Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Orchard Grove Extended	)	
Care Center,	)	Date: July 20, 1998
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-555
	)	Decision No. CR541
Health Care Financing	)	
Administration.	)	
	)	

DECISION

By notice letter dated August 19, 1997, the Health Care Financing Administration (HCFA) made an initial determination to impose a civil money penalty (CMP) against Petitioner, Orchard Grove Extended Care Center. HCFA made its determination based on those deficiencies found by its agent, the Michigan Department of Consumer and Industry Services (MDCIS), when it surveyed Petitioner's compliance with Medicare and Medicaid participation requirements during May and July of 1997. The MDCIS recommended that HCFA impose a CMP of $300 per day for the 81 days that Petitioner was found to be out of substantial compliance with program requirements. HCFA concurred and decided to impose a CMP of $300 per day for those 81 days.

Petitioner now requests that I enter summary judgment in its favor and thereby set aside the CMP imposed by HCFA. Petitioner's position is, in essence, that HCFA's CMP determination has been rendered invalid as a matter of law by the underlying decision-making process and by defects in the surveying process. HCFA opposes the relief requested by Petitioner. Additionally, HCFA makes a cross-motion for summary judgment in its favor. HCFA contends that Petitioner's hearing request did not preserve any issue of material fact and, therefore, no evidentiary hearing or other proceeding may be scheduled after I enter summary judgment against Petitioner.

I. DISPOSITION OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner raises the following contentions in its motion for summary judgment:

> Basis 1.[1] HCFA's actions are invalid because they are based upon invalid State actions. P. Br. in Supp. of Summ. Judg.,[2] 13 - 16.
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> Petitioner argues that Michigan had failed to properly promulgate relevant regulations pursuant to State law. According to Petitioner, the MDCIS was following an invalidly issued Michigan policy bulletin when it surveyed Petitioner and recommended that a $300 per day CMP be imposed by HCFA. Given also that HCFA did not conduct its own on-site survey of Petitioner's compliance with federal requirements, Petitioner reasons that the determination made by HCFA pursuant to MDCIS's survey findings and CMP recommendation is invalid as a matter of law.
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> Basis 2. HCFA's notice of initial determination is invalid because it fails to adequately apprise Petitioner of the basis for the imposition of a CMP and its calculation of the CMP amount. P. Br. in Supp. of Summ. Judg., 16 - 19.

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[1] To simplify references herein, I have used the general organization of Petitioner's brief in chief to place its related arguments under four broad bases (Basis 1 through Basis 4).

[2] This abbreviation denotes Petitioner's filing, titled "Brief in Support of Petitioner's Motion for Summary Judgment." Petitioner's brief was accompanied with 10 exhibits.

HCFA's responsive brief, titled "Memorandum of Law of the Health Care Financing Administration in Opposition to Petitioner's Motion for Summary Judgment and in Support of HCFA's Cross Motion for Summary Affirmance of the CMP," will be abbreviated as "HCFA Mem. in Opp." HCFA's brief was filed with 10 exhibits and one attachment.

Petitioner's reply brief, titled "Petitioner's Brief in Reply to Respondent's Memorandum in Opposition to Petitioner's Motion for Summary Judgment, and in Opposition to HCFA's Cross Motion for Summary Affirmance," will be abbreviated as "P. Reply."

Petitioner complains that HCFA's notice letter dated August 19, 1997 is so vague that it precludes Petitioner from developing an adequate defense. Petitioner notes as an example that, when HCFA was stating in the notice letter that it has chosen the $300 per day rate to impose as a CMP, HCFA merely recited the relevant assessment criteria contained in 42 C.F.R. § 488.404 and alleged it had considered them. In support of its motion for summary judgment on this issue, Petitioner relies on court cases which have invalidated federal agency actions because the affected entities did not receive sufficiently specific notices in advance.

Basis 3. HCFA's determination is invalid because the federal enforcement scheme used against Petitioner has not been properly adopted as regulations by the Secretary of Health and Human Services (the Secretary) or by the State of Michigan. P. Br. in Supp. of Summ. Judg., 20 - 30.

Petitioner argues first that the enforcement regulations relied upon by HCFA were invalidly promulgated,[3] in disregard of the federal Administrative Procedures Act's (APA) requirement for giving consideration to comments of significance submitted by members of the public. According to Petitioner, significant adverse comments such as those raised by the American Health Care Association (AHCA) were not addressed in the issuance of those final regulations which "condon[ed] departure from the prescribed survey process and endors[ed] a broad exercise of surveyor discretion, exacerbat[ing] the very problems identified by these studies" submitted by the AHCA. Id. at 22 - 23.

Petitioner argues in the alternative that HCFA's determination is invalid because the MDCIS's surveys of Petitioner were not conducted with the use of forms and procedures specified by the Secretary's regulations codified at 42 C.F.R. Part 488, Subpart C. Instead, the MDCIS surveyed Petitioner with use of different forms and procedures contained in Appendix P of HCFA's State Operations

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[3] I believe Petitioner is referring to regulations included within 42 C.F.R. Part 488, Subparts E and F ("Survey and Certification of Long-Term Care Facilities" and "Enforcement of Compliance for Long-Term Care Facilities with Deficiencies," respectively). Those regulations, which became effective on July 1, 1995, were issued by the Secretary to implement certain provisions of the Omnibus Budget Reconciliation Act of 1987 as further amended in 1988, 1989, and 1990. 59 Fed. Reg. 36,116 - 36,252 (1994).

Manual and Self-Instruction Manual, which have not been adopted as regulations by the Secretary or by the State of Michigan. Petitioner argues that, as a matter of law, HCFA's issuance of instructional manuals with an appendix of forms and guidelines cannot be construed as having amended or rendered obsolete those substantive requirements contained in 42 C.F.R. Part 488, Subpart C.

Petitioner argues also that the principles in Heritage Manor, Inc. v. Dep't of Social Services, 554 N.W.2d 388 (Mich. App. 1996), apply to bar HCFA from imposing a CMP in this case. Petitioner reasons that, because the State of Michigan had never promulgated regulations to implement the federal enforcement scheme applied by the MDCIS in this case, therefore, the MDCIS lacked authority to conduct the surveys at issue or to recommend that HCFA impose a CMP.

Basis 4. HCFA's determination is invalid because some of the MDCIS surveyors lacked professional licenses to practice in those fields in which they found deficiencies. P. Br. in Supp. of Summ. Judg., 31 - 33.

Petitioner asserts that, during the May 1997 survey, a social worker made findings which fell within the scope of nursing, medicine, or dietary services.[4] Petitioner states that this social worker surveyor was neither professionally qualified nor authorized by Michigan law to make resident assessments or evaluate the residents' nursing case. Accordingly, Petitioner concludes that HCFA's CMP determination is invalid because it is based on the findings of a surveyor who lacked the requisite professional expertise to make those findings.

HCFA opposes Petitioner's motion by arguing that the Secretary's regulations foreclose the entry of summary judgment for Petitioner on the grounds articulated by Petitioner. HCFA argues also that many of the legal issues raised by Petitioner have been decided in HCFA's favor in other similar cases.

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[4] Even though Petitioner implies that several MDCIS surveyors had made findings outside of their licensed fields, Petitioner has listed a social worker as its only example.

RULING 1:[5] **I deny Petitioner's Motion for Summary Judgment.**

I have noted in other rulings and decisions that an administrative law judge functions as the Secretary's delegate in these proceedings. See, e.g., cases cited at HCFA Mem. in Opp., 11. In this capacity, I am without the authority to set aside or disregard regulations which have been adopted by the Secretary. Additionally, no court of competent jurisdiction has declared invalid any of the Secretary's regulations relied upon by HCFA in this case. Therefore, I will not decide the merits of those challenges Petitioner has interposed to the Secretary's adoption of her regulations under the APA.

I reject Petitioner's arguments that HCFA's determination should be set aside because the surveyors followed the contents of HCFA's State Operations Manual and Self-Instruction Manual, which have not been adopted as regulations by the Secretary or by the State of Michigan. Petitioner has not attempted to show that the HCFA manual instructions relied upon by the surveyors differ materially from the nursing home survey and enforcement regulations codified at 42 C.F.R. Part 488, Subpart E or F. Petitioner argues instead that the surveyors should have used the forms and procedures specified in 42 C.F.R. Part 488, Subpart C. However, as explained by HCFA, the forms and procedures contained in 42 C.F.R. Part 488, Subpart C, were not used by the MDCIS in this case because their use was suspended by an order of the same court which had required their publication. HCFA Mem. in Opp., 30 - 31 (citing Estate of Smith v. Bowen, 656 F. Supp. 1093 (D. Colo. 1987) and Order dated September 27, 1990 attached to HCFA Mem. in Opp.). Under these circumstances, the surveyors' use of HCFA's manuals does not establish that the surveys of Petitioner were incorrectly performed or invalid as a matter of law.

