30-day reasonable assurance period. In a February 25, 1987, meeting with officials of the Kansas Department of Social and Rehabilitation Services, however, the regional administrator decided to reduce the reasonable assurance period from 30 days to 0 days. According to him, the law and guidelines permitted him the flexibility to make this reduction, which he felt was justified. In his opinion, reasonable assurances were demonstrated because (1) significant improvements were found during the February 16-18, 1987, follow-up inspection; (2) state officials made strong public commitments to achieve and maintain compliance; (3) the state legislature ordered studies to identify ways to improve care at Winfield; (4) he had worked effectively with the Kansas Department of Social and Rehabilitation Services over a 20-year period; and (5) the state successfully operated three other ICFs-MR.

Although the regional administrator said he was influenced by the progress in corrections reported by the regional survey team in the February follow-up inspection, the facility's provider agreement was terminated as a result of the inspection. This was because HCFA found that an immediate and serious threat still existed in four areas (see p.12).

Additionally, the regional administrator relied on commitments to correct deficiencies, although the reasonable assurance period, according to

[3]HCFA's Kansas City Regional Office conducted a look-behind inspection of Winfield in April 1985. The office concluded that (1) the facility did not meet requirements for participation and (2) patient abuse at the facility constituted an immediate and serious threat to resident health and safety. The problems were attributed to ineffective active treatment. Although the facility, over the next 3 weeks, corrected the deficiencies to the point that threat conditions no longer existed, it did not demonstrate adequate compliance with ICF-MR requirements until 4 months following the inspection. At that time, HCFA discontinued action to terminate the provider agreement.

A May 1986 inspection by the state survey agency again found the facility to have numerous problems, including failure to comply with active treatment requirements. A HCFA regional office staffer who analyzed the state's findings reported that active treatment needs were not being met and that supervision of active treatment was inadequate. In addition, he said, staff training was poor, residents were poorly groomed and dressed, and resident rights were not adequately protected. In the staffer's opinion, the survey agency's decision to recertify the facility was not supported because of the problems it reported in active treatment. An internal regional office memorandum (Oct. 1, 1986) stated that the ". . . facility still has many problems . . . " and recommended another federal inspection. According to the associate regional administrator, the January 1987 inspection was made because of the problems identified in the 1985 federal and 1986 state inspections.

HCFA guidelines, should not even begin until corrections have been completed. For example, he considered the assurances provided by state officials and the legislature that improvements would be made. But HCFA guidelines provide that the facility demonstrate compliance over a certain period of time after the deficiencies have been corrected before reinstatement can occur.

HCFA officials in the Health Standards and Quality Bureau said that the law and guidelines allow the regional offices substantial flexibility in setting reasonable assurance periods. A 0-days period may be appropriate in situations other than those in which physical plant deficiencies are involved, and evidence of facility commitment to correction is a valid consideration in setting the reasonable assurances period.

Indeed, the law and guidelines allow flexibility in setting reasonable assurance periods. Also, as pointed out by the regional administrator, certain factors (such as facility commitment to correction) might tend to lessen the length of the period. In the Winfield case, however, we believe that a period of 0 days was not justified. The serious threat did not include physical plant deficiencies not likely to recur, but failure of the facility to provide care and services needed by the residents and to protect them from harm. Avoiding deficiencies in these areas requires continuous actions by facility staff. Further, the facility's history of serious problems showed a lack of commitment to maintain compliance with HCFA guidelines.

Finally, we question whether the facts available on March 24, 1987, supported the regional administrator's conclusion on that date that there was reasonable assurance the reasons for termination would not recur. As previously discussed (p.22), the findings of the regional survey team in the March 16-20, 1987, follow-up inspection indicated the facility had not effectively corrected deficiencies associated with four of the five areas where immediate and serious threats existed. Further, the facility had not yet provided the regional office with a plan showing how and when the deficiencies would be corrected.[4]

A proposed regulation, published by HHS for comment in November 1987, would have reduced the current degree of flexibility regional offices have in setting reasonable assurance periods.[5] For example, in a

[4]The regional office transmitted a complete list of deficiencies to Winfield on March 5, 1987, and Winfield submitted a plan of correction to HCFA on April 15, 1987.

[5]2 Fed. Reg. 44300.

situation similar to the Winfield case (termination of a facility with a history of serious deficiencies because of immediate and serious threat conditions), a facility generally would be subject to a 6-month reasonable assurance period. Because of the enactment of broad nursing home reform legislation in December 1987,[6] however, HHS withdrew the proposed regulation to incorporate the changes required by the nursing home reform legislation. We believe that provisions similar to those in the proposal should be incorporated in a regulation implementing section 1910(c).

Facility Not Certified and New Provider Agreement Not Issued

The final requirements in the reinstatement of a provider following a federally initiated termination are (1) the establishment by the state survey agency of the facility's compliance with requirements for participation and certification and (2) the issuance by the state Medicaid agency of a new provider agreement. The HCFA regional office and the state Medicaid agency, however, did not adhere to these requirements in reinstating Winfield. Specifically, the HCFA regional office bypassed normal Medicaid procedures in authorizing reinstatement of Winfield without state certification, and the state Medicaid agency did not issue a new provider agreement.

Section 1910(C) Does Not Authorize HCFA to Reinstate Facilities

The regional administrator told us that, in his opinion, section 1910(c) of the Social Security Act gives HCFA clear authority for both terminating approval of a facility to participate in the Medicaid program and reinstating a facility whose approval has been terminated. He asserted that Medicaid regulations specifying that a provider agreement cannot be issued until an acceptable written plan for correcting deficiencies is submitted and the facility certified by the state survey agency do not apply in the Winfield case because it involved the reinstatement of a facility by HCFA. Consequently, he said, the state survey agency was not involved in the reinstatement.

Our analysis of the Medicaid law and regulations does not support the regional administrator's view. With respect to reinstatement of a facility whose provider agreement has been terminated, section 1910(c) of the Social Security Act provides that a facility

". . . may not be reinstated unless the Secretary finds that the reason for termination has been removed and there is reasonable assurance that it will not recur."

[6]Omnibus Budget Reconciliation Act of 1987 (P.L. 100-203, Dec. 22, 1987).

This provision merely establishes eligibility as a prerequisite before a state Medicaid agency can consider certifying a facility for reinstatement into the Medicaid program. It does not authorize direct reinstatement by HCFA. Once deemed eligible, a facility must undergo the normal state agency certification procedures under section 1902(a)(33)(B). Furthermore, although HCFA guidelines in effect at the time the Winfield decision was made did not elaborate on the appropriate procedure, the reasonable assurance guidelines did include an example incorporating it. Following federal termination of a Medicaid facility, the state survey agency had to certify the facility again before reinstatement.

Facility Not Certified by State

Our review of records at the state survey agency disclosed that the agency had not inspected or certified Winfield after HCFA terminated the Medicaid provider agreement on February 18, 1987. According to survey agency officials, they assumed that their agency had to render a certification decision before a federally terminated provider agreement could be reinstated. Thus, they were surprised to learn that without first obtaining a certification decision from them, the regional administrator had authorized the state Medicaid agency to issue a new provider agreement. But they did not ask why their agency was by-passed because they assumed HCFA would have sought their input had it been required.

No Provider Agreement Issued

Although the regional administrator authorized the state to issue a new provider agreement to Winfield, our review disclosed no evidence that it had been issued. In response to our findings, the associate regional administrator spoke with an official in the Kansas Department of Social and Rehabilitation Services. That official told him that because the state had not terminated the previous provider agreement covering the period October 1, 1986-July 31, 1987, the state did not think it necessary to issue a new agreement.

But regardless of whether the state had terminated the previous provider agreement, it was terminated—for federal matching fund purposes—by HCFA's action of February 18, 1987.

Reinstatement Procedures Clarified

In a January 26, 1988, memorandum to the regional offices, the HCFA Associate Administrator for Operations clarified the procedures that must be followed in reinstating a facility with a federally terminated provider agreement:

- After the beginning date of a federal termination, a facility no longer has any status as a Medicaid provider. It cannot participate again until it is certified by the state survey agency and the state Medicaid agency issues a provider agreement.
- The state cannot issue the provider agreement until HCFA (1) has established that the "reasons for termination" have been removed and (2) is satisfied with the facility's performance during the reasonable assurance period set by the regional office.

But the memorandum did not clarify that removal of the "reasons for termination" refers to correction of the specific deficiencies that resulted in the termination, not to the elimination of the immediate and serious threat resulting from such deficiencies.

Internal Control Weaknesses Allow Federal Funding Without Valid Agreement

Winfield did not have a valid Medicaid provider agreement after February 18, 1987. But weaknesses in internal controls over Medicaid funding contributed to (1) the state continuing to claim federal matching funds for payments it made to the facility and (2) the regional office continuing to approve claims until July 7, 1988. At that time, the regional office stopped approving these claims and began actions to recover Medicaid funds.

Required HCFA Controls Lacking

The Federal Managers' Financial Integrity Act of 1982 (31 U.S.C. 3512 (b)) requires federal agencies to establish internal controls and to evaluate their adequacy on a regular basis. Internal controls must provide reasonable assurance that expenditures are consistent with laws, regulations, and policies. HCFA controls are lacking in this regard. For example, HCFA should have adequate verification procedures to assure that on state claims for federal matching funds for ICFs-MR, such facilities meet the federal requirements to qualify as providers. Therefore, it is essential that both those charged with carrying out the verification procedures and those monitoring compliance fully understand the requirements.

