

**§ 442.40 Availability of FFP during appeals for ICFs/MR.**

(a) *Definitions.* As used in this section—

*Effective date of expiration* means the date of expiration originally specified in the provider agreement, or the later date specified if the agreement is extended under § 442.16; and

*Effective date of termination* means a date earlier than the expiration date, set by the Medicaid agency when continuing participation until the expiration date is not justified, because the facility no longer meets the requirements for participation.

(b) *Scope, applicability, and effective date—*(1) *Scope.* This section sets forth the extent of FFP in State Medicaid payments to an ICF/MR after its provider agreement has been terminated or has expired and not been renewed.

(2) *Applicability.* (i) This section and § 442.42 apply only when the Medicaid agency, of its own volition, terminates or does not renew a provider agreement, and only when the survey agency certifies that there is no jeopardy to recipient health and safety. When the survey agency certifies that there is jeopardy to recipient health and safety, or when it fails to certify that there is no jeopardy, FFP ends on the effective date of termination or expiration.

(ii) When the State acts under instructions from CMS, FFP ends on the date specified by CMS (CMS instructs the State to terminate the Medicaid provider agreement when CMS in validating a State survey agency certification, determines that an ICF/MR does not meet the requirements for participation.)

(3) *Effective date.* This section and § 442.42 apply to terminations or expirations that are effective on or after September 28, 1987. For terminations or nonrenewals that were effective before that date, FFP may continue for up to 120 days from September 28, 1987, or 12 months from the effective date of termination or nonrenewal, whichever is earlier.

(c) *Basic rules.* (1) Except as provided in paragraphs (d) and (e) of this section, FFP in payments to an ICF/MR ends on the effective date of termination of the facility's provider agreement, or if the agreement is not termi-

nated, on the effective date of expiration.

(2) If State law, or a Federal or State court order or injunction, requires the agency to extend the provider agreement or continue payments to a facility after the dates specified in paragraph (d) of this section, FFP is not available in those payments.

(d) *Exception: Continuation of FFP after termination or expiration of provider agreement—*(1) *Conditions for continuation.* FFP is available after the effective date of termination or expiration only if—

(i) The evidentiary hearing required under § 431.153 of this chapter is provided by the State agency after the effective date of termination or expiration (or, if begun before termination or expiration, is not completed until after that date); and

(ii) Termination or nonrenewal action is based on a survey agency certification that there is no jeopardy to recipients' health and safety.

(2) *Extent of continuation.* FFP is available only through the earlier of the following:

(i) The date of issuance of an administrative hearing decision that upholds the agency's termination or nonrenewal action.

(ii) The 120th day after the effective date of termination of the facility's provider agreement or, if the agreement is not terminated, the 120th day after the effective date of expiration. (If a hearing decision that upholds the facility is issued after the end of the 120-day period, when FFP has already been discontinued, the rules of § 442.42 on retroactive agreements apply).

(e) *Applicability of § 441.11.* If FFP is continued during appeal under paragraph (d) of this section, the 30-day period provided by § 441.11 of this chapter would not begin to run until issuance of a hearing decision that upholds the agency's termination or nonrenewal action.

[52 FR 32551, Aug. 28, 1987, as amended at 56 FR 48865, Sept. 26, 1991; 59 FR 56236, Nov. 10, 1994]

**§ 442.42 FFP under a retroactive provider agreement following appeal.**

(a) *Basic rule.* Except as specified in paragraph (b) of this section, if an NF

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or ICF/MR prevails on appeal from termination or, in the case of an ICF/MR, nonrenewal of a provider agreement, and the State issues a retroactive agreement, FFP is available beginning with the retroactive effective date, which must be determined in accordance with § 442.13.

(b) *Exception.* This rule does not apply if CMS determines, under § 442.30, that the agreement is not valid evidence that the facility meets the requirements for participation. This exclusion applies even if the State issues the new agreement as the result of an administrative hearing decision favorable to the facility or under a Federal or State court order.

[52 FR 32551, Aug. 28, 1987, as amended at 59 FR 56236, Nov. 10, 1994]

### Subpart C—Certification of ICFs/ MR

#### § 442.100 State plan requirements.

A State plan must provide that the requirements of this subpart and part 483 are met.

[53 FR 20495, June 3, 1988]

#### § 442.101 Obtaining certification.

(a) This section states the requirements for obtaining notice of an ICF/MR's certification before a Medicaid agency executes a provider agreement under § 442.12.

(b) The agency must obtain notice of certification from the Secretary for an ICF/MR located on an Indian reservation.

(c) The agency must obtain notice of certification from the survey agency for all other ICFs/MR.

(d) The notice must indicate that one of the following provisions pertains to the ICF/MR:

(1) An ICF/MR meets the conditions of participation set forth in subpart I of part 483 of this chapter.

(2) The ICF/MR has been granted a waiver or variance by CMS or the survey agency under subpart I of part 483 of this chapter.

(3) An ICF/MR has been certified with standard-level deficiencies and

(i) All conditions of participation are found met; and

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(ii) The facility submits an acceptable plan of correction covering the remaining deficiencies, subject to other limitations specified in § 442.105.

(e) The failure to meet one or more of the applicable conditions of participation is cause for termination or non-renewal of the ICF/MR provider agreement.

[56 FR 48866, Sept. 26, 1991, as amended at 57 FR 43924, Sept. 23, 1992; 59 FR 56236, Nov. 10, 1994]

#### § 442.105 Certification of ICFs/MR with deficiencies: General provisions.

If a survey agency finds a facility deficient in meeting the standards for ICFs/MR, as specified under subpart I of part 483 of this chapter, the agency may certify the facility for Medicaid purposes under the following conditions:

(a) The agency finds that the facility's deficiencies, individually or in combination, do not jeopardize the patient's health and safety, nor seriously limit the facility's capacity to give adequate care.

(b) The agency finds acceptable the facility's written plan for correcting the deficiencies.

(c) If a facility was previously certified with a deficiency and has a different deficiency at the time of the next survey, the agency documents that the facility—

(1) Was unable to stay in compliance with the standard for ICFs/MR for reasons beyond its control, or despite intensive efforts to comply; and

(2) Is making the best use of its resources to furnish adequate care.

(d) If a facility has the same deficiency it had under the prior certification, the agency documents that the facility—

(1) Did achieve compliance with the standard for ICFs/MR at some time during the prior certification period;

(2) Made a good faith effort, as judged by the survey agency, to stay in compliance; and

(3) Again became out of compliance for reasons beyond its control.

[56 FR 48866, Sept. 26, 1991, as amended at 57 FR 43924, Sept. 23, 1992; 57 FR 54712, Nov. 20, 1992; 59 FR 56236, Nov. 10, 1994]