I agree with HCFA that certain regulations promulgated by the Secretary preclude Petitioner from obtaining summary relief even if the surveys had been conducted with the flaws alleged by Petitioner. For example, the regulations specify that--

> [t]he State survey agency's failure to follow the procedures set forth in this section will not invalidate otherwise legitimate determinations that a facility's deficiencies exist.

42 C.F.R. § 488.305(b). Additionally, when HCFA considers the performance of its agents, the state survey agencies--

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[5] The regulations specify that all decisions of an administrative law judge shall contain separately numbered findings of fact and conclusions of law. 42 C.F.R. § 498.74(a). Accordingly, I have assigned numbers to my rulings in this Decision. Each numbered ruling, together with any separately designated subheading contained therein, summarize my findings or conclusions.

> Inadequate survey performance does not--
>
> (1) Relieve a SNF or NF[6] of its obligation to meet all requirements for program participation; or
>
> (2) Invalidate adequately documented deficiencies.

42 C.F.R. § 488.318(b). Therefore, I could not grant Petitioner's request to summarily set aside HCFA's noncompliance determination or the resultant CMP remedy even if HCFA had agreed with Petitioner's arguments concerning the survey protocol, survey forms, and State issued guidelines allegedly used by MDCIS.[7] See Bases 1 and 3, above.

The regulations at 42 C.F.R. §§ 488.305(b) and 488.318(b) also preclude my summarily setting aside HCFA's determination even if I were to accept as true Petitioner's contention that a social worker employed by MDCIS as a surveyor had made citations of deficiencies during the May 1997 survey concerning Petitioner's nursing, medical, or dietary practices. See Petitioner's Basis

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[6] A "SNF," or skilled nursing facility, means a Medicare certified nursing facility and a "NF," or nursing facility, means a Medicaid certified nursing facility. 42 C.F.R. § 488.301.

There is no dispute that Petitioner herein is dually certified under both the Medicare and Medicaid programs.

[7] HCFA did not concede Petitioner's arguments. For example, HCFA noted that federal statutes mandated the substance of the survey process, as well as the state survey agencies' adherence to it--without regard for whether or how implementing regulations were issued under the federal or state APA. HCFA Mem. in Opp., 27 (citing 42 U.S.C. §§1395i-3(g)(2), (4); 1396r(g)(2), (4)).

In the other rulings cited in HCFA's memorandum, I have addressed and rejected arguments presented by other petitioners who also sought to set aside HCFA's CMP determinations based on HCFA's failure to conduct an independent survey and the State of Michigan's alleged failure to promulgate valid regulations under its own administrative procedures act for the MDCIS to follow. Some of the arguments presented by Petitioner rely on theories similar to those I have rejected. Therefore, I refer the parties to my earlier rulings on these issues, such as my Ruling Denying Petitioner's Motion to Set Aside HCFA's Imposition of Remedies and Directives to Parties, 3 - 7 (May 22, 1997) in Presbyterian Village of Redford, Docket No. C-97-076.

4, above. Additionally, the federal statute and regulation specify that surveys must be conducted under a team approach, using professionals from various disciplines, with at least one registered nurse on the team. 42 U.S.C. § 1395i-3(g)(2)(E)(i); 42 C.F.R. § 488.314(a). Neither federal law nor regulation precludes an individual surveyor from making, or helping to make, findings which are outside of the disciplines in which he or she has a license to practice. The only limitation specified by regulation is that "the survey agency may not permit an individual to serve as a member of a survey team unless the individual has successfully completed a training and testing program prescribed by the Secretary." 42 C.F.R. § 488.314(c)(1).[8]

Petitioner does not allege that the provisions of either 42 C.F.R. §§ 488.314(a) or 488.314(c)(1) has been violated during any of the relevant surveys because the social worker surveyor had failed to successfully complete the requisite training and testing program. The relevant survey report of record shows that the survey team consisted of three individuals who were registered nurses, in addition to the one individual with the Masters in Social Work degree referenced by Petitioner. HCFA Ex. 2 at 1. Therefore, the participation of a social worker surveyor in the formulation of deficiency citations unrelated to social work does not establish that HCFA's determination is incorrect or invalid as a matter of law.

I reject also Petitioner's arguments that HCFA's notice of initial determination should be dismissed for being legally invalid because it fails to provide adequate information concerning HCFA's determination to impose the CMP. The regulation codified at 42 C.F.R. § 488.434(a) is controlling on the issue of what must be contained in HCFA's written notice of its determination to impose a CMP. In this case, HCFA's notice letter to Petitioner dated August 19, 1997 contains all of the information specifically required by 42 C.F.R. § 488.434(a). Because this regulation does not require HCFA to explain its analysis or reasoning process in its notice letter, the absence of such details in HCFA's August 19, 1997 notice letter does not render HCFA's determination invalid as a matter of law.

I note also that HCFA's notice letter states that Petitioner was informed earlier by the MDCIS of its various findings of noncompliance. Petitioner does not deny having received a copy of those relevant survey reports/statements of deficiencies (HCFA Forms 2567) prepared by the MDCIS prior to HCFA's issuance of its August 19, 1997 notice letter. See HCFA Ex. 2. The regulations vest HCFA with the discretion to impose a CMP for those days during which Petitioner was found out of compliance with one or more program participation requirements. 42 C.F.R. § 488.430. Therefore, despite the conclusory nature of HCFA's August 19, 1997 notice letter, Petitioner should have been aware of the facts relied upon by HCFA to impose the CMP remedy for 81 days. Even though I agree with Petitioner that HCFA's notice letter itself lacks details concerning HCFA's selection of the $300 per day CMP rate, the absence of such details does not

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[8] However, the survey agency may permit an individual who has not completed the training program "to participate in a survey as a trainee if accompanied on-site by a surveyor who has successfully completed the required training and testing program." 42 C.F.R. § 488.314(c)(3).

automatically relieve Petitioner of its potential liability to pay a CMP of some amount if Petitioner was out of compliance with program requirements. As I indicated earlier, 42 C.F.R. § 488.434(a) contains the standards for evaluating whether HCFA's letter constitutes a legally sufficient notice of its initial determination to impose a CMP. HCFA's August 19, 1997 notice letter in this case does not run afoul of 42 C.F.R. § 488.434(a) because said regulation does not require HCFA to set forth in a notice letter a list of the evidence it considered or its reasoning process.

Significantly, HCFA's notice letter makes clear that it has made a decision to impose a CMP remedy against Petitioner. Therefore, if I were to affirm or reject review of HCFA's basis for imposing the CMP remedy, then, as a matter of law, Petitioner would be obligated to pay at least $50 per day for each day of noncompliance. 42 C.F.R. § 488.440(a), (b);[9] 42 C.F.R. §§ 498.3(d)(11), 488.438(e)(2);[10] 42 C.F.R. § 488.438(e)(1);[11] 42 C.F.R. § 488.438(a).[12] Petitioner's liability for paying at least $50 per day under the forgoing situations would not be affected by whether HCFA has ever provided an explanation of how it had selected the $300 per day rate. Id.

I reject also Petitioner's argument that HCFA's determination must be set aside because, absent such relief, Petitioner would be forced to defend against the $300 per day CMP rate based solely on the conclusory statements set forth in HCFA's notice letter. Petitioner's argument implies incorrectly that an evidentiary hearing has been scheduled. I have not set this case for any evidentiary hearing. Moreover, as indicated by my order in this case dated September 24, 1997 all of the judges of the Departmental Appeals Board (DAB) have adopted uniform rules which require the disclosure of additional relevant information before hearing. See, e.g., Paragraph 2D,

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[9] These sections of the regulation specify that the accrual of the CMP may begin as early as the date that the facility was out of compliance and will continue until the facility achieves substantial compliance.

[10] The choice of an alternative sanction or remedy imposed on the provider is not an "initial determination" subject to challenge in the administrative hearing and appeals process. 42 C.F.R. § 498.3(d)(11). (CMP is an alternative remedy listed in 42 C.F.R. § 488.406, which may be selected for imposition by HCFA under 42 C.F.R. § 488.408.) Additionally, the regulation at 42 C.F.R. § 488.438(e)(2) expressly precludes an administrative law judge from reviewing HCFA's discretion to impose a CMP.

[11] This regulation specifies that, if an administrative law judge finds that HCFA had a basis for imposing a CMP, he or she may not reduce the CMP amount to zero.

[12] Under this regulation, the lowest rate of CMP which may be imposed by HCFA at its discretion is $50 per day. 42 C.F.R. § 488.438(a)(2).