In the Kansas City Regional Office, the Division of Health Standards and Quality is responsible for establishing the eligibility of facilities to participate as Medicaid providers. The region's Division of Financial Operations is responsible for reviewing state claims for federal matching funds to determine whether the claims are in accordance with federal

requirements. The office has established a procedure to identify situations that might affect a provider's eligibility status and thus the state's entitlement to federal matching funds. Through its monitoring program, Health Standards and Quality notifies Financial Operations of situations identified. For example, notifications are sent when (1) either the state or HCFA terminates a Medicaid provider agreement or (2) Health Standards and Quality establishes that a certification or provider agreement is not valid.

In accordance with these procedures, Health Standards and Quality issued a memorandum to Financial Operations. It informed Financial Operations that Health Standards had terminated Winfield's Medicaid provider agreement, effective February 18, 1987.[7] In a second memorandum (Apr. 7, 1987), Health Standards notified Financial Operations that HCFA had authorized the state to issue Winfield a new provider agreement effective March 21, 1987. According to Financial Operations officials, from this memorandum and the previous instructions provided by the acting regional administrator they concluded that the state was entitled to claim federal matching funds and that further monitoring of the state's claims for Winfield was unnecessary.

HCFA's associate regional administrator for Health Standards and Quality told us that he issued the April 7, 1987, memorandum to Financial Operations on the assumption that the state Medicaid agency had issued the provider agreement, as specified in the regional administrator's March 25, 1987, letter to the state. He had no evidence, however, that the state Medicaid agency had done so. This problem might not have occurred had the state established adequate internal controls to ensure that it discontinued claims for federal funding following termination of a Medicaid provider agreement. HCFA needs to establish internal control procedures requiring that funding authorization be supported by written documentation that a valid provider agreement has been issued. In the Winfield case, had the state issued a new provider agreement in response to the regional administrator's letter, it would not have been valid. This is because none of the three conditions for reinstatement discussed earlier in this chapter had been met.

[7]Subsequently, Financial Operations allowed the state to continue receiving federal financial participation for 30 days following termination based on verbal authorization from the acting regional administrator. While, in our opinion, HCFA needs to require written justification for starting or terminating federal funding of a provider, including specific justification for continuing funds following a termination action, this internal control weakness did not result in inappropriate payments in the Winfield case. As discussed in ch.2, the payments to Winfield during the first 30 days after termination were consistent with congressional intent.

In a May 20, 1988, letter, the regional administrator asked the Kansas Department of Social and Rehabilitation Services for evidence that a valid provider agreement with Winfield was issued after the prior provider agreement was terminated on February 18, 1987 (see p.13). At the direction of HCFA central office officials, in a letter dated July 7, 1988, the regional administrator informed the state that HCFA was disallowing any federal matching funds claimed by the state for payments to Winfield after February 18, 1987. This was because the state had provided no evidence that a provider agreement had been issued. After this letter, HCFA established that Winfield had been properly reinstated in the Medicaid program effective August 19, 1988 (see p.51). The regional office estimates that the amount of federal funds claimed by the state for payments to Winfield for February 19, 1987, through August 18, 1988, was about $15.8 million. The state has appealed HCFA's disallowance decision to the HHS Departmental Appeals Board. As of April 1989, the appeals board had not acted.

No Other Improper Reinstatements Found by HHS OIG

The HHS Office of the Inspector General recognized that in addition to the Kansas City Regional Office, the other nine HCFA regional offices may have invoked federal terminations for Medicaid provider agreements. OIG conducted an investigation of all cases in which three HCFA regional offices terminated Medicaid provider agreements to determine whether there were any subsequent reinstatements that were not in compliance with federal requirements. On April 25, 1989, the investigation was closed when no improper reinstatements were identified in the three regions.

Conclusions

HCFA's Kansas City Regional Office did not properly follow Medicaid requirements in the reinstatement of Winfield. The regional administrator exceeded his authority in authorizing reinstatement when Winfield had met none of the basic requirements. These were: removal of the reasons for termination, reasonable assurance that the deficiencies would not recur, and issuance of a new provider agreement following certification by the state survey agency. HCFA has initiated action to recover federal matching funds inappropriately claimed by the state Medicaid agency for payments made to Winfield during the period the facility had no valid provider agreement.

HHS has not issued regulations implementing section 1910(c) of the Social Security Act. Although HCFA issued guidelines concerning reinstatement decisions and some additional guidance following the Winfield

case, the guidance remains vague as to how to determine whether the reasons for termination have been removed. This issue should be clarified and all the requirements now set out in the guidelines incorporated in a regulation.

Because the regional office lacks adequate internal controls, no assurance is provided that decisions about the availability of federal Medicaid payments are adequately supported. HHS needs to evaluate HCFA's controls and take appropriate corrective action to strengthen them.

Recommendations

When payments to a terminated Medicaid provider can be restarted on the basis of an oral order, inappropriate payments can occur. We recommend, therefore, that the Secretary of Health and Human Services issue regulations implementing section 1910(c) of the Social Security Act. The Secretary also should strengthen internal controls over the approval of federal Medicaid payments, by requiring (1) written authorization from a designated HCFA official to start or stop payments and (2) written documentation that a valid provider agreement has been established.

Agency Comments and Our Evaluation

HHS agreed with our recommendations regarding issuance of regulations implementing section 1910(c) of the Social Security Act and strengthening internal controls over the approval of federal Medicaid payments. Procedures for written authorization from a designated HCFA official to start or stop payments are, HHS stated, already established in the regional office manual.

The procedures cited by HHS in its comments relate to notification to the state Medicaid agency that federal Medicaid funding is being disallowed. They do not address the internal control weaknesses that permitted federal funding to continue on the basis of oral orders and without written confirmation that a valid provider agreement had been established.

The State of Kansas was given the opportunity to comment on a draft of this report but had not provided comments when the report was finalized.

GAO Detailed Responses to Requesters' Questions

In this appendix, we present detailed responses to the questions posed by the Chairman and the Ranking Minority Member of the Subcommittee on the Handicapped of the Senate Committee on Labor and Human Resources in their May 11, 1987, request letter. Also, as agreed with the Committee staff, to deal with developments in the case of the Winfield State Hospital and Training Center subsequent to the request letter we added another question (question 5) to our study.

Adequacy of Support for Reinstatement Decision

Question 1

Did the federal survey team's findings in the March 16-20, 1987, reinspection of Winfield support the regional administrator's decision to authorize reinstatement of Winfield for the period of March 21-June 30, 1987?

Response

As we discuss in chapter 3, the findings from the reinspection did not support the regional administrator's decision to authorize reinstatement. The findings showed that the "reason for termination," that is, the deficiencies creating an immediate and serious threat, had not been fully corrected. The reinstatement was inappropriate for this reason and because an adequate reasonable assurance period was not established and the state did not certify the facility and issue a new provider agreement.

Compliance With Laws and Regulations

Question 2

Concerning the Winfield case, did the regional office act within the scope of its authority and otherwise comply with the "look-behind" statutes, regulations, and guidelines?

Response

As we discuss in chapter 2, the regional office's action in allowing federal funding to continue for 30 days after Winfield's termination was consistent with congressional intent and was a reasonable interpretation of guidance that existed at the time of the decision.

As discussed in chapter 3, the region exceeded its authority in

- establishing a reasonable assurance period of 0 days for the facility to demonstrate that it could operate without recurrence of the reasons for termination; and
- authorizing the state Medicaid agency to issue the facility a new provider agreement reinstating the facility, effective March 21, 1987.

Assertions That a "Political Deal" Was Arranged

Question 3

Was there any basis for various assertions in a May 10, 1987, newspaper article about the regional administrator's decision to reinstate Winfield, particularly whether it was the result of a "political deal"?

Response

We found no evidence that the regional administrator, in making his decision, either "discarded" the survey teams' findings or "backed down" after meeting with state officials as alleged in the newspaper article. The regional administrator demonstrated consistency in his opinions concerning the existence of immediate and serious threat conditions at Winfield. The regional administrator stated, according to notes taken by regional staff members in two separate meetings held within a week after the termination, that of the five conditions reported by the regional office (in its February 12, 1987, notification letter) as constituting an immediate and serious threat, only the resident abuse clearly represented such a threat. All regional personnel involved in the March 1987 reinspection concurred that resident abuse problems had been corrected.

Although there was a widely held perception by Winfield staff that the reinstatement was the result of a "political deal," we found no evidence to that effect. Some of the decisions made by regional management,

however, including apparently conflicting decisions or actions, may have led to perceptions that a political deal had contributed to the reinstatement of Winfield.

Scope of Review

We (1) analyzed the newspaper article to identify the allegations; (2) reviewed information in the regional office's files pertaining to the allegations; (3) analyzed information gathered by the Office of the Inspector General, Department of Health and Human Services, in its investigation, including an OIG interview with the newspaper reporter; and (4) interviewed Kansas City Regional Office personnel, including the survey team and managers involved in the decision-making process.

Background

A May 10, 1987, article in the Wichita Eagle Beacon stated that sources within the HCFA regional office had made the following assertions concerning the inspection and reinstatement of Winfield:

- Regional officials notified the facility on March 20, 1987, at the conclusion of the inspection, that Winfield was "failing the inspection."
- During a meeting on March 23, 1987, the regional administrator "backed down" after being confronted with "growing resistance" from state officials representing the facility.
- The regional administrator "discarded" the regional survey team's findings and set aside its recommendation to withhold funds.

The article stated that the March 25, 1987, regional office letter authorizing reinstatement of Winfield was "tersely worded"; although the letter stated that abuse was no longer considered a problem, it made no mention of the other four "threat" conditions. Finally, the article quoted a Winfield staff member as saying that it was common knowledge that a "political deal" was involved in the decision to continue federal aid to Winfield.

