

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

42 CFR Part 124

RIN: 0905-AE33

Medical Facility Construction and Modernization; Requirements for Provision of Services to Persons Unable to Pay

AGENCY: Public Health Service, DHHS.

ACTION: Final rule.

SUMMARY: This document revises the rules currently governing how certain health care facilities, assisted under Titles VI and XVI of the Public Health Service Act, fulfill the assurance, given in their applications for assistance, that they would provide a reasonable volume of services to persons unable to pay. Public comment on the current rules and operational experience with them indicated the need to revise the current requirements with respect to nursing homes, many of which are unable under current requirements to meet their obligation to provide such services. The rules below should permit qualified facilities to satisfy their uncompensated services assurance.

DATES: These rules are effective on May 1, 1995.

Applicability For facilities certified under 42 CFR 124.516(b)(1), these rules are applicable on the later of May 1, 1995 or the beginning of the facility's next fiscal year. For all other facilities, these rules are applicable on May 1, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. Eulas Dortch, 301-443-5656.

SUPPLEMENTARY INFORMATION: On April 4, 1994, the Secretary of Health and Human Services proposed amending the rules governing what is popularly known as the Hill-Burton uncompensated services program. 59 FR 15693. As explained more fully below, the Notice of Proposed Rulemaking (NPRM) proposed to expand the income eligibility limits applicable to patients served by obligated nursing homes, to help such facilities meet their existing uncompensated services obligations.

The Public Health Service strongly encourages all grant recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. This is consistent with the PHS mission to protect and advance the physical and mental health of the American people.

Regulatory Background

Health care facilities covered by the program received construction assistance under two titles of the Public Health Service Act, Title VI (the "Hill-Burton Act", 42 U.S.C. 291, *et seq.*) and Title XVI (42 U.S.C. 300q, *et seq.*). Under both titles, facilities receiving such construction assistance have been required, as a condition of receiving the construction assistance, to provide an assurance that "there will be available in the facility or portion thereof to be constructed or modernized a reasonable volume of services to persons unable to pay therefor * * *." 42 U.S.C. 291c(e). See also 42 U.S.C. 300s-1(b)(1)(K)(ii). This assurance is known as the "uncompensated services assurance."

Regulations governing compliance with the uncompensated services assurance were first issued in 1947, and have been revised several times. On May 18, 1979, comprehensive regulations governing compliance with the assurance were issued at 44 FR 29372. Among other things, the 1979 regulations: established a minimum level of uncompensated services facilities were required to provide; set an annual compliance level of uncompensated services to be provided and required facilities to make up any deficit in meeting the annual compliance level through provision of more uncompensated services in later years; required facilities to allocate their uncompensated services either under a plan meeting certain requirements or on a first-request, first-served basis; required facilities to notify the public of the existence of their uncompensated services programs through public notice and provision of personal notice to individuals served by the facilities; and required facilities to keep records documenting compliance and to periodically report concerning compliance. The 1979 regulations also for the first time established national eligibility criteria, based on income: Individuals whose annual income was at or below the poverty level (known as "Category A individuals") were automatically eligible for uncompensated services; individuals whose annual income was at or below two times the poverty level (known as "Category B individuals") were also eligible for uncompensated services, unless the facility decided to limit its services to Category A individuals only. However, the 1979 regulations also provided that amounts to which an individual was entitled under a third-party insurance or governmental program could not be credited towards

a facility's uncompensated services quota.

On December 3, 1987, the Secretary revised the 1979 regulations at 52 FR 46022. As pertinent here, the 1987 regulations effected a technical revision of the 1979 regulations, making explicit what had formerly been implicit in those regulations; *i.e.*, that coverage of an indigent under a third-party insurance or governmental program precludes eligibility for uncompensated services. 42 CFR 124.505(a)(1) (1988). This policy simply reflects the long-standing agency view of the uncompensated services program as a program of last resort, designed to serve persons who have no source of payment, such as Medicaid or private insurance, for medical care.