3, and 4 of Order dated September 24, 1997.[13] The statute also provides administrative law judges with the discretion to take appropriate actions after HCFA has issued a formal notice letter governed by 42 C.F.R. § 488.434(a) in order to ensure against the type of results anticipated by Petitioner. See 42 C.F.R. §§ 498.47, 498.49; 42 U.S.C. § 1320a-7a(c)(4) (as incorporated by 42 U.S.C. §1395i-3(h)(2)(B)(ii)). Therefore, Petitioner has insufficient cause for fearing that, if an evidentiary hearing were to be held in this case, it would be proceeding to that hearing with nothing more than HCFA's August 19, 1997 notice letter.

II. DISPOSITION OF HCFA'S CROSS-MOTION FOR SUMMARY AFFIRMANCE OF ITS CMP DETERMINATION

In its cross-motion for summary judgment, HCFA relies primarily on its contentions that all of the disputes raised by Petitioner in its hearing request are either legally incognizable under the relevant regulations or are immaterial to any issue which I have the authority to adjudicate. HCFA is of the view that, since no genuine dispute of material fact has been raised by Petitioner, I am without the authority to review the merits of HCFA's CMP determination.[14] Therefore, HCFA contends that summary affirmance of its CMP determination would be appropriate.

HCFA's cross-motion for summary affirmance relies upon the contents of 42 C.F.R. § 498.40 to support its conclusion that Petitioner has secured a right to review and adjudication of only certain issues of law.[15] HCFA does not dispute that Petitioner's letter dated August 29, 1997 is a

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[13] For example, Paragraph 2D(4) of my order requires the parties to identify "factual disputes, with a summary of each party's current position and a description of the proof it will likely introduce for each material proposition . . . ."

The parties have not complied with the foregoing order only because they have chosen to submit dispositive motions instead.

[14] As I will discuss below, there is an issue of fact (which HCFA does not concede to be material) concerning HCFA's consideration of Petitioner's financial condition. HCFA has submitted evidence on this issue to show that summary judgment should be entered against Petitioner on this issue.

[15] Below, I will use the term "preserved" to refer to those situations wherein a litigant articulates an issue and thereby becomes lawfully entitled to an adjudication of that issue. I do so because this concept is inherent in HCFA's arguments concerning 42 C.F.R. § 498.40 and my reviewing authority. Additionally, the parties use the same words for what may be different propositions. (For example, HCFA uses the specificity requirements of 42 C.F.R. § 498.40(b) to argue that Petitioner did not "raise" any issue of material fact (HCFA Mem. in Opp., 38); Petitioner, in apparent reliance upon its use of the words "[m]y client challenges . . . the factual findings . . . "

valid hearing request in that it has preserved certain issues for adjudication in accordance with the requirements of 42 C.F.R. § 498.40(a) and (b). As distinguished from the motions to dismiss under 42 C.F.R. § 498.40(c) discussed in other cases, HCFA's cross-motion for summary judgment before me does not suggest that Petitioner has filed no timely request for hearing within the meaning of 42 C.F.R. § 498.40. Instead, HCFA's cross-motion for summary affirmance incorporates the principle that the merits of administrative findings or determinations become nonreviewable and binding upon Petitioner if they were subject to review but Petitioner did not timely request their review and the agency itself does not initiate changes sua sponte. See 42 C.F.R. §§ 498.20(b), 498.70(a). HCFA relies upon the contents of 42 C.F.R. § 498.40 for determining whether and which issues have been preserved by Petitioner for review and adjudication.

HCFA's cross-motion for summary judgment requests that I terminate litigation after I have reviewed and rejected Petitioner's position on those issues it has preserved.[16] In that respect, HCFA's cross-motion also underscores the axiom that the manner and extent of adjudication should suit the nature of any outstanding issues. "[T]he right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing." Citizens for Allegany County, Inc. v. Fed. Power Comm'n, 414 F.2d 1125, 1128 (D.C. Cir. 1969). Thus, "adjudication" is not a synonym for "evidentiary hearing" in every situation, as impliedly acknowledged by Petitioner's filing of its summary judgment motion.[17] Nor should an evidentiary hearing or additional proceedings always follow the denial of a summary judgment motion.

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in its hearing request, responds that it has "clearly raised a challenge" to such matters (P. Reply, 5).) The term "preserved" better reflects the legal proposition presented by HCFA's motion, while incorporating also the related legal axiom that is not being disputed by either party: that adjudication rights do not attach to everything articulated by a petitioner.

[16] HCFA stated, for example--

> [i]f the ALJ denies petitioner's motion for summary judgment the ALJ will have ruled upon all of the issues raised in Orchard Grove's hearing request. There being no issues of fact for hearing, upon denying Orchard Grove's motion for summary judgment the ALJ should grant HCFA's cross motion for summary affirmance and issue a decision upholding the CMP.

HCFA Mem. in Opp., 3.

[17] It is well settled that an administrative law judge may grant summary judgment "and the due process clause does not require a hearing where there is no disputed issue of material fact to resolve." Paige v. Cisneros, 91 F.3d 40, 44 (7th Cir. 1996)(citation omitted).

For obvious reasons, an evidentiary hearing would be necessary to adjudicate those legally cognizable material disputes of fact which remain unresolved by my summary judgment ruling.[18] Additional proceedings of some type may be appropriate if a moving party's summary judgment motion fails because the opposing party needs additional factual information before responding to the merits of said motion.[19] However, no further proceedings of any type may be scheduled for those issues which were raised by the hearing request but which I have determined in my summary judgment ruling to be to be purely legal and without support, immaterial as a matter of law, or beyond my authority to adjudicate.

For these reasons, my rulings below will include an analysis of the following questions raised by HCFA's cross-motion for summary judgment:

> 1. What are the legal standards to be used for determining whether issues have been preserved by a petitioner for adjudication in this forum?

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[18] Using the Federal Rules of Civil Procedure for guidance, I note that Rule 56(d) states, inter alia, that:

> [i]f on motion under this rule [summary] judgment is not rendered upon the whole case or for all of the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practical ascertain what material facts exists without controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

Rule 56(d), Fed. R. Civ. P. (emphasis added).

[19] See Rule 56(f), Federal Rules of Civil Procedure, which states in relevant part:

> [s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present . . . facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit . . . discovery to be had or may make such other order as is just.

2. Which issues (and of what nature) were preserved by Petitioner for adjudication?

3. Has Petitioner been precluded from preserving for adjudication any issue which is material to the merits of HCFA's CMP determination?

4. Has Petitioner had the opportunity to fully support its position on all issues it has presented for summary judgment?

5. Does my ruling on Petitioner's summary judgment motion fully dispose of all issues preserved for adjudication by Petitioner?[20]

6. Has Petitioner been precluded from responding to any argument or evidence submitted by HCFA in support of its cross-motion for summary judgment?

7. Should other issues not preserved for adjudication by Petitioner be added to this case?

In addition to reviewing the relevant portions of Petitioner's summary judgment brief, I will focus on the content of Petitioner's hearing request, as well as its written reply to HCFA's cross-motion, in order to decide whether HCFA's cross-motion for summary judgment should be granted to end all further proceedings in this case,[21] and thereby cause all unappealed portions of HCFA's initial determination to become final and binding on Petitioner by operation of law.

RULING 2: **The requirements contained in 42 C.F.R. § 498.40 are controlling for determining whether and which issues have been preserved by Petitioner for review and adjudication in this forum.**

I address as a threshold legal issue the two inter-related premises of HCFA's motion: that a petitioner must comply with the requirements of 42 C.F.R. § 498.40 in order to preserve issues for administrative review and adjudication and a petitioner's right to administrative review and adjudication is limited to only those issues so preserved.

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[20] If issues remain either because they were not fully resolved by my summary judgment ruling or because Petitioner did not request summary judgment be entered on those issues, it would be necessary to determine whether additional proceedings would be necessary and, if so, what type of proceedings would be appropriate. Whether Petitioner receives any addition proceeding depends on the materiality of the remaining issues and the scope of my reviewing authority.

[21] See Portion of Rule 56(d), Fed. R. Civ. P., quoted above.

Petitioner does not indicate any specific disagreement with HCFA's reliance upon 42 C.F.R. § 498.40, except to the extent of implying that HCFA has misinterpreted the regulation in order to require the use of "magic words." P. Reply, 5 - 6. However, Petitioner argues that it has raised a "challenge" to those matters that HCFA considered to have been waived under the requirements of 42 C.F.R. § 498.40. Therefore, I find it appropriate to settle the question of whether the requirements of 42 C.F.R. § 498.40 are controlling for determining whether potential issues have been preserved by a petitioner. I agree with HCFA that only those matters which conform to the requirements of 42 C.F.R. § 498.40 may be considered issues which have been preserved by Petitioner for litigation in this forum.