Findings

The following sections discuss (1) the assertions attributed to sources within the HCFA regional office; (2) the March 25, 1987, regional office notification letter; and (3) the assertion that there was a political deal.

Assertions Made By HCFA Sources: In the February 18, 1987, letter terminating the provider agreement, the associate regional administrator told Kansas Social and Rehabilitation Services officials that the facility could not be reinstated until it (1) achieved compliance with ICF-MR requirements, including active treatment; and (2) maintained that compliance for at least 30 days. These terms were published in the media. In a February 25, 1987, meeting with Kansas Social and Rehabilitation Services

officials, however, the regional administrator said that he would (1) authorize reinstatement once the "threat" problems were corrected and (2) give the facility from 60 to 90 days to achieve satisfactory compliance with all ICF-MR requirements, including active treatment. The regional administrator said these decisions were not made as a result of pressure from the secretary, Kansas Department of Social and Rehabilitation Services, but because they were the proper decisions under the circumstances.

In a March 12, 1987, letter to the regional administrator, the secretary stated that the state had corrected the immediate and serious threat deficiencies set out by the regional office in the February 12, 1987, notification letter. These were: (1) staff abuse of residents, (2) resident neglect, (3) inadequate medical and nursing services, (4) inadequate dental services, and (5) poor sanitation. The state requested a reinspection to determine eligibility for reinstatement.

According to the reinspection plan prepared by the associate regional administrator on March 12, 1987, a regional survey team was to inspect the facility, beginning March 16, 1987. In accordance with the regional administrator's February 25, 1987, decision, the team was to determine whether the ". . . facility has addressed and resolved the immediate and serious situation, which was the reason for the February 18, 1987 cancellation." The plan specified that after completing the inspection, the team would return to the regional office and make a report to management, who would make the final decision. This was to be conveyed to state officials in a meeting on March 25, 1987. The plan also specified that although no formal exit meeting would be held at the conclusion of the inspection, the team's "feelings" as to the adequacy of corrections could be conveyed to state officials at that time.

The reinspection was carried out on March 16 to 20, 1987. Members of the regional survey team believed that their findings indicated that an immediate and serious threat still existed in four of the five areas; only deficiencies concerning staff abuse of residents had been corrected. At the conclusion of the inspection, the team and its supervisor briefed the associate regional administrator and deputy regional administrator by telephone as to their findings and opinions. As a result of this discussion, the associate regional administrator concluded that only the deficiencies concerning staff abuse of residents had been adequately resolved.

The deputy regional administrator, who was acting regional administrator on March 20, 1987, called the secretary of the Kansas Department of Social and Rehabilitation Services and told him of the above conclusion. The deputy regional administrator was, he told us, conveying the team's "feelings" as to the adequacy of corrective action. Although these feelings did not represent HCFA regional management's final decision, he believed that he should present them as the likely outcome and discuss their consequences.

According to the record of the telephone call prepared by the deputy regional administrator, the message conveyed to the secretary was that ". . . an immediate and serious threat to the health and safety of the residents continues to exist based on the results of our visit this week. As a result, FFP [Federal Financial Participation] will terminate as of midnight tonight." The memorandum shows that the secretary expressed concern over the fact that he thought, on the basis of an earlier meeting, that all the Kansas Department had to do was resolve the abuse situation; the department could have an additional 60 days to address the other problems. The memorandum also indicated that the deputy advised the secretary that regional officials ". . . had specified that any [our emphasis] serious and immediate threat conditions had to be removed and that abuse was only one (albeit the most significant)." The deputy regional administrator agreed to schedule a meeting with the secretary and other state officials for March 23, 1987, after regional officials met with the survey team. The deputy regional administrator also agreed that HCFA would not discuss the status of the inspection with anyone until after the meeting with the secretary and that ". . . the same offer still applies—if they can eliminate the I & S [immediate and serious] threat Winfield can get FFP."

The associate regional administrator told us that he thought the message conveyed in the above discussion was the regional office's final decision. According to the regional administrator, the deputy regional administrator had informed him of the survey team's findings before calling the secretary and he (the regional administrator) had authorized the deputy to talk with the state officials about those findings. But the message conveyed to the state on March 20, 1987, he said, did not constitute the final decision that regional management had provided for in the regional office's reinspection plan. In addition, as provided for in the plan, before committing the region to a final decision the regional administrator planned on receiving a personal briefing on the team's findings and rationale. According to the regional administrator, his role is not to blindly accept recommendations of subordinate staff and pass them on

as his own. Rather, his responsibility is to (1) critically assess facts presented and make independent judgments in accordance with existing laws, regulations, and policies, and (2) assure that the regional office is consistent in carrying out its responsibilities.

The deputy regional administrator told us that over the weekend of March 21 to 22, 1987, he reviewed information in the regional files on Winfield and further evaluated the deficiencies reported by the team in a March 20, 1987, teleconference. By March 23, 1987, he said, he had doubts about whether the deficiencies reported by the team supported a finding of immediate and serious threat. He told us that he discussed these concerns with the regional administrator before they met with the survey team.

On March 23, 1987, members of the survey team and others involved in the March 20, 1987, discussions briefed the regional administrator on the findings. According to the regional administrator, he understood that the problems had not been totally corrected but did not believe that the findings supported a position that a "threat" still existed. In a July 1987 written response to the OIG's Office of Investigations questions, he gave a detailed account as to why he concluded for each of the four areas at issue that a "threat" finding was not supportable. Essentially, he said that the problems reported by the team were not sufficiently serious or widespread or both to support a finding of immediate and serious threat.

According to the team members, the regional administrator's demeanor in the March 23 meeting indicated he was not receptive to their findings; he was argumentative and appeared to be attempting to trivialize the findings. According to other regional management officials who were in attendance, however, the regional administrator's actions and questions were related to testing and evaluating the team's evidence and were appropriate. They also stated that it was apparent that the regional administrator was not convinced that the deficiencies reported to him constituted an immediate and serious threat to the health and safety of residents.

On March 23, 1987, the regional administrator and deputy regional administrator met with the secretary of the Kansas Department of Social and Rehabilitation Services and other state officials representing the facility. According to the regional officials in attendance, state officials primarily emphasized the progress made in correcting the deficiencies leading to the immediate and serious threat. They also presented

oral comments relating to the team's findings in general and written comments relating to the team's findings for medical and dental services.

The written comments included those of the facility medical director concerning 6 of the 13 patients reported by the team as receiving inadequate medical services. According to the regional administrator, he did not recall that the state officials had any significant disagreements with the survey team's findings; the state's presentation was neither more nor less convincing than that of the survey team. The deputy regional administrator concurred in this observation.

After considering the comments of the survey team and state officials and further discussions with other members of regional management involved in the case, the regional administrator concluded on March 24, 1987, that the conditions described to him did not represent an immediate and serious threat to the health and safety of Winfield residents. He reached his decision "over time" and fully considered the team's findings in his deliberation, he said. Although it was obvious that deficiencies still existed, he said none of those deficiencies—separately or together—posed a threat. He could recall nothing in the meeting with state officials that had any effect on his final decision. He denied that he either "rejected" the team's findings and recommendations or "backed down" after meeting with state officials, as asserted in the newspaper article. The session with the survey team, he said, had not convinced him there were "threat" conditions.

The deputy told us that he concurred in the regional administrator's conclusion. The associate regional administrator said that although he concluded the facility had not adequately resolved the immediate and serious threat other than in resident abuse, judgments as to immediate and serious threat are highly subjective. Thus, he said, he deferred to and supported the regional administrator's judgment. The members of the regional survey team and their supervisor told us that they continue to believe that the deficiencies they identified indicated that threat conditions existed in all areas except the one mentioned above.

According to the regional administrator, the regional office has no requirement that subordinate staff concur in decisions that he has authority to make. Disagreements are inherent in any bureaucracy, he commented; the final decision rests with the highest level manager who has the authority and responsibility to make a decision. The decision

was his to make and he still believes it was appropriate. The appropriateness of his decision was demonstrated, he asserted, when the inspection conducted in May 1987 by a special survey team established by HCFA Central Office disclosed no immediate or serious threat conditions of the nature reported by the regional survey team in the March 1987 reinspection. This does not demonstrate the appropriateness of his March 1987 decision because of the 2-month lapse between it and the May 1987 inspection.

Notification letter: On March 24, 1987, the regional administrator called the secretary to informally notify him that the March 16-20, 1987, reinspection findings showed that the problems that caused the provider agreement with Winfield to be terminated had been resolved. The regional administrator said that he was allowing the state to issue Winfield a Medicaid provider agreement for the period March 21-June 30, 1987. He instructed subordinate managers to send the state a letter providing formal notification of his decision. The letter (March 25, 1987) stated that the problem of staff abuse of residents had been resolved, but made no mention of the other four areas that posed an immediate and serious threat—that is, medical and nursing services, dental services, resident neglect, and sanitation, including pest control. The letter stated that

"Our March 16-20, 1987, revisit at the Winfield State Hospital and Training Center verified that the issue of staff abuse of residents has been resolved. You have assured me that the State will continue its efforts to make improvements in other areas, and I am requesting that you submit your plan for making these improvements to me within the next few days.

"Because of the actions taken and planned, your Department may issue a Medicaid provider agreement to the Winfield State Hospital and Training Center for the period March 21, 1987 through June 30, 1987. Prior to June 30, 1987, my office will conduct a full survey of the Winfield State Hospital and Training Center to assess compliance with Federal regulations."

