

IN THE STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA HEALTH CARE ASSOCIATION,
INC., a Florida Corporation not for profit;
and
FLORIDA ASSOCIATION OF HOMES
FOR THE AGING,
a Florida corporation not for profit

Petitioners,

v.

Case No. _____

STATE OF FLORIDA, AGENCY FOR HEALTH
CARE ADMINISTRATION,

Respondent.

_____ /

PETITION TO CHALLENGE PROPOSED RULE

Petitioners Florida Health Care Association, Inc. (FHCA) and Florida Association of Homes for the Aging, Inc. (FAHA) bring this Petition to challenge a proposed rule of the State of Florida, Agency for Health Care Administration (AHCA), under Fla. Stat. § 120.56(1) and (2), and say:

1. This Petition challenges AHCA's proposed rule amending Rule 59G-6.010, Fla. Adm. Code, entitled "Payment Methodology for Nursing Home Services." This proposed rule reduces reimbursement for skilled nursing facility services under the State Medicaid Program.

2. The Division of Administrative Hearings has exclusive jurisdiction under Fla. Stat. § 120.56(1) and (2).

3. Petitioner FHCA is a Florida not-for-profit corporation that represents approximately 530 member Florida skilled nursing facilities with approximately 65,000 beds.

These facilities are licensed and regulated by AHCA under Fla. Stat. Ch. 400 Part II. FHCA's members receive reimbursement from the State Medicaid Program for long term care services rendered to eligible persons, under the provisions of Fla. Stat. Ch. 409, and the subject rule. For purposes of this action, FHCA's address is that of undersigned counsel.

4. Petitioner FAHA is a Florida not for profit corporation that represents approximately 100 member Florida skilled nursing facilities with approximately 10,000 beds. These facilities are licensed and regulated by AHCA under Fla. Stat. Ch. 400 Part II. FAHA's members receive reimbursement from the State Medicaid Program for long term care services rendered to eligible persons under the provisions of Fla. Stat. Ch. 409 and the subject rule. For purposes of this action, FAHA's address is that of undersigned counsel.

5. Respondent AHCA is the state agency responsible for administering the Medicaid Program under Fla. Stat. Ch. 409. The Medicaid Program is funded by federal and state matching funds to provide health care to eligible persons based on medical and financial need. Long term care in skilled nursing facilities is a mandatory component of the Medicaid program. AHCA is also the state agency responsible for licensing and regulating skilled nursing facilities under Fla. Stat. Ch. 400 Part II. AHCA's duties as a regulatory agency include enforcing requirements for levels of staffing to assure such facilities meet quality of care standards. AHCA's address is 2727 Mahan Drive, MS#3, Tallahassee, FL 32308.

AHCA'S PROPOSED RULE

6. On December 26, 2003, AHCA published the two notices described below in the Florida Administrative Weekly (FAW), announcing proposed changes in Rule 59G-6.010:

(a) AHCA's first notice announced the proposed rule and describes that it would reduce Medicaid rates for long-term care facilities "by a factor effecting the elimination of price

level increases over the December 31, 2003, effective rates,” and that “an adjustment factor will be applied... to effect the elimination of price level increases over the December 31, 2003 rates.” The notice states, as the “full text” of the proposed rule, that Version XXVI of the Long Term Care Reimbursement Plan is replaced with Version XXVII of this Plan, and gives the name and title of the AHCA representative from whom copies of the revised Plan Version XXVII may be obtained. This notice was published at 29 FAW No. 52 p. 5082 (Dec. 26, 2003). (Copy at Exhibit 1).

(b) AHCA’s second notice contains a similar description of the proposed rule, and cites as “justification” that the payment for Medicaid compensable services on behalf of Medicaid eligible persons is “subject to the availability of moneys and any limitations of directions provided in the General Appropriation Act or Chapter 216, Laws of Florida [sic].” This notice was published at 29 FAW No. 52 p. 5217 (December 26, 2003). (Copy at Exhibit 2).

7. Neither of these notices contained the full text of the proposed rule. The full text is found in the Revised Plan Version XXVII, which is itself a “rule,” as defined in Fla. Stat. § 120.52(15). However, the text of this Revised Plan was never published, and was not available to Petitioners or the public until 18 days after the notices, on January 13, 2004. The Revised Plan contains, as the amendment, a new paragraph IV(N) on page 36, which describes a formula for an adjustment factor to be applied to skilled nursing facility per diem rates, but does not state the actual dollar amount of the decrease. (Copy at Exhibit 3).

8. Likewise, neither notice contained a justification for the proposed rule. For example, neither notice stated that funds are actually not available.

9. Ordinarily AHCA adjusts the Medicaid reimbursement to skilled nursing facilities annually on January 1 of the year, to assure that increased costs imposed by inflation and other

increased costs of doing business are reimbursed. The effect of this proposed rule is to rollback the 2004 Medicaid reimbursement rates for nursing home services to 2003 rates, to take effect prospectively from the date the proposed rule amendment is adopted.