The regulation under consideration, 42 C.F.R. § 498.40, exists in an administrative appeals framework where plenary review of every finding or decision made by HCFA is expressly foreclosed. See 42 C.F.R. §§ 498.3, 498.5, 498.70. The regulations even designate certain specific actions taken by HCFA as beyond challenge at the administrative level. E.g., 42 C.F.R. § 488.440(e). Even when the findings or decisions made by HCFA are subject to review and change by an administrative law judge, the affected entity must file a timely request for hearing in order to invoke the administrative law judge's jurisdiction. 42 C.F.R. §§ 498.40, 498.44, 498.74. Otherwise, those findings or determinations will become final, non-reviewable, and binding upon the affected entity by operation of law. 42 C.F.R. §§ 498.20(b), 498.70(a).

It is within the foregoing context that 42 C.F.R. § 498.40 states in clear, mandatory terms that a petitioner "must" file within the specified time limit (42 C.F.R. § 498.40(a)(emphasis added)) a document which "must"--

> (1) Identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and
>
> (2) Specify the basis for contending that the findings and conclusions are incorrect.

42 C.F.R. § 498.40(b)(emphasis added). The regulation does not set forth these requirements in the disjunctive, or as suggestions for petitioners to follow. Instead, these requirements are mandatory, internally consistent, and embody the principle that the administrative hearing process should be used for the resolution of genuine, ascertainable controversies.

For example, under 42 C.F.R. § 498.40(b)(1), a petitioner must identify what it perceives to be "issues" or disagreements; therefore, 42 C.F.R. § 498.40(b)(2) reasonably requires the petitioner to identify its "basis" for those disagreements, so that the alleged disputes may be shown to be real as opposed to illusory, unascertainable, or inarticulable. Implicit in these regulatory mandates is the requirement that, before petitioners draft their hearing requests, they should make their own preliminary study of the relevant information in order to determine for themselves whether and why a matter should be appropriately designated as an "issue," a "dispute," or a "disagreement" for resolution in this forum. Imposing this implied obligation upon petitioners is just and fair,

since it serves as a reasonable safeguard against groundless or needless litigation[22] within a regulatory framework which contains no enforceable right to conduct discovery. See 42 C.F.R. Part 498.

The mandatory terms of 42 C.F.R. § 498.40 are not unduly harsh measurements for what has been preserved by a petitioner for review and adjudication. Subsection (a) of that regulation provides an automatic 60-day period for the preparation and filing of the document which sets forth a petitioner's issues with supporting bases. If the 60-day period is not sufficient for a petitioner, subsection (c) of the same regulation permits the petitioner to make a request for extension with a showing of good cause. 42 C.F.R. § 498.40(c).[23] Additionally, neither 42 C.F.R. § 498.40(a) nor 42 C.F.R. § 498.40(c) precludes amendments or specifically limits a petitioner to filing only one initial request for hearing. Therefore, I construe the regulation to mean that a petitioner has the right to file as many amended or substituted hearing requests as it may wish within the 60-day period provided by 42 C.F.R. § 498.40(a); thereafter, it may file as many initial, amended, or substituted requests as the administrative law judge will allow based on the good cause shown by the petitioner. 42 C.F.R. § 498.40(c). Alternatively, a petitioner may make a request under a separate regulation for the administrative law judge to exercise his or her discretion by adding new issues for adjudication. 42 C.F.R. § 498.56(a).[24]

As correctly pointed out by Petitioner, 42 C.F.R. § 498.40(b) does not require the use of any "magic words." Rather, the regulatory mandates serve as tools for determining whether a

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[22] This principle is also reflected in the Appellate Panel's decision in Hillman Rehabilitation Center, DAB No. 1611 (1997), which sets forth the following in discussing the parties' burdens of proof: once HCFA has set forth the basis for its determination with sufficient specificity for the provider to respond, the provider must "identify which of the findings material to the determination the provider disputes, and must also identify any additional facts the provider is asserting"; thereafter, HCFA assumes the obligation to present a prima facie case at hearing with the use of legally sufficient evidence "related to the disputed findings." Hillman at 8 (emphasis added).

[23] Due to the requirements that a petitioner make the request for extension of time and that good cause be shown, this regulation does not permit administrative law judges to extend the 60-day limitation at will in order to create additional windows of opportunity for petitioners. Nor does this regulation permit administrative law judges to authorize, at their will, the filing of new or amended hearing requests to surmount problems in the requests already of record.

[24] This regulation also permits administrative law judges, on their own initiative, to add new issues for adjudication. In a separate section of this ruling, I will discuss why I find it inappropriate to use 42 C.F.R. § 498.56 for providing unsolicited aid to Petitioner herein during the pendency of HCFA's cross-motion for summary judgment.

petitioner's words or statements, when reasonably interpreted, constitute disputes and entitle the petitioner to an adjudication of them. Issues preserved for adjudication need to be ascertained and delineated in order to determine what type of adjudication would be appropriate.

Other considerations also militate in favor of applying the terms of 42 C.F.R. § 498.40 for determining whether Petitioner has preserved potential issues for adjudication. Administrative law judges are without the discretion to disregard, modify, selectively apply, or create exceptions for the clearly stated regulatory requirements of 42 C.F.R. § 498.40. If a judge wishes, she may exercise her discretion to provide a safety net for the petitioner by ordering the addition of new issues pursuant to 42 C.F.R. § 498.56(a). However, even in deciding whether to add new issues and what should be considered a new issue, there need to be standards for deciding which matters have already been preserved by a petitioner as issues for adjudication. The same would be true if a petitioner should wish to request leave under 42 C.F.R. § 498.40(c) to submit a modified hearing request containing additional or altered issues. The petitioners, too, need standards for determining which matters have already been preserved for adjudication and whether additions or modifications are necessary.

Thus, the determination of which matters have already been preserved by a petitioner as issues for adjudication requires the application of consistent, ascertainable legal standards. Consistent and ascertainable legal standards are contained in 42 C.F.R. § 498.40. Applying the provisions of 42 C.F.R. § 498.40 as written would avoid the parties' attaining inconsistent results from different administrative law judges pursuant to varying standards.

For all of these foregoing reasons, I conclude that it is appropriate and necessary to apply the requirements of 42 C.F.R. § 498.40 as written for determining which issues have been preserved by Petitioner for adjudication in this forum.

RULING 3: I grant the portion of HCFA's cross-motion for summary judgment which pertains to its basis for imposing the CMP remedy against Petitioner.

A. No issue of material fact was preserved by Petitioner's hearing request to challenge HCFA's basis for imposing the CMP.

Petitioner stated in its hearing request that it was listing its "legal arguments" with which it was challenging the "legal basis for imposition of the penalty." In Paragraph 1 and Paragraph 2a through i of its hearing request, Petitioner listed those legal arguments that it was relying on to challenge HCFA's legal basis for imposing the CMP. Accordingly, the contents of these paragraphs in Petitioner's hearing request satisfied the requirements of 42 C.F.R. § 498.40(b) relevant to preserving legal issues for adjudication.

Petitioner's hearing request contains also a single reference to "factual findings." That reference appears in the portion of Petitioner's hearing request which states:

> [m]y client challenges both the factual findings on which the citations were based, as well as the legal basis for imposition of the penalty. The legal arguments are as follows[.]

Hearing Request, 1 (emphasis added).

I conclude that Petitioner's reference to "factual findings" did not preserve any genuine issue of material fact for adjudication.

HCFA's basis for imposing a CMP remedy necessarily consists of the survey findings that Petitioner was out of compliance with program requirements and the findings that the noncompliance occurred during the period indicated by the CMP remedy. 42 C.F.R. § 488.430. Therefore, in order to preserve any genuine issue of material fact on HCFA's basis for imposing the CMP, Petitioner must follow the dictates of 42 C.F.R. § 498.40 and refer to either the survey findings of noncompliance or the findings on the duration of Petitioner's noncompliance. Petitioner's reference to challenging "factual findings" does not meet the requirements of the regulation, which specifies that within 60 days of receiving HCFA's notice of initial determination (42 C.F.R. § 498.40(a)),[25] a petitioner must "(1) [i]dentify the specific issues, and the findings of fact . . . with which [it] disagrees" and "(2) [s]pecify the basis for contending that the findings . . . are incorrect." 42 C.F.R. § 498.40(b)(1), (2). Even if I were to construe Petitioner's reference to "factual findings" as having satisfied 42 C.F.R. § 498.40(b)(1), the only bases Petitioner has provided for such a challenge are those matters which even its hearing requests describes as "legal arguments." Thus, the most that can be said on Petitioner's efforts to challenge HCFA's factual findings is that Petitioner has a disagreement with all of HCFA's factual findings only because they resulted from a process that Petitioner views as unlawful and legally invalid. This disagreement does not constitute a dispute of material fact.