The regional administrator told us he was out of the office when the letter was issued and, therefore, had no opportunity to review it. He agreed with the assertion that the letter was vague as to the regional office position on the status of four of the five areas. Had he had an opportunity to review the letter before it was sent, the regional administrator said, he would have revised it to clearly state that none of the deficiencies in these areas reported by the regional survey team in the March 16-20, 1987, reinspection constituted an immediate and serious threat.

Perception That a "Political Deal" Was Involved: The OIG Office of Investigations, which examined the allegation that a "political deal" took place, found no evidence of any direct political influence that caused the regional administrator to resume federal funding of Winfield. An OIG investigator interviewed the reporter who wrote the May 10, 1987, article quoting a Winfield supervisor as saying, "It's common knowledge we were saved in March by a political deal . . . ." The reporter told the investigator that the supervisor had no facts to support the statement and that it was just a perception by the supervisor and others at Winfield.

Regional survey team members said that while they were conducting the March 16-20, 1987, reinspection, they were told on several occasions by Winfield staff that they were wasting their time because a "deal" had already been worked out to reinstate the facility. The regional administrator and his deputy denied any deal, saying that they did not know what the newspaper allegations meant. Both officials said that the regional office, however, did work cooperatively with the Kansas Department of Social and Rehabilitation Services to resolve problems at Winfield. According to the regional administrator, his decision to continue federal funding was in the best interest of Winfield residents because it permitted HCFA to continue to work with the state to further improve the situation for residents. Had he ruled on March 24, 1987, that an immediate and serious threat continued, he pointed out, HCFA would not have reinstated the facility. In effect, HCFA would have "walked away," he said, and left whatever might happen to someone else. He told us, however, that consideration of the latter did not influence him in his decision that the deficiencies reported in the reinspection did not constitute an immediate and serious threat to residents. According to the regional administrator, had the team's findings clearly supported such a threat, he would have so ruled, despite the consequences.

We found no evidence that the regional office agreed, before the March 16 to 20, 1987, reinspection, to reinstate Winfield as was alleged. Lack of public knowledge as to some of the decisions made by regional management officials, however, as well as apparent inconsistencies in decisions or actions taken by those officials, may have led to a perception that a political deal occurred in the reinstatement process:

1. The terms and conditions for reinstatement were revised before the reinspection but the new terms were not widely disseminated.

2. The regional administrator's actual or apparent countermanding of subordinate managers' decisions concerning reinstatement terms and conditions, as well as eligibility for reinstatement, may have created the appearance that a political deal had been arranged.

Intervention on Behalf of Residents

Question 4

Should HCFA's Kansas City Regional Office have intervened on behalf of Winfield residents identified by the regional survey team as possibly receiving inadequate care?

Response

In the March 16-20, 1987, federal reinspection, the nurse on the regional survey team raised questions as to the adequacy of medical care for 13 residents. HCFA Central Office guidelines to regional offices specify that issues of this kind should be referred to appropriate peer review organizations for investigation and evaluation. The regional administrator concluded that the findings in the 13 cases were not serious and decided that a referral was unnecessary. We believe the regional administrator exercised poor judgment in not obtaining a physician's opinion on the seriousness of the allegations or referring the 13 cases to an appropriate peer review organization for follow-up. Our chief medical advisor's review, however, showed that although the cases raised valid concerns about the quality of care at Winfield, there was no apparent immediate threat to resident health.

Scope of Review

To determine whether the regional office should have intervened on behalf of the 13 residents, we (1) analyzed the Medicaid requirements; (2) reviewed information in the regional office files pertaining to the nurse surveyor's findings in the March 16-20, 1987, reinspection and various reports prepared by independent physicians concerning medical services at the facility; and (3) interviewed regional personnel, including the nurse-surveyor. With the regional survey team, we discussed their findings and their efforts to obtain HCFA intervention. We talked to members of regional management about their decision not to intervene and to HCFA Central Office officials about agency policies and procedures regarding intervention. Because the questions concerned medical judgment, we asked our chief medical advisor to analyze the information

gathered in the above steps to determine if there was an immediate threat to resident health.

Background

In the March 16-20, 1987, reinspection, the nurse-surveyor found 13 residents to have had medical conditions that she believed were inappropriately addressed, including

- two cases in which the facility staff did not take appropriate action on suspected gastrointestinal bleeding;
- two cases in which the facility staff did not appropriately monitor patients receiving anticonvulsant drugs;
- three cases in which the facility staff did not do appropriate tests when signs showed that residents might be experiencing the toxic effects of anticonvulsant drugs;
- four cases in which the facility staff was not properly monitoring residents' weight, such as investigation of sudden, major weight loss or failure to establish weight goals; and
- one case in which a resident had a tumor and the staff and consulting physicians had wrongly decided not to surgically remove it at that time.

The nurse-surveyor also reported a general concern as to whether residents receiving either of two types of anticonvulsant drugs were being appropriately monitored and doses appropriately adjusted. The above findings formed the basis for the nurse-surveyor's opinion that an immediate and serious threat to resident health and safety existed.

Officials of the Kansas Department of Social and Rehabilitation Services, in a March 23, 1987, meeting with the regional administrator, provided written comments prepared by the Winfield medical director on 6 of the 13 residents. The medical director asserted that the nurse-surveyor had (1) not recognized all pertinent information in the medical records or (2) proposed certain actions that were inappropriate.

As discussed under question 3, on March 24, 1987, the regional administrator concluded that the nurse-surveyor's findings, as described above, did not indicate an immediate and serious threat to residents.

Findings

The regional administrator stated that there was "little substance" to the nurse-surveyor's medical concerns. Because he did not consider the findings to be serious, he saw no reason to ask for HCFA Central Office assistance in evaluating them before arriving at a decision as to whether a "threat" existed. Survey team members told us that (1) they disagreed

with the regional administrator's conclusion and (2) he was not professionally qualified to make judgments on medical issues.

According to the survey team leader, on several occasions following the above decision, they asked members of HCFA regional management (associate regional administrator and branch chief) to intervene on behalf of the 13 residents because they believed the findings indicated a "threat" existed. The managers acknowledge that such requests were received but could not recall whether the matter was discussed with the regional administrator. The regional administrator told us he was unaware of those requests, but added that he probably would not have taken any action because (1) the nurse-surveyor findings were not serious and (2) peer review resources generally were unavailable under the Medicaid program.

HCFA Central Office guidelines to regional offices generally provide that concerns about professional practices by physicians should be referred to peer review organizations or a medical society for investigation. According to a HCFA Central Office official, the peer review organizations are not a readily available resource under the Medicaid program because HCFA's contracts with those organizations currently cover only the Medicare program. The official added, however, that whenever a regional office has a question about medical care in a Medicaid-only facility and requests assistance, HCFA Central Office will make arrangements to provide the necessary expertise. The Central Office would have made assistance available if the regional administrator had requested. The official pointed out that this procedure was followed in August 1987 when HCFA sent a physician to Winfield to investigate allegations about the medical care received by a resident.

The regional administrator said he did not consider the regional survey team's findings on medical services to be serious. But in his July 1987 written response to the OIG Office of Investigation questions, he pointed out that the findings of the nurse-surveyor could have placed HCFA in an untenable position because she was second-guessing both the facility and consulting physicians.

Having nurses screen medical records to identify questionable cases is a common practice in peer review, as is having an independent physician review cases identified through such screening. At a minimum, the regional administrator should have had a physician review the nurse-surveyor's findings on the 13 residents before they were dismissed.

Although the facility medical director commented on the care provided to 6 of the 13 residents, the regional administrator dismissed the allegations concerning the other 7 residents without input from either the facility medical director or an independent physician.

Our chief medical advisor analyzed the nurse-surveyor's findings on the 13 cases, as well as comments of the facility medical director on 6 of the 13 cases. This analysis was not, however, a full evaluation of the issues, which would have required him to review medical records and discuss the cases with attending physicians and appropriate support personnel. In his opinion, there was no clear evidence for any of the 13 residents of any life-threatening matters that mandated intervention by HCFA. The types of issues raised by the nurse-surveyor indicate that quality of care might be improved through a program of peer review of physician practices. Our advisor also pointed out that reports of on-site investigations by a HCFA physician and the Kansas agency that licenses physicians both recommended that Winfield implement such a program.

Actions Taken Since May 1987

Question 5

What actions did HCFA take concerning Winfield's Medicaid eligibility status after the Subcommittee's May 11, 1987, request letter?

Response

Special survey teams established by HCFA Central Office inspected Winfield in late May 1987 and again in July 1988. The May survey disclosed that Winfield did not meet the ICF-MR requirements for participation, and HCFA attempted to terminate the facility's Medicaid provider agreement, effective August 14, 1987. The state requested a hearing, however, and the effective date was postponed pending the outcome of the hearing. The hearing had not been held when a special survey team again inspected the facility in July 1988. This survey disclosed some deficiencies, but HCFA concluded that Winfield complied with the ICF-MR requirements for participation. HCFA subsequently approved the facility's plan for correcting the deficiencies and concurred in the state's decision to issue Winfield a new Medicaid provider agreement, effective August 19, 1988.

HCFA also notified the state, in a letter dated July 7, 1988, that it had determined that Winfield had not held a valid Medicaid provider agreement after HCFA had cancelled the previous agreement, effective February 18. Because of this determination, HCFA also told the state that until Winfield again had a valid provider agreement, HCFA was disallowing any claims for federal matching funds for state payments to Winfield after February 18, 1987. HCFA determined that the amount of federal matching funds claimed by the state from February 19, 1987, through August 18, 1988, is about $15.8 million. The state has appealed HCFA's disallowance to the HHS Departmental Appeals Board.