This policy has created major compliance problems for many Hill-Burton-obligated nursing homes. HHS determined that, of the 287 nursing homes with outstanding uncompensated services obligations under the general compliance standards of the regulations, 243 have deficits; the majority of these have received no uncompensated services credit. These deficits persist despite many attempts by HHS to provide technical assistance to nursing homes to bring them into compliance. The fundamental problem is that, in most of these nursing homes, the only individuals who meet the income-eligibility requirements for receipt of uncompensated services are also covered by their state's Medicaid program; hence, they are by definition *ineligible* for uncompensated services under § 124.505(a)(1). Thus, in states in which the Medicaid eligibility limits exceed the Hill-Burton eligibility limits and which cover most or all medical services, nursing homes are chronically unable to fulfill their uncompensated services obligations.

Proposed Rules

HHS established a task force to analyze nursing home compliance issues and develop strategies for dealing with compliance problems. Based on the task force findings and its own survey of regional offices of the Health Care Financing Administration, which administers the Medicaid program, HHS proposed to triple the income eligibility limit for individuals in nursing homes, to create a broader pool of eligible individuals for such facilities. The NPRM accordingly proposed to establish a third income eligibility level (Category C) for nursing home services only. See, proposed § 124.505(a)(2)(iii). A Category C individual would be an individual whose annual income is greater than two times, but does not

exceed three times, the poverty level. The regulations already define which facilities are "nursing homes" within the scope of the regulation. See, § 124.502(h). In addition, the NPRM proposed certain technical and conforming amendments to other sections of the regulations. The principal one was the proposed change to § 124.506(a)(1)(v), to provide that if a nursing home provides services on a reduced charge basis to both Category B and Category C individuals, it may not employ a discount method that gives Category C individuals greater discounts than those given to Category B individuals.

Public Comment and Department's Response

The Department received seven comments on the NPRM, two from nursing home associations and five from representatives of individual nursing homes. While most of the commentors applauded the proposed revisions as a step in the right direction, they made a number of suggestions for other policies that would, in their view, better address the chronic deficit problem faced by so many nursing homes. These comments and the Department's responses thereto are set out below.

1. The most common criticism was that the proposed remedy fails to address what the commentors in general see as the chief problem: The inadequacy of Medicaid reimbursements. The commentors generally noted that their facilities run large losses attributable to the differential between Medicaid reimbursement and actual costs, and suggested that facilities be permitted to write off this differential as uncompensated services. An Ohio facility that advocated this approach noted that, in Ohio, all persons with incomes up to the cost of nursing home services qualify for Medicaid, so that there are no non-Medicaid eligible patients who would qualify for uncompensated services. A variation of this approach was the suggestion that a compliance alternative be created for facilities with a Medicaid patient census of at least 70%.

The Department does not agree that it should treat as uncompensated services amounts in excess of "reasonable costs" (the amount reimbursed by Medicaid). To do so would result in facility credit for unreasonable charges and a reduction in the amount of uncompensated services to persons unable to pay. Rather, it wishes to look at the effect of the rules below, together with the recently adopted charitable facility alternative, on reducing the

incidence of intractable deficits. For the same reasons, it is not prepared to craft a compliance alternative for majority-Medicaid facilities along the lines suggested. These facilities, by virtue of their high volume Medicaid levels, have an inherently smaller compliance level under the 3 percent compliance option. However, the Department intends to continue to study this issue.

With respect to the Ohio situation, it is likely that such facilities will qualify under the recently published charitable facility alternative. See, 59 FR 44634 (Aug. 30, 1994). Such facilities may be able to satisfy their obligations and make up their deficits under that alternative, as long as they collect no monies (other than those required to be collected under governmental programs) from Hill-Burton eligible patients.

2. One provider association, while supportive of the proposed rules, suggested that the Department adopt additional compliance alternatives for facilities in states which have medically needy programs and which, accordingly, are likely to be unable to benefit from the proposed increase in the income eligibility level. The association suggested that (1) services uncovered by Medicaid be identified and considered eligible for inclusion as uncompensated services, such as additional hours of nursing care, therapies, or other activities; (2) health-related services provided to eligible non-residents on the nursing facility premises be counted as uncompensated services; and (3) services provided by nursing homes off-premises under Medicaid home and community-based waivers be counted as uncompensated services.

