

**PROVIDER REIMBURSEMENT REVIEW BOARD  
HEARING DECISION**

ON-THE-RECORD  
98-D62

**PROVIDER** -Hurley Medical Center  
Flint, Michigan

**DATE OF HEARING-**  
May 7, 1998

Provider No. 23-0132

Cost Reporting Period Ended -  
June 30, 1990

**vs.**

**INTERMEDIARY** -  
Blue Cross and Blue Shield Association/  
Health Care Service Corporation

**CASE NO.** 94-3278

**INDEX**

	Page No.
<b>Issue</b> .....	2
<b>Statement of the Case and Procedural History</b> .....	2
<b>Provider's Contentions</b> .....	4
<b>Intermediary's Contentions</b> .....	6
<b>Citation of Law, Regulations &amp; Program Instructions</b> .....	7
<b>Findings of Fact, Conclusions of Law and Discussion</b> .....	9
<b>Decision and Order</b> .....	12

ISSUE:

Was the denial of the TEFRA exception request proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Hurley Medical Center (“Provider”) is a nonprofit, tertiary teaching hospital located in Flint, Michigan.<sup>1</sup> The Provider operates a psychiatric unit which is exempt from the Medicare prospective payment system and continues to be reimbursed on the basis of reasonable cost. As such, the exempt unit is subject to cost limitations enacted by the Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”).<sup>2</sup>

On September 24, 1991, Blue Cross and Blue Shield of Michigan (“Intermediary”)<sup>3</sup> issued a Notice of Program Reimbursement (“NPR”) effectuating final settlement of the Provider’s Medicare cost report for its fiscal year ended June 30, 1990.<sup>4</sup> On March 19, 1992, within 180 days of the date of the Intermediary’s NPR, the Provider sent a letter to the Provider Reimbursement Review Board (“Board”) explaining that no adjustments were made by the Intermediary to its 1990 cost report and, therefore, it had no adjustments to appeal at that time. However, the letter also explained that the Provider had submitted a request to the Health Care Financing Administration (“HCFA”) for an exception/adjustment to the TEFRA limits for its 1989 cost reporting period, and stated “[i]f a new base is granted, Hurley appeals to have this base rolled forward and applied to it’s FY ‘90 cost report.”<sup>5</sup>

On May 20, 1992, the Provider sent a letter to the Intermediary withdrawing its appeal. The Provider asserts this action was taken after being verbally advised by a representative of the Board that it was inappropriate to appeal to the Board in a situation where no adjustment had been made. In this letter to the Intermediary the Provider stated:

[f]or the Psychiatric Distinct Unit Target Amount, it is our understanding that if

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<sup>1</sup> Provider’s Position Paper at 3.

<sup>2</sup> Provider’s Position Paper at 20.

<sup>3</sup> Health Care Service Corporation is the Provider’s current Medicare fiscal intermediary. Blue Cross and Blue Shield of Michigan, the former intermediary, issued the original NPR involved in this case as well as first and second Revised NPRs. Health Care Service Corporation issued a third Revised NPR, which is also at issue.

<sup>4</sup> Exhibit P-A.

<sup>5</sup> Exhibit P-O.

an “adjustment” is granted, the new Target Amount is automatically rolled forward and applied directly to fiscal Year 1990 without reopening the cost report period.

If an “exception” is granted for Fiscal year 1989 only, or is not approved at all, we understand that we would have the right to file an exception/adjustment request for the Fiscal Year 1990 Target Amount with [Health Care Financing Administration] HCFA and do not need to file or appeal anything with the PRRB.

Provider letter dated May 20, 1992.<sup>6</sup>

On June 25, 1992, HCFA sent a letter to the Intermediary approving the Provider's request for an adjustment to the TEFRA limit for its fiscal year ended June 30, 1989, and stated:

[i]n addition, for subsequent periods [i.e., cost reporting periods following FYE 6/30/89] where the bases of the adjustments are the same as in FY 1989, we are granting you the authority to compute adjustment amounts using the methodologies outlined in the enclosures. Please send our office an informational copy of any future adjustments granted to HMC [the Provider].