Scope of Review

To monitor actions concerning Winfield, we (1) analyzed the inspection reports prepared by the 1987 HCFA special survey team, information submitted by the facility operators in response to those findings, and actions taken by HCFA; (2) interviewed selected members of the special survey team, as well as regional office and HCFA Central Office officials who were involved in the decisions made about the team's findings; (3) reviewed correspondence concerning the July 1988 inspection, discussing with regional officials what transpired in the inspection and the decisions made as a result of the findings; and (4) reviewed information about HCFA's July 1988 decision to disallow federal matching funds.

May 1987 Inspection

On May 11, 1987, the HCFA Associate Administrator for Operations, told the director of the Health Standards and Quality Bureau (in HCFA Central Office) to investigate the Winfield case. According to the director, because both we and the HHS OIG were investigating the propriety of the regional office's decisions about the March 1987 reinstatement—which he assumed at the time was valid—he decided that his highest priority should be to determine whether Winfield complied with the ICF-MR requirements for participation. Hence, he formed a special survey team to conduct the full survey the regional office had planned to conduct before June 30, 1987. The team was comprised of three mental retardation professionals (including the team leader), three registered nurses, a dietitian, and a pharmacist. The pharmacist was the sole team member from the Kansas City Regional Office. The team members were some of HCFA's most qualified personnel, said the director; many had previously served on similar special teams.

The team inspected Winfield May 19-22, 1987. At the conclusion of the inspection, the special survey team presented its findings in a teleconference with Health Standards and Quality Bureau officials in Baltimore and regional office officials in Kansas City. The participants concluded

that the facility was not in compliance with requirements for participation because it did not meet active treatment requirements and lacked adequate nursing staff in two of its six units. The special survey team concluded that the staffing shortage constituted an immediate and serious threat to the health and safety of residents in the two units.

First termination notice: As a result of the above decision, the regional office, by letter (dated May 22, 1987) informed the secretary of the Kansas Department of Social And Rehabilitation Services that it would cancel approval of the facility's eligibility to participate in Medicaid, effective May 27, 1987, unless the "threat" conditions were corrected by that date. The notice described the threat conditions as follows:

1. Residents in the units had fragile medical conditions requiring immediate response to emergencies on a 24-hour-a-day-basis, and the facility's registered nurse staffing was inadequate to assure such a response.

2. As a regular practice, facility personnel were performing procedures such as oxygen adjustments, tracheotomy care, respiratory therapy, and suctioning, although these personnel were neither qualified nor licensed to do so and were not directly supervised by qualified licensed staff.

As to the second condition, a nurse-surveyor on the special survey team told us that team members observed unqualified and unlicensed staff carrying out procedures both incorrectly and without following appropriate infection-control techniques.

Neither the nurse staffing nor procedures done by unqualified and unlicensed staff were cited as threat conditions by the Kansas City Regional Office team in the January 26-February 6, 1987, inspection. In the regional office's February 12, 1987, notice to the Kansas Department of Social and Rehabilitation Services, poor infection control practices were among the matters cited under the medical and nursing services area as being of immediate and serious threat. The nurse-surveyor cited no infection control problems in her report on the March 16-20, 1987, reinspection. But notes prepared by the branch chief indicated two instances in which facility staff did not wash their hands after treating one resident and before going on to the next. The May 19-22, 1987, inspection disclosed no deficiencies that HCFA considered to be an immediate and serious threat in the other four areas cited in the regional office's February 12, 1987, letter—that is, dental services, resident neglect, resident abuse, and sanitation.

The Kansas Department of Social and Rehabilitation Services proposed to correct the immediate and serious threat by (1) increasing the number of registered nurses and other licensed nursing staff in the two units and (2) establishing controls to assure that only licensed, qualified staff carried out the procedures discussed earlier. To immediately implement this plan, Kansas officials indicated they intended to do some reassignment of present staff and use a health personnel agency to supplement the present nursing staff until more full-time nurses could be hired.

On May 28, 1987, two members of the special survey team conducted a follow-up visit to determine whether the threat conditions had been corrected. According to the nurse-surveyor, nurse staffing was found to be adequate, and with a few minor exceptions, all procedures were being carried out by licensed, qualified staff and done correctly. The team discussed their findings in a teleconference with Health Standards and Quality Bureau officials in HCFA Central Office and officials in the regional office. This discussion resulted in a conclusion that the threat conditions had been corrected and that the termination scheduled for May 27, 1987, should be rescinded. The officials also agreed, however, that a new termination notice should be issued because the facility was not providing active treatment in accordance with Medicaid regulations.

Second termination notice: In a letter dated June 8, 1987, the regional administrator notified the secretary of the Kansas Department of Social and Rehabilitation Services that because active treatment requirements were not met, HCFA was terminating the facility's Medicaid provider agreement, effective August 14, 1987. The letter stated that HCFA would revisit the facility before the termination to determine whether deficiencies had been corrected and that, if corrected, the termination would be rescinded.[1]

Kansas, by letter dated July 7, 1987, requested a hearing on the decision to terminate. The letter stated that the request would be withdrawn if HCFA rescinded the termination as a result of its findings in the planned follow-up inspection. In a July 29, 1987, letter, Kansas claimed that corrective action taken had returned the facility to compliance and requested that HCFA make the follow-up inspection before August 14, 1987.

[1]Because the region had initially authorized reinstatement only through June 30, 1987, the above letter also extended the facility's approval to participate for the period July 1-Aug.14, 1987.

August 1987 follow-up inspection: The HCFA special survey team conducted the follow-up inspection on August 11-14, 1987. At the conclusion of the inspection, the team discussed its findings in a teleconference with Bureau officials at the HCFA Central Office Health Standards and Quality Bureau and the Kansas City Regional Office. There were no immediate and serious threat conditions, the conferees agreed, but the facility still was not providing active treatment in accordance with Medicaid requirements. Therefore, the termination would not be rescinded.

In an August 14, 1987, letter, the regional administrator notified the secretary of the Kansas Department of Social and Rehabilitation Services of HCFA's decision not to rescind the termination. The letter stated that the provider agreement would remain in effect pending the outcome of the hearing requested by the state. Also, it said, federal financial participation would continue until the hearing decision unless, in the intervening period, the facility was found to have conditions posing an immediate and serious threat to resident health and safety.[2]

July 1988 Inspection

A hearing had not yet been held on the above appeal when the state, in a June 23, 1988, letter to the HCFA Kansas City Regional Office, asserted that Winfield was in compliance with the ICF-MR requirements for participation and requested that HCFA inspect the facility to assess compliance. An 11-member federal survey team formed by HCFA Central Office inspected Winfield July 19-22, 1988.

At the conclusion of the inspection, the federal team discussed its findings in a conference call with the director of the Office of Survey and Certification, Health Standards and Quality Bureau (in HCFA Central Office), and Kansas City Regional Office officials. The conferees agreed that although there were deficiencies, the facility adequately complied with the ICF-MR requirements for participation, including active treatment. On July 28, 1988, the regional office sent the state a list of deficiencies identified in the inspection. On August 19, 1988, the state submitted a plan of correction to the regional office that it found acceptable.

HCFA gave the state survey agency, which had monitored the federal inspection, a list of the deficiencies reported to the facility and the facility's plan of correction. The state survey agency did not do its own

[2]Section 1910(c) of the Social Security Act provides that, in situations other than immediate and serious threat, providers are entitled to a hearing before imposition of a federal termination.

inspection but accepted HCFA's findings and the facility's plan of correction. On September 15, 1988, the state survey agency certified the facility for the period August 19, 1988 through July 31, 1989.[3] The state Medicaid agency informed HCFA it would issue a Medicaid provider agreement for the period covered by the certification. HCFA officials concurred in the state's decision and considers Winfield to have a valid provider agreement as of August 19, 1988.

HCFA Initiated Disallowance Action for Earlier Period

In a May 20, 1988, letter, the HCFA regional administrator informed the secretary that HCFA could find no evidence that a valid Medicaid provider agreement had been issued to Winfield after the prior agreement had been cancelled effective February 18, 1987. His letter referred to the regional office's March 25, 1987, letter to the state, authorizing the state to issue Winfield a new provider agreement for March 21 through June 30, 1987.[4] The regional administrator further stated that the subsequent federal surveys and the termination the state was appealing assumed that the state had issued a new provider agreement to Winfield.[5] The letter requested the state to provide any explanation and evidence it had to refute HCFA's understanding that since February 18, 1987, Winfield had been without a valid Medicaid provider agreement.

In a June 22, 1988, letter to the regional administrator, the state requested additional time to respond to the above inquiry. It was expecting a draft audit report from the OIG dealing with the subject, the state added, and it wanted to review the report before responding to the regional administrator's request.[6]

On July 7, 1988, however, at the direction of the HCFA Central Office the regional administrator notified the state of the following. Because the state had provided no evidence that Winfield had a valid provider agreement, he had determined that the state since February 18, 1987, had been improperly claiming reimbursement on behalf of Winfield. The determination was made because of the failure of the state to execute a

[3]Guidelines issued by HCFA Central Office on Jan. 26, 1988, provide that state survey agencies can make certification decisions based on federal surveys in certain circumstances.

[4]On Dec. 3, 1987, the associate regional administrator called a state Medicaid agency official, who told him that no new provider agreement had been issued because the agency had not terminated the earlier agreement, issued for the period Oct. 1, 1986, through July 31, 1987.

[5]This refers to the HCFA Central Office May 1987 inspection and August 1987 follow-up inspection, which resulted in HCFA's decision to terminate participation, effective Aug. 14, 1987.

[6]The draft report was transmitted to the state by OIG, Office of Audit, on July 22, 1988.

new provider agreement with Winfield after the regional office had terminated the previous agreement on February 18, 1987. Facility certification by the state survey agency and a validly executed provider agreement are prerequisites for claiming federal reimbursement, the letter said.