Of course, Petitioner was acting within its rights under 42 C.F.R. § 498.40(b) when it interposed only legal arguments as its challenges to the survey citations or findings adopted by HCFA in this case. No regulation requires any petitioner to raise disputes of fact in a hearing request. However, for the reasons I have set out previously, Petitioner's exercise of its right to interpose in its hearing request only legal arguments to challenge HCFA's survey findings affects the type of adjudication it is entitled to receive in this case.

The record before me establishes that Petitioner has had the opportunity to articulate more than legal arguments in its hearing request to challenge HCFA's basis for imposing the CMP remedy. The regulation itself provided Petitioner with 60 days within which to draft and file a hearing request. 42 C.F.R. § 498.40(a). Petitioner submitted no request for extending the 60-day period to assess the existence or nature of any factual controversy. Even after HCFA had argued that "[a] general challenge to 'factual findings' is insufficient to place at issue the basis for imposing a

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[25] An extension may also be granted by the administrative law judge upon a petitioner's request and for good cause shown. 42 C.F.R. § 498.40(c).

CMP" (HCFA Mem. in Opp., 38), Petitioner did not identify any specific survey citation or finding with which it disagreed on the basis of any fact. Nor did Petitioner request leave to amend its hearing request for good cause.[26] Petitioner's reply to HCFA's cross-motion merely intimates that it was not able to understand HCFA's survey citations and, therefore, it could not provide greater specificity in its efforts to challenge the "factual findings on which the citations were based." See P. Reply, 5; see also Basis 2 of Petitioner's motion for summary judgment.

I must reject Petitioner's intimation on the basis of the survey reports (HCFA 2567) submitted by HCFA with its brief. See HCFA Ex. 2. The contents of these survey reports provided Petitioner with the opportunity to follow the requirements of 42 C.F.R. § 498.40(b) and thereby draft a hearing request which would have preserved issues of fact concerning the survey citations adopted by HCFA: i.e., by identifying the specific survey citations it disputed and Petitioner's factual bases for its disagreements. Instead, what Petitioner has done is to make a broad statement that it is challenging the "factual findings on which the citations were based," followed by various contentions which Petitioner's hearing request describes as "legal arguments." The position indicated by Petitioner's words in its hearing request is that Petitioner disputes all of HCFA's factual findings because Petitioner believes all of them to be invalid as a matter of law on the basis of those legal arguments it has set forth. Nothing provided by Petitioner since filing its hearing request differs from the foregoing interpretation.

For the forgoing reasons, I cannot construe Petitioner's general statement that it "challenges both the factual findings on which the citations were based as well as the legal basis for imposition of the penalty" (Hearing Request, 1) as having preserved any genuine dispute of material fact concerning HCFA's basis for imposing the CMP. The information before me establishes that Petitioner has preserved for adjudication only those legal issues listed in paragraphs 1 and 2a through i of its hearing request.

B. To the extent I have the authority to review and adjudicate the issues preserved by Petitioner, my ruling denying Petitioner's summary judgment motion has fully disposed of all the issues preserved by Petitioner.

1. Paragraphs 1 and 2a through 2f of Petitioner's hearing request

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[26] In appropriate cases where petitioners have requested leave to amend their hearing request and shown good cause for their failure to have included certain issues in their original hearing request, I have extended the time period for filing a hearing request in order to allow for such amendments. See 42 C.F.R. § 498.40(c).

There is no issue of material fact contained in Paragraphs 1 and 2a through 2f of Petitioner's hearing request.[27] The issues Petitioner preserved for adjudication in Paragraphs 1 and 2a

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[27] Petitioner's hearing request states that:

> 1. HCFA has decided to impose the CMP not based upon any independent survey conducted by HCFA, but based entirely upon its concurrence with the MDCIS recommendation and findings.
>
> 2. There is no legal basis for the state citations and recommendations to serve as the basis for a CMP in this matter, for reasons including but not limited to the following:
>
> a. The State of Michigan's OBRA enforcement process is invalid and illegal, since it is contained in policy "Bulletins" (DSS Bulletin Nos. 94-04 and 95-03) which have never been promulgated as a "rule" under the Michigan Administrative Procedures Act of 1969, MCLA 24.201 et seq. In this regard, the Michigan Court of Appeals has ruled that the enforcement is invalid. See In Re: Heritage Manor, Inc., 218 Mich. App. 608, 554 NW2d 388 (1996);
>
> b. The Bulletins are also invalid for having been implemented in violation of other federal and state law and regulations, including 42 USC §1396r(h)(2)(A), 42 USC §1396a(a)(1), 42 USC §1396c, 42 USC §1316, 42 CFR §430.12-20, MCLA 400.10, and MCLA 400.111a;
>
> c. The State of Michigan, in addition to never promulgating the Bulletins as rules, has never passed any legitimate legislation to implement their provisions;
>
> d. The entire OBRA enforcement process lacks clear and definite standards for its application, such that the State of Michigan has never fairly and consistently applied the enforcement provisions, thereby depriving my client of its rights to procedural due process;
>
> e. The above infirmities also mean that the enforcement action violates the Michigan Social Welfare Act, MCLA §400.1;
>
> f. Due to all of the above, MDCIS could not legally or properly make any recommendation to HCFA regarding imposition of OBRA remedies with respect to my client. Thus, HCFA's determination to impose remedies is based upon invalid state determinations and recommendations, and HCFA's decision is therefore itself improper and invalid.

through 2f of its hearing request were especially explained by Petitioner in Basis 1 of its motion for summary judgment.

As correctly pointed out by HCFA's brief, I have issued rulings and decisions holding that I do not have authority to decide the merits of recommendations made by a state survey agency to HCFA[28] and that I am without the authority to decide whether certain bulletins allegedly relied upon by MDCIS were validly issued under State law. Additionally, federal regulations codified at 42 C.F.R. §§ 488.305(b) and 488.318(b)(2) make immaterial Petitioner's arguments by specifying that survey findings cannot be invalidated solely for the reasons relied upon by Petitioner.

For these reasons, there was never any issue of material fact raised by Paragraphs 1 and 2a through 2f of Petitioner's hearing request or by the explanation of those paragraphs in Basis 1 of Petitioner's motion for summary judgment. The matters raised therein have been fully resolved by my summary judgment ruling.

2. Paragraph 2g of Petitioner's hearing request

To the extent Paragraph 2g of Petitioner's hearing request relates to HCFA's basis for imposing the CMP remedy,[29] Petitioner has explained its position in Basis 2 of its motion for summary judgment.

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[28] This conclusion is dictated by 42 C.F.R. § 498.3, which authorizes me to review only the initial determinations made by HCFA.

[29] As relevant to challenging HCFA's basis for imposing a CMP, Paragraph 2g of Petitioner's hearing request states as follows:

> 2. There is no legal basis for the state citations and recommendations to serve as the basis for a CMP in this matter, for reasons included but limited to the following:
>
> * * *
>
> g. HCFA's notice of imposition of remedies is inadequate, in that it fails to specifically and adequately advise my client of the basis for HCFA's determination to impose a CMP, or the basis for HCFA's calculation of the CMP. . . duration. This deprives my client of its due process right to know what it is called upon to defend or rebut.

Paragraph 2g of the hearing request also contains challenges to the CMP amount calculated by HCFA. I will defer discussion of these challenges to the CMP amount.

In addressing Basis 2 of Petitioner's motion for summary judgment, I have ruled above that HCFA's letter dated August 19, 1997 is a legally valid notice of HCFA's initial determination to impose a CMP because it satisfies the content requirements of 42 C.F.R. § 488.434(a). I found also that Petitioner has received additional information concerning the basis of HCFA's findings of deficiencies in HCFA's statements of deficiencies or Forms 2567. To the extent that there might have existed any dispute of fact concerning the type of information Petitioner was entitled to receive from HCFA in the August 19, 1997 notice letter, that dispute has been resolved against Petitioner by my summary judgment ruling.

Since Paragraph 2g of the hearing request alleges also that HCFA's August 19, 1997 notice letter was not sufficient to apprise Petitioner of how the duration of the CMP was calculated, I now take notice of the regulation which authorizes HCFA to impose a CMP "for the number of days of noncompliance until the date the facility achieves substantial compliance . . . ." 42 C.F.R. § 488.440(b).[30] Petitioner is aware that it was found out of compliance during the May 20, 1997 survey and also that it was not found in compliance again until August 9, 1997. P. Br. in Supp. of Summ. Judg., 9, 10. Petitioner is aware also that HCFA is seeking to collect a CMP for the above described 81 days of alleged noncompliance (i.e., from May 20 through August 8, 1997). Id. at 10.[31] Petitioner has raised no dispute of fact concerning the survey findings which have resulted in HCFA's imposition of a CMP for 81 days and it has not requested leave to amend its hearing request for good cause.[32] Therefore, no genuine issue of fact concerning HCFA's calculation of the CMP's duration was created by Petitioner's challenge to the legal sufficiency of HCFA's notice letter.