10. The rates paid in 2003 were inadequate for many facilities to meet costs even in that year. The proposed rate rollback to 2003 rates will deny even more facilities funding they need to meet the increased costs in 2004, arising from inflation and from increased staffing requirements imposed by law under Fla. Stat. § 400.23(3)(a), which are intended to raise standards for quality of care for all providers.

11. As a result, some facilities may have to shut down, and others may need to seek bankruptcy protection. Still other facilities, in order to financially survive and meet increased costs, will have to reduce Medicaid resident admissions, or reallocate extra cost burdens to non-Medicaid residents, or some combination of these. There will be lower access to nursing home facilities for Medicaid recipients than for other potential residents, with waiting lists for scarce bed space. The rate rollback will substantially and detrimentally affect the providers, as well as the residents or potential residents of such facilities, and their families/guardians.

12. The proposed rule will also arbitrarily affect different facilities very differently, depending solely upon the cost reporting period, as it does not allow consideration of cost increases reported after December 31, 2003, but does allow consideration if cost reports were filed prior to that date.

13. The State has adequate available funds for long term skilled nursing facility care of Medicaid recipients to meet all required costs in the 2003-04 fiscal year, so its proposed rule to reimburse less than these costs cannot be justified or excused on this basis. In any case, even assuming the purported lack of sufficient funds could be shown, that would not excuse

compliance with federal laws and regulations that assure a fair reimbursement setting process and require reimbursement to be adequate to assure access and quality of care standards are met.

STANDING TO CHALLENGE PROPOSED RULE

14. Skilled nursing facilities that receive Medicaid reimbursement are “substantially affected” by the proposed rule, within the meaning of Fla. Stat. § 120.56.

15. Both FHCA and FAHA have standing to challenge the proposed rule on behalf of their members, because the member facilities are substantially affected, their interests that this Petition seeks to protect are germane to FHCA’s and FAHA’s purpose, and the relief requested does not require individual members’ participation.

16. In addition, present and future residents of skilled nursing home facilities, including both Medicaid recipients and non-Medicaid recipients, as well as persons who are responsible family members or guardians of such residents, are “substantially affected” by the proposed rule, within the meaning of Fla. Stat. § 120.56. They may face lack of available bed space and waiting lists (if they are Medicaid recipients); or higher payments (if they have insurance or other resources to pay); and/or reduced care and amenities in non-essential areas (for both categories).

17. Skilled nursing facilities that provide these services have standing to challenge the proposed rule on behalf of their substantially affected residents. FHCA and FAHA have standing to challenge the proposed rule on behalf of the skilled nursing facilities and their residents who are substantially affected by the proposed rule.

COUNT I – DEPARTURE FROM REQUIRED NOTICE PROCEDURES

18. The proposed rule is invalid as defined in Fla. Stat. § 120.52(8)(a) because AHCA materially departed from required APA and federal procedures to provide notice and opportunities for objection. The allegations of paragraphs 1-17 above are realleged.

19. Fla. Stat. § 120.54(3)(a) requires the Agency to publish a notice of its proposed rule that contains the “full text” of the proposed rule. Neither of the published notices contained the full text of the proposed rule. The delayed production of the proposed Plan revision text January 13, 2004, is not substantial compliance.

20. The published notices advised that, if requested, AHCA would conduct a public hearing on the proposed rule on January 21, 2004. However, as a result of noncompliance with the notice requirements, substantially affected facilities were not fully informed to mobilize and express their concerns to AHCA at this public meeting.

21. Fla. Stat. § 120.54(3) requires that the agency give the public 21 days from the date of the publication to request a hearing. As long as the initial published notice complies with the law, this period allows the public adequate time to become informed and mobilize for advocacy. However, if the published notice is defective and incomplete, as in this case, then the substantially affected constituencies are deprived of their statutory right to 21 days in which to request and prepare for a hearing. Absent strict compliance with notice requirements, the ensuing process for proposing and adopting a rule is deficient, and the proposed rule is invalid.

22. The notice is also deficient for failure to comply with federal law governing public notice of changes in Medicaid reimbursement. Section 1902(a)(13) of the Federal Medicaid law, 42 U.S.C. § 1396a(a)(13), and 42 C.F.R. § 447.205(c) require that the published notice contain a justification for the proposed change, an opportunity for providers to comment

on the proposed justification, and an estimate of the increase or decrease in aggregate annual expenditures. Both the two published notices and the unpublished Revised Plan omitted this required information and thus do not provide the fair opportunity for providers to comment.

COUNT II - NONCOMPLIANCE WITH STATE MEDICAID LAW

23. AHCA's proposed rule is invalid within the meaning of Fla. Stat. § 120.52(8)(c) because it enlarges, modifies or contravenes the State Medicaid law requirements governing reimbursement to skilled nursing facilities in Fla. Stat. § 409.908(2)(b). The allegations of paragraphs 1-17 above are realleged.