HCFA determined that the amount of federal matching funds claimed by the state for payments to Winfield for the period February 19, 1987-August 18, 1988, was about $15.8 million. In August 1988, the state appealed HCFA's decision to the HHS Departmental Appeals Board. As of April 1989, the board had not made a decision.

In October 1988, the state petitioned the HHS Office of Hearings and Appeals to withdraw the state's request for an evidentiary hearing on HCFA's earlier decision to terminate Winfield's provider agreement effective August 14, 1987. The HHS Office of Hearings and Appeals agreed to dismiss the case without prejudice to the state's appeal of HCFA's disallowance action.

Investigation of Unexpected Deaths

Question 6

First, was the Kansas City Regional Office's decision, allowing the state to investigate an April 1987 unexpected death of a Winfield resident consistent with agency policies and procedures? Second, did the regional office independently evaluate the state's report and conclusions? And third, were there other unexpected deaths at Winfield or other facilities in the Kansas City region in the last 3 years and, if so, were these deaths appropriately investigated?

Response

The regional office's resolution of the complaint about the April 1987 death was in accordance with HCFA policies and procedures. In analyzing reports on the death prepared by Winfield physicians and an independent physician, a regional office staff member suspected that a Winfield practice, unrelated to the allegation in the complaint, may have contributed to the resident's death. Although the regional office did not investigate these suspicions and should have, our analysis indicates the suspicions probably were not valid. Our tests of other complaints on

ICFs-MR received by the regional office over the last 3 years identified only one other resident death, in August 1987, which was appropriately investigated by HCFA.

Scope of Review

We reviewed (1) HCFA Central Office and Kansas City Regional Office complaint investigation policies and procedures and (2) the regional office's complaint logs and individual facility files to identify complaints relating to resident's deaths. We interviewed (1) regional staff about complaint-handling procedures and (2) regional personnel assigned to the investigation of or decision making relating to these allegations. Our chief medical advisor analyzed the information we had gathered on the allegations. To assess the reasonableness of the nurse-surveyor's theory concerning factors contributing to the one resident's death, he obtained the views of other physicians.

Background

Within 5 days of a complaint made directly to a regional office about a Medicaid-only facility indicating that immediate and serious threat to resident health and safety is possible, the office must assume full responsibility for investigation and conduct a federal on-site survey. This is specified by HCFA Central Office guidelines. Regional offices are to refer all other complaints to the state survey agencies for investigation. A regional office must notify the complainant of the referral and then monitor the progress of the investigation. According to an official in the Kansas City Regional Office, the regional office requires states to report to the office the results of investigations on all referred complaints. According to a regional official, the regional office reviews the investigation reports submitted by the states. If issues appear to be unresolved, the office may either request the state survey agency to do additional investigation or use regional office personnel to do so.

Most complaints against facilities are made directly to the state survey agencies, according to regional office officials. HCFA Central Office guidelines instruct the survey agencies to evaluate each complaint to establish a priority for investigation.[7] In the investigation, the survey agency is to establish whether (1) the complaint is valid and (2) there was any noncompliance with the applicable requirements for participation. Where such noncompliance is found, the survey agency is to issue a statement of deficiencies to the facility, obtain a plan of correction, and revisit the facility as necessary to verify corrective action.

[7]Allegations involving possible immediate and serious threat to resident health and safety must be investigated within 2 working days. States can follow their normal priority system on other types of complaints.

In a 1982 memorandum, the Kansas City Regional Office instructed state survey agencies to transmit results of investigations on all complaints against Medicaid-only facilities when the allegations are substantiated or the facility is cited for noncompliance or both. The regional office maintains a log listing all complaints received directly, as well as those complaints forwarded by the states. The log is used both to assure that action is taken on each complaint and serve as a source for direct federal surveys.

Findings

April 1987 Death: On April 13, 1987, a regional employee received a telephone call alleging that the April 7, 1987, death of a resident was due to an allergic reaction to a drug and that staff physicians had not appropriately monitored the resident. According to the associate regional administrator, he did not consider this to be an immediate and serious threat situation requiring investigation by regional staff, because it was an isolated instance rather than a widespread problem. This conclusion was reasonable considering HCFA central office guidelines for determining whether threat conditions are present.[8]

He called the Kansas Department of Social and Rehabilitation Services to learn whether the department had any information concerning the death. The facility had begun an internal investigation, said a department official, and an outside physician also would make an independent investigation. Reports on both investigations would be provided to the regional office. According to the associate regional administrator, learning of the investigations, he decided to postpone referring the complaint to the state survey agency until he had received and analyzed the investigation reports. We believe this decision was reasonable because it would have provided him with additional information to evaluate the credibility of the complaint.

The regional office received the report of the internal investigation on April 16, 1987, and the independent one on May 6, 1987. According to the associate regional administrator, neither report indicated that a drug reaction or any improper management by physicians was involved in the resident's death.[9] Therefore, he concluded that (1) the allegation was unfounded and (2) referral of the complaint to the state survey agency

[8]The referenced guidelines cite various criteria including widespread patterns of poor patient care and drug or pharmaceutical hazards, such as failure to monitor drugs.

[9]The internal investigation report included as an attachment the certificate of death prepared by a physician at the local community hospital. The cause of death reported was respiratory arrest due to aspiration pneumonia.

for investigation was unnecessary. Because information from independent sources indicated that the allegation was unfounded, we believe that this decision was appropriate.

In reviewing the facility's internal investigation report, the nurse-surveyor (who participated in the region's inspections at Winfield) theorized that a procedure used by facility staff may have contributed to the death. The report indicated the following:

1. Winfield staff had placed the resident on her right side, in a postural drainage position,[10] before the medical crisis.

2. By the time facility staff noted the crisis, the resident had vomited.

3. The stated cause of death was aspiration pneumonia (which means that foreign matter had entered the lungs).

4. The resident required tube feeding.

Because tube-fed patients are prone to aspiration, the nurse-surveyor said, good nursing practice dictates that they never be placed in a postural drainage position. Therefore, the positioning used for the resident may have contributed to the aspiration.

On about April 16, 1987, the nurse said, she discussed her suspicions with the regional office branch chief, who supervises the regional survey team. It was agreed that the nurse would investigate further when the survey team returned to Winfield in June. However, on about May 11, 1987, on learning from an unidentified source at Winfield that other tube-fed residents might also be subject to that kind of positioning, the nurse and another member of the survey team recommended to the branch chief and the associate regional administrator that the regional office investigate the matter immediately.

According to the associate regional administrator, he took no action at that time because a special survey team selected by HCFA Central Office was planning to inspect the facility the following week. In his opinion, if residents were being inappropriately positioned in their beds, the special survey team would identify and report the problem, requiring the facility to take corrective action. He did not, however, discuss the nurse's

[10]Used to drain secretions from the lungs.

suspicions with the special team or request that it investigate the matter. We believe that the associate regional administrator should have brought the problem to the team's attention to ensure that it was evaluated and resolved.

Although the problem was not resolved by the regional office, the nurse's theory does not appear to be valid. According to information published by a manufacturer of tube-feeding kits, which the nurse gave us, aspiration pneumonia is a potential complication. As a preventive measure, the manufacturer recommends that the patient's head be elevated at least 30 degrees during feeding and for approximately 1 hour after feeding. The literature did not indicate, however, that any other restrictions on patient positioning were required. According to the death report on which the nurse formed her theory, the resident had last been tube-fed about 2 hours before the medical crisis.

Our chief medical advisor reviewed information on the death and the nurse's theory and consulted with other physicians, including a specialist in pulmonary medicine and the independent physician who investigated the death. In our advisor's opinion and the opinion of the physicians he consulted, it is inadvisable to place any patient in a postural drainage position immediately after feeding, regardless of the feeding route. In the Winfield case, however, sufficient time had elapsed before the patient was placed in this position. Therefore, according to both the manufacturer's literature and the above medical opinions, the nurse's concerns would not appear to be valid.

Other Death Complaints: In the 3-year period, January 1985-December 1987, the Kansas City Regional Office received 31 complaints (or reports of investigation of complaints prepared by state survey agencies) for a total of 17 ICFs-MR in the region. Because the office's complaint log does not show the nature of the complaints, we were unable to readily determine if any involved resident deaths. Therefore, to establish the nature of the complaints, we searched through files for the individual facilities, a time-consuming process. We initially looked for ICFs-MR for which complaints were logged in January 1986 or later. Thus, 10 of the 17 facilities, with 15 of the 31 complaints, were selected. In searching the files on those 10 facilities, we reviewed all complaints, regardless of age. The complaints covered a variety of issues, including staff hygiene, inadequate staffing, administration of medications, resident grooming and clothing, facility sanitation, and both staff-resident and resident-resident abuse. This review identified only one other complaint about a resident death, an August 1987 death at Winfield.

According to regional officials and regional personnel who process complaints, they could recall no complaints about deaths at any ICF-MR other than Winfield. Considering the results of our research on complaints received over 2 years and the comments by agency personnel, we concluded that a search for complaints at the other seven facilities identified would not be productive.

The complaint about a death at Winfield was received in a telephone call to a regional employee on August 16, 1987. The caller alleged that the facility was at fault in the August 14, 1987, death of a resident because (1) a staff physician did not recognize that the resident's medical condition required transfer to an acute care hospital, (2) the resident was not closely monitored, and (3) neither a registered nurse nor a physician was readily available to assist when staff noted the resident was in cardiac arrest. This allegation was also brought to the attention of HCFA Central Office officials, who decided to send an investigative team. The team, which included a HCFA physician, conducted an investigation at the facility on August 25 and 26, 1987. At the request of the facility operator, the team also reviewed the circumstances surrounding the death of another resident on August 23, 1987. The team's reports indicate that the allegations generally were unfounded, although there may have been deficiencies in the medical management of the residents.