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[30] The other factors specified in this regulation are not relevant to Petitioner's situation.

[31] HCFA's notice of initial determination dated August 19, 1997 did not specify any specific date on which the CMP would end. At page 2 of this notice letter, HCFA stated only that the "CMP continues to accrue . . . until you have made the necessary corrections to achieve substantial compliance with the participation requirements or your provider agreement is terminated."

However, by the time Petitioner moved for summary judgment, it was aware that the CMP had ceased to accrue after August 8, 1997. HCFA agreed also in its responsive brief that the CMP was imposed only for the period from May 20 through August 8, 1997, when Petitioner was determined to be out of compliance with program requirements. HCFA Mem. in Opp., 1.

[32] In responding to HCFA's cross-motion for summary judgment, Petitioner has only re-emphasized the legal issues raised in its hearing request: that HCFA's notice letter was legally defective and therefore provided HCFA with no lawful basis for imposing a CMP. P. Reply, 15 - 20; Paragraph 2g of Hearing Request.

3. Paragraph 2h of Petitioner's hearing request

I find that there ~~was~~ no issue of material fact preserved by Paragraph 2h of Petitioner's hearing request.[33] Petitioner's position under Paragraph 2h of its request was further explained in Basis 3 of its summary judgment motion. I have rejected that position in my denial of Petitioner's summary judgment motion.

With respect to Petitioner's arguments that the federal regulations relied upon by HCFA are invalid, I re-emphasize my ruling above that, absent the invalidation of any of these regulations by a court of competent jurisdiction, I have no authority to adjudicate the merits of those arguments. Additionally, no evidentiary hearing or other proceeding is warranted by the alternative arguments presented in Petitioner's summary judgment motion, which asserts that HCFA's determination is invalid because the MDCIS's surveyors had failed to use the forms and procedures specified by the Secretary's regulations codified at 42 C.F.R. Part 488, Subpart C. The September 27, 1990 order of U.S. District Judge Richard Matsch (D. Colo.) appended to HCFA's brief directed that the regulations contained in 42 C.F.R. Part 488, Subpart C "shall be suspended but not repealed pending further orders of this Court. . . ." As for Petitioner's related arguments concerning the MDCIS' use of survey forms and procedures which are not contained in any federal or State regulations, those regulations I have discussed previously specify that neither inadequate survey performance nor improper survey procedures can invalidate otherwise valid findings of deficiencies or excuse Petitioner from meeting all requirements of program participation. See 42 C.F.R. §§ 488.305(b), 488.318(b).

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[33] Paragraph 2h of Petitioner's hearing request states:

> 2. There is no legal basis for the state citations and recommendations to serve as the basis for a CMP in this matter, for reasons including but not limited to the following:
>
> * * *
>
> h. HCFA's determination, to the extent it relies upon federal OBRA regulations or the State Operations Manual, is invalid, since the regulations were published without appropriate notice and comment in violation of the Administrative Procedures Act, 5 U.S.C. § 553 et seq., and since the survey forms, procedures and guidelines in the State Operations Manual have not been promulgated as rules under the APA.

Petitioner has not asserted compliance with program requirements as an affirmative defense in its hearing request or to support its summary judgment motion.[34]

4. Paragraph 2i of Petitioner's hearing request

I find no issue of material fact in Paragraph 2i[35] of Petitioner's hearing request, which was explained also in Basis 4 of Petitioner's motion for summary judgment.

Citing the example of a social worker who helped survey Petitioner in May of 1997, Petitioner argues that the survey results are invalid because some MDCIS surveyors lacked professional licenses to practice in those fields in which they found deficiencies during surveys of Petitioner. HCFA does not deny that, during May of 1997, a surveyor who was a social worker had reviewed the medications received by a resident. HCFA Mem. in Opp., 31 - 38. HCFA disagrees only with Petitioner's legal conclusion that the survey findings are invalid as a matter of law because she was a social worker. I have already rejected Petitioner's legal arguments and ruled above that the credentials of the social worker do not render the survey findings invalid as a matter of law.

After denying Petitioner's summary judgment motion under Basis 3, I have considered providing an evidentiary hearing by construing Petitioner's arguments concerning the licensure issue as raising an issue of fact concerning the weight that should be accorded the opinions of the social

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[34] Even after HCFA had summarized the contents of 42 C.F.R. §§ 488.305(b) and 488.318(b) (HCFA Mem. in Opp., 16) and noted Petitioner's failure to assert that it was in substantial compliance with program requirements (id. at 39), Petitioner did not attempt to demonstrate in its reply brief how the words it used in its hearing request or motion for summary judgment may be construed as having created any factual issue cognizable under 42 C.F.R. §§ 488.305(b) and 488.318(b). Instead, Petitioner misconstrued HCFA's position as requiring the use of "magic words" such as "basis" or "reasonableness" in a hearing request. P. Reply, 6.

[35] Paragraph 2i of Petitioner's hearing request states:

> 2. There is no legal basis for the state citations and recommendations to serve as the basis for a CMP in this matter, for reasons including but not limited to the following:
>
> * * *
>
> i. Some or most of the citations made by the MDCIS may have been made by individuals without requisite legal licensure, certification, or training to make determinations outside the scope of their professional discipline, and such findings and conclusions are therefore illegal.

worker surveyor. However, the actual words used by Petitioner in its motion for summary judgment and in its hearing request foreclose construing the issues preserved by Petitioner as material factual disputes. In Paragraph 2i of its hearing request, Petitioner specifically alleged that the survey findings were "illegal" because they were made by persons "without requisite legal licensure, certification, or training. . . ." (emphasis added). Petitioner's motion for summary judgment on this issue discussed at length the State licensure requirements for various disciplines and does not deviate from the theory that the survey findings have been rendered invalid as a matter of law by the surveyor's lack of certain licenses. Even after HCFA filed its cross-motion and specifically argued that the absence of State licenses does not constitute a genuine issue of material fact in this case (HCFA Mem. in Opp., 31), Petitioner did not identify in its reply brief which material factual issue, if any, it was attempting to raise with respect to the surveyors' qualifications.

For these reasons, I cannot properly construe Petitioner as having preserved any material issue of fact to challenge the weight of a social worker's opinion concerning a resident's need for certain medications. I have rejected Petitioner's arguments that the survey findings are invalid as a matter of law due to the surveyors's failure to hold certain State licenses. Therefore, I grant the portion of HCFA's motion which seeks to bar Petitioner from further litigating the matter contained in Paragraph 2i of its hearing request.

C. No evidentiary hearing or other proceeding is needed to further consider those matters preserved by Petitioner to challenge HCFA's basis for imposing the CMP and HCFA is entitled to summary affirmance of its "basis" determination.

Petitioner filed its motion for summary judgment by choice and under a schedule it had selected. Petitioner has not argued that, in order to prevail on its summary judgment motion, it needs additional time or proceedings to obtain other information. Therefore, there is no basis for concluding that Petitioner was without the opportunity to fully set forth its position on all matters contained in that motion. For the reasons explained above, I view Petitioner's summary judgment motion as having presented for resolution all the issues it has preserved to challenge HCFA's basis for having imposed the CMP remedy.

Also for the reasons discussed above, I consider my ruling denying Petitioner's summary judgment motion to have resolved fully (or as fully as was legally permissible) all of the issues preserved by Petitioner for adjudication in this forum. Petitioner's preserved issues are legal in nature. My rulings against Petitioner on those legal issues also have the effect of rejecting the related proposition implied by Petitioner's hearing request: that all of the survey results used by HCFA to impose the CMP as incorrect as a matter of law because they resulted from an unlawful and legally invalid process.

Petitioner has made no request to amend its request for hearing. Nor has Petitioner made a credible showing that it was unable to set forth in its existing hearing request other potential

challenges to HCFA's basis for imposing the CMP. As I noted above, for example, the HCFA Forms 2567 in this case contained details of the survey findings which resulted in HCFA's imposition of the CMP remedy. Given the content of these HCFA Forms 2567 as well as other information incorporated by HCFA's notice letter, Petitioner could have preserved issues of material fact concerning HCFA's basis determination in accordance with the requirements of 42 C.F.R. § 498.40, if Petitioner had wished to do so.