Generally, the Department agrees that health services provided by a Hill-Burton facility that are not covered by Medicaid should count as uncompensated services, and it has traditionally accepted them as such. However, since Medicaid patients are not liable for additional hours of care provided which exceed established Medicaid standards, such costs are not considered to be uncompensated services. With respect to the second proposal, there is no problem under the present regulations with counting, toward a facility's uncompensated services quota, health services provided on-premises to eligible nonresidents of the facility. Thus, facilities may include such services in their allocation plans. However, the association's third proposal is not one that the Department can accept, since services which are reimbursed by Medicaid are, by definition, ineligible for Hill-Burton credit.

3. A couple of facilities objected to the proposed rules on the grounds that expanding the income eligibility limits would create a larger pool of eligibles and thus be devastating to facilities that are already in financial straits. One facility asked in particular that it be allowed to write off necessary building maintenance and improvement expenses as uncompensated services, as it is unable to afford to serve more persons below cost than it already does.

These facilities appear to misapprehend the requirements of the current uncompensated services regulations. Under the current regulations, facilities that are financially unable to meet their uncompensated services obligation may apply to have it deferred until they are financially able to make it up. See 42 CFR 124.503(b)(1)(i) and 124.511(c). However, except to the extent building maintenance and improvement expenses are factored into a facility's indirect cost rate that forms part of the basis for its charges for services, such expenses are not creditable as "uncompensated services," because they are not "services" within the meaning of the statute.

4. A couple of commentors stated that the proposed increase in income eligibility limits would be problematic for other reasons: (1) Because such individuals would be covered under the proposed Health Security Act; and (2) because the proposed limit exceeds the costs of nursing home services in certain states. The Department, however, does not share the commentors' concerns in this regard. Should health care reform become law, this program (like others) will have to be reviewed for consistency with the operation of the reform statute enacted, but this is not an issue that can productively be addressed before enactment of such a statute. With respect to the second comment, the Department thinks that the income limit will not be a problem in such states, as a facility cannot, in any event, receive credit for more than it charges.

5. No comments were received concerning the conforming and technical amendments proposed. However, the recent adoption of the charitable facility compliance alternative has necessitated a conforming amendment to that section (see § 124.516 below). Otherwise, however, no changes to the proposed technical and conforming amendments have been made.

6. Dates. Note that, with respect to facilities certified under the alternative in the newly adopted § 124.516(b)(1), this amendment is applicable on May 1, 1995 or the beginning of the facility's

next fiscal year, whichever is later. Thus, it is the Department's intention that the three-year base in § 124.516 will operate prospectively only with respect to the amendment to the charging restriction of § 124.516(b)(1). For example, a nursing home applying for certification under § 124.516(b)(1) in 1996 would only have to demonstrate that it had not charged persons with incomes up to three times the poverty level for that part of the three-year period in which the amendment below applied to it, not for the entire three-year period.

It should be noted that the changes adopted below will not have the same automatic effect for other nursing homes. Rather, unless a nursing home has failed to adopt an allocation plan, it will generally not be required to provide uncompensated services to Category C individuals unless it takes an affirmative action to do so, through publication of a revised allocation plan covering Category C individuals. See, § 124.506(a)(1)(v) below. However, to facilitate prompt coverage of such individuals, a facility need not wait until the effective date of these amendments to publish a revised allocation plan under § 124.506(c), but may do so any time after publication of these amendments, with the effective date of the revised allocation plan being at least 60 days following publication.

Regulatory Flexibility Act and Executive Order 12866

The rules below do not change the existing procedural and reporting requirements for obligated facilities. The Department has determined that the impact will not approach the annual \$100 million threshold for major economic consequences as defined in Executive Order 12866. Therefore, a regulatory impact analysis is not required.

Consistent with the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Secretary certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act of 1980

The rules below contain no information collection or reporting requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980.

List of Subjects in 42 CFR Part 124

Grant programs—health, Health facilities, Loan programs—health, Low income persons.

Dated: January 12, 1995.

Philip R. Lee,
Assistant Secretary for Health.
 Approved: March 24, 1995.
Donna E. Shalala,
Secretary.