Role of Central Office

Question 7

What role did HCFA Central Office play in the Winfield case and, if none, should it have played a more active role?

Response

The HCFA Health Standards and Quality Bureau was slow to investigate allegations concerning the reinstatement of Winfield. It investigated only after being directed to do so by HCFA's Associate Administrator for Operations in May 1987, about 1 month after receiving the allegations. HCFA Central Office officials have played an active role in the Winfield case since that time, however, and their role continued at the time we ended our field work in November 1988. Actions taken at the direction of those officials included (1) inspections by a special survey team of the facility, (2) investigation of allegations concerning the death of a Winfield resident, and (3) issuance of a notice to the state of Kansas that HCFA was disallowing state claims for federal matching funds after the

termination of the Medicaid provider agreement. HCFA Central Office also issued additional guidelines to the regional offices on federal terminations and reinstatements.

Scope of Review

To assess the role of HCFA Central Office, we (1) determined the actions taken by Central Office officials and analyzed the outcomes of those actions and (2) discussed the actions with the director, Health Standards and Quality Bureau, and the director of the Bureau's Office of Survey and Certification.

Findings

The Health Standards and Quality Bureau, which has primary responsibility for the survey and certification program, assumed an active role in the Winfield case in May 1987. Bureau officials acknowledged that they had seen a memorandum prepared by a bureau staff member in early April 1987, with allegations made by an employee in HCFA's Kansas City Regional Office about the decision of regional officials to reinstate Winfield, effective March 21, 1987. The memorandum included (1) a chronology of events following the February 1987 termination, (2) assertions that residents were subject to immediate and serious threat conditions, and (3) rumors of a "political deal." The officials took no action initially, they said, concluding that the allegations were made by a disgruntled employee who disagreed with a management decision. We believe the decision to disregard the allegations was inappropriate and that the bureau should have immediately investigated the allegations because they expressed concerns about threats to resident health and safety.

Action was initiated by bureau officials on May 11, 1987, when HCFA's Associate Administrator for Operations told them to look into the case. From May 1987 through August 1988, HCFA Central Office was responsible for, or took part in, the following actions concerning the Winfield case:

- In May and August 1987, a special survey team established by the bureau inspected Winfield to assess compliance with ICF-MR requirements for participation. Because of these inspections, HCFA initiated action to terminate Winfield from the Medicaid program a second time.
- In a July 1, 1987, memorandum, the bureau notified the HCFA's regional offices of the agency's policy on continuation of matching funds for 30 days following a federal termination action.
- In August 1987, when a complainant alleged that Winfield staff were at fault in a resident's death, the bureau sent a team to the facility to investigate the circumstances.

- In a January 26, 1988, memorandum to the regional offices, the Associate Administrator for Operations clarified the requirements for reinstatement of a federally terminated Medicaid provider agreement.
- In July 1988, the bureau again sent a special survey team to inspect the Winfield facility and determine whether it was in compliance with federal requirements for participation.
- In July 1988, the Associate Administrator for Operations directed the Kansas City regional administrator to disallow state claims for federal matching funding for payments it made to Winfield after February 18, 1987.

Inspector General's Involvement

Question 8

Should the HHS OIG have been involved in the Winfield case?

Response

The OIG Office of Investigations, beginning about May 1, 1987, conducted an investigation of various allegations concerning the HCFA Kansas City Regional Office's decision to reinstate Winfield. The matters investigated included whether the regional administrator (1) ignored certain findings of the regional survey team, (2) failed to follow federal regulations, or (3) was influenced by political pressure in making the reinstatement decision. The resulting report of investigation was reviewed by the HHS Office of General Counsel, which issued a legal opinion about the regional office's compliance with statutes, federal regulations, and HCFA guidelines and instructions. Subsequent to the above actions, the OIG Office of Audit reviewed the state's claims for federal matching funds for payments to Winfield and issued a report dated February 24, 1989. It recommended that the approximately $15.8 million in federal funds provided to Winfield for services rendered on behalf of Medicaid residents for the period February 19, 1987, through August 18, 1988, be recovered from the state. This action was recommended because Winfield did not have a valid provider agreement during that period.

The OIG provided us with copies of the above documents for review and consideration. At its direction, however, the contents of those documents cannot be disclosed at this time.

Appropriate Use of Look-Behind Authority for Other Facilities

Question 9

Is the Kansas City Regional Office conducting look-behind surveys in appropriate situations in other states within the region?

Response

According to officials in the Kansas City Regional Office, the office lacks the staff resources needed to conduct a look-behind survey in every case where the states' certification decisions appear questionable. Therefore, regional officials have to exercise judgment as to which facilities receive such a look-behind survey. From February 1985, when the regional office formed a survey team for ICF-MR reviews, through April 1987, the office conducted 34 surveys of ICFs-MR and found compliance problems significant enough to initiate adverse action for 22 (65 percent) of the cases.

Scope of Review

To answer this question we (1) reviewed Medicaid statutes and regulations, as well as HCFA guidelines, (2) interviewed regional staff about regional procedures for identifying and selecting facilities for direct federal surveys, and (3) analyzed the results of ICF-MR surveys conducted by the regional office. For cases in which the office concluded that the facilities did not comply with ICF-MR requirements for participation and thus were ineligible for certification, we determined whether the office complied with look-behind statutes and regulations and HCFA Central Office and regional office policies and procedures. In doing so, we analyzed the regional office's decisions and actions on the cases and interviewed regional and HCFA Central Office officials about those decisions.

Background

HCFA Central Office guidelines specify procedures to be followed by HCFA regional offices in monitoring the performance of state survey agencies (which carry out the survey and certification program), including desk review of certification decisions, and direct federal surveys of selected facilities.

HCFA regional offices do a desk review of facility certification documents submitted by the state survey agencies. The documents include a list of deficiencies identified in the survey, the facility's plan for correcting

them and the survey agency's certification decision. HCFA Central Office guidelines provide that the desk review should determine whether (1) the state survey agency's certification decision is consistent with the findings and (2) the facility plan of correction is realistic and the corrections will be completed in a reasonable time.

When the review indicates that the certification decision is questionable, regional officials have statutory authority (section 1902(a)(33)(B) of the Social Security Act) to make an independent and binding determination of the eligibility of the facility.

Under the "new look-behind authority," granted in 1980 amendments to the Social Security Act, facilities generally are entitled to an HHS hearing on a termination before the action is carried out. Termination can be carried out before such a hearing, however, under certain conditions. The Secretary must make a written determination that continuation of participation constitutes an immediate and serious threat to the health and safety of patients—conditions for which HCFA Central Office has provided criteria. Also, the Secretary must certify the facility was notified of its deficiencies and failed to correct them.

HCFA Central Office guidelines issued to regions in December 1985 specify that facilities with immediate and serious threat conditions will be given 5 days after notification to correct the deficiencies or their provider agreement will be terminated. When HCFA finds that a facility does not comply with the ICF-MR requirements for participation, but no threat conditions are present, the guidelines provide that the facility can be given up to 90 days to achieve compliance before termination. Should the facility then appeal this action, termination is deferred pending the outcome of the hearing.

HCFA Central Office provides the regional offices with guidelines for selecting various types of providers for direct federal survey. For ICFs-MR during fiscal years 1985-87 (Oct. 1984-Sept. 1987), the guidelines generally required that a certain percentage of the facilities selected be in each of the following three bed-size groups—1 to 15 beds, 16 to 299 beds, and 300 beds or more. This was supplemented by a regional policy that those selected provide some coverage in all four states in the region (Iowa, Kansas, Missouri, and Nebraska).

Findings

According to officials of the Kansas City Regional Office, resource limitations and other factors preclude the regional office from conducting look-behind surveys in every case in which it may be appropriate.

As part of the desk review process, personnel prepare reports on cases in which the state certification is questionable and a look-behind survey may be appropriate. For example, from October 1986 to April 1987, seven ICFs-MR were recommended for direct federal surveys. These recommendations primarily resulted from survey agency decisions to recertify ICFs-MR despite questionable compliance with active treatment requirements. During that same period, the regional office did nine ICF-MR surveys, including one of the seven recommended facilities (Winfield). As discussed below, another two of the seven facilities recommended were scheduled for survey, but those surveys were not done.

According to the regional branch chief (who decides which facilities will be surveyed and schedules them), she considers the desk review recommendations in the overall selection process. Although she would schedule for survey recommended cases that may include risk to resident health and safety, she said the region is not able to do surveys on all recommended cases because of (1) limited survey staff and (2) the need to comply with HCFA Central Office and regional office selection criteria for surveys.

The regional office has one special survey team to monitor the state survey agencies' compliance enforcement activities for the approximately 80 ICFs-MR in the region. According to the branch chief, one survey team is probably sufficient for this purpose, but questionable certification decisions by survey agencies can be investigated only on a selective basis. Those survey cases for which the team finds noncompliance place additional limits on the survey workload because of the need to do follow-up inspections. For example, the branch chief had to cancel a survey of one of the seven recommended facilities because the team had to do a follow-up inspection at Winfield in February 1987. During 1987, the survey workload was further limited by the regional administrator's decision to suspend ICF-MR survey activity in May because of allegations surrounding the Winfield case. The ICF-MR survey program was not resumed until November 1987. Another of the seven recommended facilities—a state-operated facility in Iowa—had been scheduled for survey in May or June 1987, but it was not done because of the suspension of survey activity.