Nor does the information before me suggest that further proceedings should be scheduled because Petitioner lacks adequate information for opposing the merits of HCFA's cross-motion. On the issue of whether HCFA's "basis" determination should be summarily affirmed, HCFA's motion turns on various legal theories as applied to what is contained (or not contained) in Petitioner's hearing request. Petitioner has had adequate opportunity to formulate its response to HCFA's legal arguments and interpretations of its hearing request without the need for further proceedings. Additionally, having explained my rejection of Petitioner's contention that was it unable to formulate additional challenges to HCFA's determination based on the contents of HCFA's notice letter, I find that Petitioner has not been precluded from responding to HCFA's cross-motion.

HCFA has shown that, as a matter of law, none of the issues and arguments presented by Petitioner can invalidate HCFA's determination that a basis existed to impose the CMP remedy against Petitioner. In accordance with 42 C.F.R. § 488.430 ("Civil money penalties: Basis for imposing penalty"), HCFA imposed the CMP against Petitioner because the survey findings adopted by HCFA indicated to HCFA that Petitioner was out of compliance with program requirements during the relevant time period. In no case may an administrative law judge set aside HCFA's basis for imposing a CMP without considering the merits of the survey findings relied upon by HCFA. See 42 C.F.R. §§ 488.305(b), 488.318(b).

In this case, however, I am unable to consider the survey findings because Petitioner has preserved no dispute of fact concerning the merits of those survey findings. Nor has Petitioner preserved the affirmative defense that it was in compliance with program requirements during the relevant surveys. By operation of law, all portions of HCFA's initial determination which are not appealed (or not appealed timely) to an administrative law judge must become final and binding upon the affected party. See 42 C.F.R. §§ 498.20(b), 498.70(a), (c). Accordingly, HCFA is entitled to summary affirmance of its basis for imposing the CMP remedy against Petitioner.

RULING 4: I grant also the portion of HCFA's summary judgment motion which pertains to its determination of the CMP amount.[36]

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[36] Because HCFA refers to the criteria of 42 C.F.R. § 488.438(f) in discussing the CMP amount (HCFA Mem. in Opp., 38), I believe HCFA is interpreting the term "amount" as I had in the "Ruling on Scope of Hearing" I issued on December 11, 1996 in Baltic Country Manor v. HCFA, C-96-281: as denoting the specific daily CMP rate which should be chosen in accordance with the criteria of 42 C.F.R. §

A. No further proceeding is needed to resolve the only issue of law preserved by Petitioner concerning HCFA's CMP amount determination: whether the CMP amount determination should be set aside because HCFA's notice letter is inadequate.

In the portion of Petitioner's hearing letter which are designated as "legal arguments," Petitioner contended in relevant part:

> HCFA's notice of imposition of remedies is inadequate, in that it fails to specifically and adequately advise my client of . . . the basis for HCFA's calculation of the CMP amount or its duration. This deprives my client of its due process right to know what it is called upon to defend or rebut. HCFA has merely repeated the regulatory language of 42 C.F.R. § 488.404 and 434 without providing specific information which would show that HCFA even made a determination independent of the illegal determination made by MDCIS.

Hearing Request, Paragraph 2g.

I have adequately addressed the foregoing legal issue in Ruling 1, above. I have already determined within that ruling that Petitioner is not entitled to receive the type of details it wishes in a notice letter HCFA issues under the authority of 42 C.F.R. § 488.434. Moreover, as also stated within that ruling, there exist adequate safeguards to protect a petitioner's due process right to know what it is being called upon to defend or rebut. As a matter of law, HCFA's CMP amount determination cannot be invalidated, dismissed, or stricken as requested by Petitioner (P. Br. in Supp. of Summ Judg, 34; P. Reply, 21), because HCFA has issued a notice letter which satisfies the requirements of the applicable regulation.

The only other matter of note presented by Petitioner under this legal issue is its request that I impose certain sanctions against HCFA for its failure to make a detailed disclosure of how the CMP rate was calculated. P. Reply, 21. Petitioner's request for sanctions incorrectly implies that

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488.438(f), from a permissible range of daily penalty rates. The duration of the CMP is included under the issue of whether HCFA has a basis for imposing the CMP because 42 C.F.R. § 488.430 is titled "Civil money penalties: Basis for imposing penalty" and it specifies the days for which a CMP may be imposed. Baltic Country Manor, "Ruling on Scope of Hearing" at 7. In granting HCFA's motion for summary judgment on the "basis" issue, I addressed the portion of Petitioner's hearing request which refers to the duration of the CMP remedy. Ruling 3, Part B, § 2, above.

For these reasons, I use the terms "CMP amount" and "CMP rate" interchangeably.

I have issued orders directing HCFA to make such disclosures to Petitioner. I have not done so. Therefore, HCFA is not subject to any sanction for the reasons relied upon by Petitioner.

For the foregoing reasons, I conclude that the issues concerning HCFA's notice letter have been resolved by summary judgment and no further proceeding is needed for these issues.

B. Petitioner has preserved an issue of fact concerning whether HCFA had reviewed information concerning Petitioner's financial status.

HCFA's notice of initial determination dated August 19, 1997 stated in relevant part:

> [w]e have considered your facility['s] history, your financial condition and the factors enumerated in the Federal requirement at 42 CFR Section 488.404 in determining the amount of the CMP that we will impose for each day of noncompliance.

After receiving HCFA's notice letter, Petitioner placed the following challenge in its request for hearing:

> [m]y client also challenges the calculation of the penalty amount. In HCFA's notice of imposition of the penalty, HCFA states that it has considered the facility's financial condition in determining the amount of the fine. My client submits that HCFA has never looked at the facility's financial status nor its books and therefore has never had any appropriate information from which to make any determination regarding financial condition.

Based on the foregoing, I incorporate the analysis set forth in Ruling 2, Part A, above, in concluding that, in contesting the CMP amount determination made by HCFA, Petitioner has preserved an issue of fact: i.e., whether HCFA had looked at Petitioner's financial status or its "books" in determining the CMP rate.

C. As a matter of law, the CMP rate selected by HCFA cannot be set aside on the basis of Petitioner's dissatisfaction with the methods used by HCFA to evaluate its financial condition nor on the basis of HCFA's admission that it did not inspect Petitioner's "books."

As correctly noted by HCFA, the "amount issue" that is material in these CMP cases is whether the rate selected by HCFA is reasonable, based on the factors specified in 42 C.F.R. § 488.438(f)(1),(2), (4)[37], as well as the portion of 42 C.F.R. § 488.404 incorporated by 42 C.F.R.

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[37] In accordance with 42 C.F.R. § 488.438(f)(1) and (2), HCFA must evaluate Petitioner's history of noncompliance and financial condition in determining the CMP

§ 488.438(f)(3)[38]. Capital Hill Community Rehabilitation and Specialty Care Ctr., DAB CR469, at 3, (1997), aff'd, DAB No. 1629, at 2 - 3, (1997). If an affected provider is merely disagreeing with the methods used by HCFA in considering these regulatory factors, there is no right to an on-merit hearing in this forum. See id. at 5. To avoid summary dismissal of its hearing request, there must be at least some contention or evidence from the affected provider to indicate that the CMP amount set by HCFA is unreasonable. See id.

In this case, HCFA agrees with Petitioner's contention that no direct examination of Petitioner's "books" has been conducted. HCFA Mem. in Opp., 40. HCFA does not dispute that, in determining the CMP amount, it had an obligation to consider evidence of a facility's financial condition. Instead, HCFA argues that it was not required by statute or regulations to examine Petitioner's "books."

I agree with HCFA. HCFA cannot be compelled to examine Petitioner's "books." The statute and regulations require HCFA to consider a facility's financial condition without specifying any particular process or categories of documents. Therefore, Petitioner's complaint that HCFA has failed to examine its "books" does not present a material issue warranting additional proceedings. The validity of HCFA's CMP amount determination has not been materially affected by HCFA's admission concerning its failure to examine Petitioner's "books."

D. HCFA is entitled to have summary judgment entered against Petitioner on the factual issue of whether HCFA had considered Petitioner's financial condition in setting the CMP rate.

HCFA recognizes the possibility that Petitioner's hearing request may be suggesting that the CMP amount determination is unreasonable as a matter of law due to HCFA's alleged failure to consider any information concerning a facility's financial status.[39] See HCFA Mem. in Opp., 40.

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rate. In accordance with 42 C.F.R. § 488.438(f)(4), HCFA must evaluate the facility's degree of culpability in determining the CMP rate.

[38] Under 42 C.F.R. § 488.404 (as incorporated by 42 C.F.R. § 488.438(f)(3)), HCFA must evaluate the seriousness, scope, and number of deficiencies in determining the CMP rate.

[39] This proposition is by no means clear from Petitioner's position of record. Petitioner's hearing request does not contain any reference to "reasonable" or like concepts. It does not request a lower CMP rate. Instead, its reply brief asserts that HCFA is requiring the use of "reasonableness" as a "magic word." P. Reply, 6.