For reasons set out in the preamble, subpart F of 42 CFR part 124 is hereby amended to read as follows:

Subpart F—Reasonable Volume of Uncompensated Services to Persons Unable to Pay

1. The authority citation for 42 CFR part 124, subpart F, continues to read as follows:

Authority: 42 U.S.C. 216; 42 U.S.C. 300s(3).

2. The first two sentences of § 124.503(b)(4) are revised to read as follows:

§ 124.503 Compliance level.

- (a) * * *
- (b) * * *

(4) *Affirmative action plan for precluding future deficits.* Except where a facility reports to the Secretary in accordance with § 124.509(a)(2)(iii) that it was financially unable to provide uncompensated services at the annual compliance level, a facility that fails to meet its annual compliance level in any fiscal year shall, in the following year, develop and implement a plan of action that can reasonably be expected to enable the facility to meet its annual compliance level. Such actions may include special notice to the community through newspaper, radio, and television, or expansion of service to Category B, or, with respect to nursing homes, Category C, persons. * * *

3. Section 124.505 is amended by revising paragraph (a)(2)(ii) and adding (a)(2)(iii) to read as follows:

§ 124.505 Eligibility criteria.

- (a) * * *
- (2) * * *

(ii) *Category B*—A person whose annual individual or family income, as applicable, is greater than but not more than twice the poverty line issued by the Secretary pursuant to 42 U.S.C. 9902 that applies to the individual or family. If persons in Category B are included in the allocation plan, the facility shall provide uncompensated services to these persons without charge, or in accordance with a schedule of charges as specified in the allocation plan.

(iii) *Category C*—With respect only to persons seeking or receiving nursing home services, a person whose annual or family income, as applicable, is more

than twice but not greater than three times the poverty line issued by the Secretary pursuant to 42 U.S.C. 9902 that applies to the individual or family. If persons in Category C are included in the allocation plan, the facility shall provide uncompensated services to these persons without charge, or in accordance with a schedule of charges as specified in the allocation plan; and

* * * * *

4. Section 124.506 is amended by revising paragraph (a)(1)(iii) through (a)(1)(v), the first sentence of paragraph (b)(2), and by adding paragraph (a)(1)(vi), to read as follows:

§ 124.506 Allocation of services; plan requirement.

- (a)(1) * * *

(iii) State whether Category B or, in the case of nursing homes only, Category C persons will be provided uncompensated services, and if so, whether the services will be available without charge or at a reduced charge;

(iv) If services will be made available to Category B persons at a reduced charge, specify the method used for reducing charges, and provide that the method is applicable to all persons in Category B;

(v) With respect to nursing homes only, if services will be made available to Category C persons at a reduced charge, specify the method used for reducing charges, provided that such method may not result in greater reductions than those afforded to Category B persons, and provide that this method is applicable to all persons in Category C; and

(vi) Provide that the facility provides uncompensated services to all persons eligible under the plan who request uncompensated services.

- (b)(1) * * *

(2) If no plan was previously published in accordance with paragraph (a)(2) of this section, the facility must provide uncompensated services without charge to all applicants in Category A and Category B, and, with respect to nursing homes, Category C, who request service in the facility.* * *

* * * * *

5. Section 124.516 is amended by revising paragraph (b)(1) to read as follows:

§ 124.516 Charitable facility compliance alternative.

- (a) * * *
- (b) * * *

(1)(i) *For facilities that are nursing homes:* It received, for the three most recent fiscal years, no monies directly from patients with incomes up to triple the current poverty line issued by the

Secretary pursuant to 42 U.S.C. 9902, exclusive of amounts charged or received for purposes of claiming reimbursement under third party insurance or governmental programs, such as Medicaid or Medicare deductible or coinsurance amounts;

(ii) *For all other facilities.* It received, for the three most recent fiscal years, no monies directly from patients with incomes up to double the current poverty line issued by the Secretary pursuant to 42 U.S.C. 9902, exclusive of amounts charged or received for purposes of claiming reimbursement under third party insurance or governmental programs, such as Medicaid or Medicare deductible or coinsurance amounts; or

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