24. Fla. Stat. § 409.908(2)(b) provides in pertinent part:

Subject to any limitations or directions provided for in the General Appropriations Act, the Agency shall establish and implement a Florida Title XIX Long-Term Care Reimbursement Plan (Medicaid) for nursing home care in order to provide care and services in conformance with the applicable state and federal laws, rules, regulations, and quality and safety standards and to ensure that individuals eligible for medical assistance have reasonable geographic access to such care.

* * *

2. The Agency shall amend the long-term care reimbursement plan and cost reporting system to create direct care and indirect care subcomponents of the patient care component of the per diem rate....

3. The direct care component shall include salaries and benefits of direct care staff providing nursing services including registered nurses, licensed practical nurses, and certified nursing assistants who deliver care directly to residents in the nursing home facility....

25. These provisions are intended to set reimbursement rates that are sufficient to assure that the requirements of federal regulations, quality of care, safety standards and

reasonable geographic access to care are met, and to require AHCA to fairly consider costs of staffing and other costs in setting these rates.

26. AHCA's proposed rule contravenes this provision by failing to provide adequate reimbursement to cover reasonable staffing and other reasonable costs in many facilities.

COUNT III – NONCOMPLIANCE WITH FEDERAL REGULATIONS

27. The proposed rule is invalid within the meaning of Fla. Stat. § 120.52(8)(c) because it enlarges, modifies or contravenes the Federal Medicaid law, which is binding and enforceable in its own right, and is adopted as state law in Fla. Stat. § 409.908. The allegations of paragraphs 1-17 above are realleged.

28. The proposed rule fails to comply with Section 1902(a)(13) of the Federal Medicaid law, referenced above, and also with Section 1902(a)(30), 42 U.S.C. § 1396a(a)(30), which provides in pertinent part:

A State plan for medical assistance must –

(30) (A) provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan...as may be necessary...to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area;....

29. Implementing Federal Medicaid regulations provide in pertinent part:

§ 447.200 Basis and purpose.

This subpart prescribes State plan requirement for setting payment rates to implement, in part, section 1902(a)(30) of the Act, which requires that payments for services be consistent with efficiency, economy, and quality of care.

§ 447.204 Encouragement of provider participation.

The agency's payments must be sufficient to enlist enough providers so that services under the plan are available to recipients at least to the extent that those services are available to the general population.

§ 447.250 Basis and purpose.

(a) This subpart implements section 1902(a)(13)(A) of the Act, which requires that the State plan provide for payment for hospital and long-term care facility services through the use of rates that the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities to provide services in conformity with State and Federal laws, regulations, and quality and safety standards.

§ 447.253 Other requirements

(a) *State assurances.* In order to receive CMS approval of a State plan change in payment methods and standards, the Medicaid agency must make assurances satisfactory to CMS that the requirements set forth in paragraphs (b) through (i) of this section are being met...

(b) *Findings.* Whenever the Medicaid agency makes a change in its methods and standards, but not less often than annually, the agency must make the following findings:

(1) *Payment rates.* (i) The Medicaid agency pays for inpatient hospital services and long-term care facility services through the use of rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers to provide services in conformity with applicable State and Federal laws, regulations, and quality and safety standards.

* * *

(iii) With respect to nursing facility services...the methods and standards used to determine payment take into account the costs of complying with the requirements of part 483 subpart B of this chapter...

30. The proposed rule rolling back reimbursement rates does not comply with the Federal law requirements. AHCA cannot make the findings or give the assurances required by Federal law because it has no factual basis to support findings or assurances that the proposed rollback rates are adequate. A finding or assurance that is contrary to the facts, or that is based on speculation, or is based on a defective process that does not afford fair consideration of facts, does not suffice to justify the rollback in rates.

COUNT IV – PROPOSED RULE IS ARBITRARY

31. The proposed rule is invalid as arbitrary, as defined in Fla. Stat. § 120.52(8)(e), meaning without logical or factual support. The allegations of paragraphs 1-17 above are realleged.

32. AHCA has no logical or factual basis to contend that (1) the proposed rule complies with the requirements of state and federal law that it purports to implement; (2) that it provides adequate funding to cover the reasonable costs of care necessary to assure compliance with applicable laws and regulations, and to assure standards of quality and access to care are met; and (3) the proposed rule to roll back rates is required or justified based on lack of availability of funds.

WHEREFORE, Petitioners request the Division of Administrative Hearings to take jurisdiction over this matter, conduct an evidentiary hearing, and enter its Final Order declaring the proposed rule is an invalid exercise of delegated legislative authority, and cannot be implemented, and granting such further relief as may be proper.

Dated this _____ day of January, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been furnished via first class mail to Agency Clerk, Agency for Health Care Administration, 2727 Mahan Drive, Ft. Knox Bldg. 3, Tallahassee, Florida 32308, this ___ day of February, 2004.

Attorney