Petitioner complains only that HCFA has failed to consider any financial information (including Petitioner's "books"). Petitioner does not suggest that, if its financial information had been considered, a different or lower CMP rate should have been

Therefore, HCFA has introduced evidence to show that it had considered Petitioner's financial status with use of relevant information other than Petitioner's "books." HCFA Mem. in Opp., 40; HCFA Ex. 9. The information on the face of that document indicates that HCFA's Exhibit 9 is Petitioner's balance sheet for calendar year 1996.

Having had the opportunity to review HCFA's Exhibit 9, Petitioner did not state in its reply brief that the financial information contained therein is not accurate, is not material, or should not have been reviewed by HCFA. Nor did Petitioner dispute, or request leave to further investigate, HCFA's representations that Exhibit 9 was reviewed as evidence of Petitioner's financial condition in setting the CMP rate. Instead, Petitioner cites other cases in which HCFA had not voluntarily provided proof to support its contention that federal regulatory factors had been considered in setting the CMP rate. P. Reply, 21. Those other cases are inapposite.

I find it significant also that Petitioner's reply brief does not attempt to set forth any explanation for its earlier belief that "HCFA has never looked at the facility's financial status . . . ." Hearing Request, 3. Having had the opportunity to look at the contents of HCFA's Exhibit 9, Petitioner did not make any assertion to the effect that the CMP rate set by HCFA is unreasonable. In fact, Petitioner's reply brief does not address HCFA's Exhibit 9 and appears to have abandoned its earlier presented issue of fact concerning HCFA's alleged failure to consider its financial condition.

Under the foregoing circumstances and to the extent there was a material issue of fact preserved by Petitioner, I conclude that HCFA is entitled to have summary judgment entered against Petitioner on its assertion that--

> HCFA has never looked at the facility's financial status nor its books and therefore has never had any appropriate information from which to make any determination regarding financial condition.

Hearing Request, 3. The undisputed facts before me establish that HCFA did review evidence of Petitioner's financial condition in setting the CMP rate.

E. No other issue of material fact has been preserved by Petitioner to challenge the reasonableness of the CMP amount; consequently, Petitioner is not entitled to the scheduling of additional proceedings for further review of HCFA's CMP determination.

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imposed. Therefore, I can only infer that, if HCFA's alleged failure to consider <u>any</u> financial information may be linked at all to the reasonableness or unreasonableness question, Petitioner's complaint is that HCFA's alleged failure to consider all financial information has rendered the resultant CMP amount determination invalid as a matter of law.

Having entered summary judgment against Petitioner on the only relevant factual issue it has preserved, I find no need to consider any other matter which might bear on the reasonableness of the CMP rate selected by HCFA. I agree with HCFA's observation that no genuine issue of material fact remains with respect to the amount issue, since Petitioner has raised no challenge to the reasonableness of the CMP amount aside from its unsupported allegation concerning HCFA's failure to consider it's financial condition. HCFA Mem. in Opp., 41.

Even though Petitioner has complained that HCFA's notice letter "fails to specifically and adequately advise my client of . . . the basis for HCFA's calculation of the CMP amount . . .[,]" I cannot view the absence of details in HCFA's notice letter as having precluded Petitioner from raising in its hearing request additional challenges to HCFA's CMP amount determination.

Petitioner knew from the notice letter that HCFA alleged it had to have considered also Petitioner's compliance history, as well as the seriousness, scope, and number of deficiencies specified in 42 C.F.R. § 488.404 in setting the CMP rate. For drafting a hearing request in conformity with the requirements of 42 C.F.R. § 498.40, Petitioner had sufficient relevant information concerning HCFA's view of its compliance history, since, as indicated by the record in this case, survey results are shared with the affected facility with the transmittal of HCFA's notice letters and HCFA Forms 2567 to the facility.

The HCFA Forms 2567 issued to Petitioner in this case also contain "SS" (scope and severity) findings for each group of cited deficiencies. HCFA Ex. 2. HCFA's subsequently issued notice of initial determination did not alter those scope and severity findings. With knowledge of the scope and severity level determinations, Petitioner was not precluded from preserving disagreements concerning or arising from those scope and severity levels.

At no time before or since the filing of its hearing request of record has Petitioner requested leave to modify or augment its issues to include references to its compliance history or to the scope and severity findings allegedly considered by HCFA in setting the CMP rate. Petitioner's reply brief does not specifically deny HCFA's contention that Petitioner has only raised an allegation concerning HCFA's alleged failure to evaluate Petitioner's financial condition as its disagreement with the CMP amount. HCFA Mem. in Opp., 40 - 41. When evaluated in the context of what should be placed into a hearing request to preserve issues for adjudication, Petitioner's alleged lack of adequate information from HCFA is without support.[40]

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[40] Petitioner's briefs in this case cite other rulings wherein I had criticized similarly cursory statements made by HCFA in its notice letters to other facilities concerning its selection of the CMP rates. However, in those other cases, I stated those criticisms in situations where the petitioners' right to an evidentiary hearing was not challenged by HCFA or where the petitioners' entitlement to an evidentiary hearing on a material CMP rate issue had been established on the basis of the facts and arguments presented by other litigants. I did not create any universal rule concerning the manner in which a petitioner may preserve issues for litigation. I

Even though Petitioner is correct in noting that 42 C.F.R. § 498.40(b) does not require the use of any "magic words" (P. Reply, 6), the words chosen for use by Petitioner, when reasonably interpreted, need to indicate its belief that the CMP is unreasonable and the basis for that belief.[41] Here, the only words which might even conceivably imply that the CMP amount was unreasonable are those Petitioner used in its hearing request to allege HCFA's failure to examine any financial information. Despite its opportunity to do so, Petitioner has set forth no disagreement with the reasonableness of the CMP amount for any other reason.

For these reasons, having entered summary judgement against Petitioner on the sole issue of fact which might relate to the reasonableness of the CMP amount selected by HCFA, I now affirm HCFA's CMP amount determination.

RULING 5: No new issue will be added pursuant to my authority under 42 C.F.R. § 498.56(a).

In this case, Petitioner has not requested the addition of new issues by me under 42 C.F.R. § 498.56(a) in order to continue its litigation against HCFA. However, I have considered, and then rejected, the possibility of adding new issues to this case.

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stated those criticisms in directing HCFA to be more forthcoming, to avoid unjustly prejudicing those other petitioners' ability to prepare and present evidence at hearing.

[41] Above, in Ruling 2, I discussed the application of the requirements contained in 42 C.F.R. § 498.40(b) and the need to interpret a petitioner's words reasonably for determining whether or which issues have been preserved for adjudication.

I note that in CarePlex of Silver Spring v. HCFA, DAB No. 1627 (1997), an Appellate Panel of the DAB found that the petitioner's hearing request, though less than clear, had met the regulatory requirements 42 C.F.R. § 498.40(b) for presenting a challenge to HCFA's CMP amount determination by using words in its hearing request such as, "[it] was inappropriate and unfair to assesse a CMP" for deficiencies for which CarePlex had "no culpability whatsoever." Id. at 23 - 24. I agree with the foregoing conclusion.

Given that HCFA's cross-motion turns on the appropriateness of proceedings in light of the issues requiring adjudication, I think it significant also that the Appellate Panel did not indicate that CarePlex was entitled to an evidentiary hearing merely because it had preserved its challenge to the reasonableness of the CMP rate. When it remanded the case to the administrative law judge, the Appellate Panel directed only "further proceedings" to consider the reasonableness of the CMP amount issue. Id. at 26.

I do not consider it appropriate for me to come to the unsolicited aid of Petitioner after HCFA has placed a legally sound motion before me. My adding new issues would, in effect, render moot the merits of HCFA's position, and thereby deprive the parties of their right to have a resolution to the legal disputes they have generated. Adding new issues on my own initiative will also likely interfere with Petitioner's right to litigate selected issues of its choice. In this respect, I note that the content of the hearing request reflects Petitioner's care in preserving numerous specific legal issues and only one issue of fact, and Petitioner has not availed itself of its subsequent opportunities to request modification or addition of any issue even after HCFA has filed its cross-motion for summary judgment. Nothing before me indicates that Petitioner was deficient in its ability to protect or advocate its own rights in this forum.

Notwithstanding the broad discretion conferred by 42 C.F.R. § 498.56(a), I do not interpret that regulation as an encouragement for administrative law judges to create a need for an evidentiary hearing or other proceedings when litigation should properly be brought to an end. In this case, HCFA has exercised its right as a party to request the cessation of litigation in an appropriate manner and by use of the most expeditious means possible. I have granted that request because all outstanding issues have been reviewed and adjudicated.

CONCLUSION

On the basis of the ruling issued above, all litigation in this case is now concluded.

/s/

Mimi Hwang Leahy

Administrative Law Judge