From February 1985, when the special ICF-MR survey team was established, until May 1987, the team conducted 34 surveys. According to the regional official who made the selections, most cases were chosen because the regional office's desk review process raised questions about

the state survey agency's certification decision, particularly concerning compliance with active treatment requirements.

As shown in table I.1, facilities were surveyed in all four states, and the region initiated termination action following 22 of the 34 surveys. In three of the cases, the facilities either were involuntarily terminated or voluntarily chose to discontinue participation.

Table I.1: ICF-MR Surveys Conducted by HCFA's Kansas City Regional Office (Feb. 1985-May 1987)

Action	State				
	Iowa	Kansas	Missouri	Nebraska	Total
Kansas City Regional Office surveys	5	11	11	7	**34**[a]
Actions taken based on findings:					
No actions (acceptable compliance)	2	2	5	2	**11**
Termination initiated	3	9	5	5	**22**
Unacceptable compliance but no termination initiated	0	0	1	0	**1**
Disposition of terminations:[a]					
Rescinded because of facility corrective action	2	8	5	4	**19**
Acted upon	1	1	0	1	**3**

[a]Status as of June 1988

In one case, the regional office found a facility's compliance to be unacceptable, but elected not to initiate termination, as the table shows. In May 1987, the regional office concluded that the surveyed facility did not comply with the active treatment requirements. No conditions, however, posed an immediate and serious threat to residents. The Associate Regional Administrator, on the basis of his interpretation of a May 1987 HCFA Central Office guideline, decided to not issue a termination notice until the regional office had obtained and evaluated the facility's plan for correcting the deficiencies. The regional office subsequently found the plan to be acceptable and decided it was unnecessary to issue the notice.

The May 1987 guideline did not provide that the regional office could delay issuance of the notice, but did provide that the office need not terminate an agreement if the plan of correction is found acceptable. Therefore, the office initially should have issued a termination notice that the office could have rescinded after concluding that the plan of correction was acceptable. Since the facility's plan of correction was accepted by the regional office, however, failure to issue the termination notice had no impact on the final outcome.

In 7 of the 22 termination notices initiated, regional office officials concluded that the facility had deficiencies that constituted an immediate and serious threat to resident health and safety. In six of the seven cases, some form of resident abuse (staff-resident, resident-resident, self-abuse) was involved. In the seventh case, the facility did not meet fire safety requirements. The regional office generally allowed 5 days to correct the deficiencies;[11] in five of the seven cases, the office concluded after follow-up that adequate corrective action was taken. In the other two cases (Hy-Vue Center and Winfield), the facilities did not adequately correct the deficiencies within 5 days and the regional office terminated the provider agreement. The Kansas City Regional Office continued federal matching funds for 30 days for both of those cases (see ch.2).[12] Of the two involuntary termination cases, only Winfield sought reinstatement. As discussed in chapter 3, the regional office did not comply with laws, regulations, and guidelines in acting on Winfield's reinstatement request.

In 15 cases, termination was initiated because the facilities did not adequately comply with active treatment requirements. In 14 of the 15 cases, the regional office rescinded the termination action because of corrective action by the facilities. In the other case, the facility voluntarily agreed to withdraw from the Medicaid program while the termination was under appeal.

[11]The regional office, after the Apr. 1985 inspection of Winfield, gave facility operators about 20 days to resolve abuse problems. HCFA's Central Office guidelines limiting the period to 5 days were issued in Dec. 1985.

[12]For the 30-day period, the federal share of payments to Hy-Vue Center was about $500 and to Winfield, about $650,000.

Comments From the Department of Health and Human Services

DEPARTMENT OF HEALTH & HUMAN SERVICES — Office of Inspector General

Washington, D.C. 20201

AUG 28 1989

Mr. Lawrence H. Thompson
Assistant Comptroller General
United States General
Accounting Office
Washington, D.C. 20548

Dear Mr. Thompson:

Enclosed are the Department's comments on your draft report, "Medicaid: Improvements Needed in Federal Oversight of Facilities for the Retarded." The comments represent the tentative position of the Department and are subject to reevaluation when the final version of this report is received.

The Department appreciates the opportunity to comment on this draft report before its publication.

Sincerely yours,

Richard P. Kusserow
Inspector General

Enclosure

Comments of the Department of Health and Human Services on the General Accounting Office Draft Report, "Improvements Needed in Federal Oversight of Facilities for the Retarded"

Overview

The Health Care Financing Administration's (HCFA's) Kansas City Regional Office inspected Winfield (Kansas) State Hospital and Training Center for the mentally retarded from January 26 to February 6, 1987, and identified deficiencies in five areas that posed an immediate and serious threat to the health and safety of Winfield residents. When a February 16-18, 1987, follow-up inspection showed that deficiencies in four of the five areas still posed an immediate and serious threat, the regional office terminated the Medicaid provider agreement effective February 19, 1987.

According to GAO, on March 25, 1987, the Kansas City Regional Administrator authorized Winfield's reinstatement when, in his opinion, deficiencies at the facility no longer posed an immediate and serious threat to the health and safety of residents. In GAO's opinion, however, the reinstatement was not proper because Medicaid requirements had not been met. Federal funding for Winfield operations continued uninterrupted until July 1988 when the regional office, at the direction of HCFA's central office, discontinued Federal funding after it learned that Winfield had not been properly reinstated. Winfield was reinstated effective August 19, 1988.

HCFA subsequently initiated action to recover approximately $15.8 million in Federal funds for services provided to Winfield residents during the period February 19, 1987, when the regional office first terminated the provider agreement with Winfield, and August 18, 1988, when the hospital was reinstated. GAO supports the action to recover these funds, with the exception that those funds provided during the first 30 days after the termination should be allowed, assuming Winfield had been making reasonable efforts to relocate patients, because the Congress intended that funding be continued for some reasonable time following Federal termination of a Medicaid provider agreement to facilitate relocation of residents.

HCFA issued two disallowances due to the lack of a valid provider agreement for Winfield State Hospital and Training Center. The first, file number KS-88-003 MAP, issued July 7, 1988, disallowed $12,578,811 in Federal financial participation (FFP) for payments to Winfield for the period February 19, 1987 through April 30, 1988. The second, file number KS-89-001-MAP, issued January 30, 1989, disallowed $3,186,255 FFP for payments to Winfield for the period May 1, 1988 through August 18, 1988. The total amount disallowed is $15,765,066 FFP. Kansas has appealed both disallowances to the Departmental Appeals Board (the Board).

GAO Recommendation

That the HHS Secretary issue a regulation that authorizes State claims for Federal matching funds for 30 days (or some other reasonable period) after the date on which the Secretary terminates a Medicaid provider agreement with a facility as long as the facility is making reasonable efforts to relocate residents.

Department Comment

We nonconcur with GAO's recommendation that FFP should continue to be available, in the case of a Federal termination under section 1910(c) of the Social Security Act (the Act), (section 1910(c) was redesignated as section 1910(b) by section 4212(e)(3)(c) of OBRA-87) for 30 days while the State relocates patients from the terminated facility. (As noted in the report, the existing regulation providing a 30-day continuation of FFP to relocate patients from terminated facilities applies to State terminations only.)

We believe instead that the policy of the July 1, 1987, and the January 26, 1988 memorandums to all HCFA Regional Administrators should continue to be followed. (These memorandums were discussed in the GAO report.) Typically, Federal surveys are performed on a sample basis to validate State surveys or investigate complaints. If the facility's participation is cancelled as a result of a Federal survey, there is an indication that the State survey agency was deficient in applying the requirements for certification in its prior surveys. Further, if the State survey agency was not actually deficient in its prior surveys, the denial of Federal funds during a period of relocating patients will be additional incentive to the survey agency to use all the remedies at its disposal short of termination for multiple deficiencies. Appropriate remedies include a certification for less than 12 months or with an automatic cancellation date, or denial of payment for new admissions pending correction of deficiencies.

GAO Recommendation

When payments to a terminated Medicaid provider can be restarted based on an oral order, there is potential for inappropriate payments to occur. We recommend therefore, that the HHS Secretary issue regulations implementing section 1910(c) of the Social Security Act, and strengthen internal controls over the approval of Federal Medicaid payments, by requiring written authorization from a designated HCFA official to start or stop payments and written documentation that a valid provider agreement has been established.

Page 3

Department Comment

We concur with GAO's recommendation that the Department issue regulations implementing section 1910(b) of the Act. The need for such regulations is illustrated by Board decision number 920, dated November 23, 1987 (not discussed by the GAO). Because of the lack of regulations, the Board was forced to rely solely on section 1910(b) in deciding that FFP is available in payments to a dual participating Medicare/Medicaid skilled nursing facility (SNF) for which HCFA has denied a provider agreement based on the survey and recommendation of the State survey agency. The decision that FFP must continue in an initial HCFA decision of noncompliance, as well as in a look-behind cancellation under section 1910(b), is not consistent with long-standing policy to deny FFP on the effective date of the Medicare termination of an SNF provider.

We also concur with the recommendation that internal controls over approval of Federal Medicaid payments could be strengthened "by requiring written authorization from a designated HCFA official to start or stop payments and written documentation that a valid provider agreement has been established." The procedures for written authorization from a designated HCFA official to start or stop payments are already established in the Regional Office Manual (ROM), Standards and Certification, HCFA-Pub. 23-4, Exhibit No. 4-151, Sample Memorandum Disallowing Claims for Federal Payments (Used in Look-Behind Disapprovals) and ROM Section 4235, Disallowance of FFP to a State Because the State Fails to Follow Correct Certification Procedures for Medicaid Providers.

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