HCFA letter dated June 25, 1992.<sup>7</sup>

On July 29, 1993, the Intermediary issued an amended NPR applicable to the Provider's 1990 cost reporting period.<sup>8</sup> Thereafter, on August 11, 1993, the Provider re-submitted its TEFRA exception request<sup>9</sup> and, on March 22, 1994, the Intermediary issued a Corrected NPR approving the request.<sup>10</sup>

However, on December 20, 1994, HCFA instructed the Intermediary to reverse the TEFRA exception for the Provider's 1990 cost reporting period based on the determination that the request was not filed within the required 180 days following the date of the applicable NPR.<sup>11</sup>

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<sup>6</sup> Exhibit P-Z.

<sup>7</sup> Exhibit P-Q.

<sup>8</sup> Exhibit P-R.

<sup>9</sup> Exhibit P-S.

<sup>10</sup> Exhibit P-A.

<sup>11</sup> Exhibit P-T.

Subsequently, the Provider submitted a request for reconsideration, but HCFA did not change its position.<sup>12</sup>

On January 31, 1996, the Intermediary issued another amended NPR containing an adjustment reversing the TEFRA exception previously granted for the Provider's 1990 cost reporting period.<sup>13</sup> On June 24, 1996, the Provider appealed the Intermediary's adjustment to the Board pursuant to 42 C.F.R. §§ 405.1835-.1841, and has met the jurisdictional requirements of those regulations. The amount of Medicare reimbursement in controversy is \$1,156,692.

The Provider was represented by Kenneth R. Marcus, Esquire. The Intermediary was represented by Bernard M. Talbert, Associate Counsel, Blue Cross and Blue Shield Association.

#### PROVIDER'S CONTENTIONS:

The Provider contends that the Intermediary's adjustment reversing its exception to the TEFRA cost limits is improper. The Provider asserts that contrary to the Intermediary's argument, its request for an exception was, in fact, timely filed in accordance with Medicare regulations.<sup>14</sup>

The Provider asserts that the governing regulation in effect as of September 24, 1991, the date of the initial NPR for its June 30, 1990 cost report, was 42 C.F.R. § 413.40(e), as issued on August 30, 1991, 56 Fed. Reg. 43241-43243.<sup>15</sup> In part, the regulation states:

[a] hospital may request an exception from, or adjustment to, the rate of cost increase ceiling imposed under this section. The hospital's request must be made to its fiscal intermediary no later than 180 days after the date on the intermediary's notice of amount of program reimbursement.

42 C.F.R. § 413.40(e).

Respectively, the Provider asserts that it met the 180 day requirement because the letter it sent to the Board, with a copy to the Intermediary, was dated March 19, 1992, and the applicable NPR was issued on September 24, 1991. Thus, the Intermediary was notified within 180 days

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<sup>12</sup> Exhibit P-W.

<sup>13</sup> Exhibit P-C.

<sup>14</sup> Provider's Position Paper at 23-25.

<sup>15</sup> Exhibit P-Y.

that the Provider was requesting an exception to the TEFRA limits for its fiscal year ended June 30, 1990.

The Provider emphasizes that the aforementioned regulation in effect when it filed its request did not require the entirety of supporting documentation to be submitted at that time. Rather, it merely required that the request be made to the Intermediary in a timely manner. In contrast, the Provider notes that many other Medicare regulations specify the contents of a request. For example, the requirement that a request for reclassification of misclassified graduate medical education costs must include certain supporting documentation, 42 C.F.R. § 413.86(j), as does the requirement for submitting a request for obligated capital under the Medicare capital prospective payment system, 42 C.F.R. § 412.302(c)(1)(v). Moreover, the provisions of the Provider Reimbursement Manual, Part I (“HCFA Pub. 15-1”) §§ 2803.1 - 2803.6, 2803.62, and 2803.66 that were in force during the subject cost reporting period also did not require supporting documentation to be submitted with the request.

The Provider also emphasizes that it believed the TEFRA exception request it filed for its fiscal year ended June 30, 1989, if granted, would automatically apply to its 1990 cost reporting period. The Provider asserts that this understanding was not contradicted by either the Board or the Intermediary. Thus, the Provider withdrew its appeal to the Board with the express understanding:

[f]or the Psychiatric Distinct Unit Target Amount, it is our understanding that if an “adjustment” is granted, the new Target Amount is automatically rolled forward and applied directly to fiscal Year 1990 without reopening the cost report period.

If an “exception” is granted for Fiscal year 1989 only, or is not approved at all, we understand that we would have the right to file an exception/adjustment request for the Fiscal Year 1990 Target Amount with HCFA and do not need to file or appeal anything with the PRRB.

Provider letter dated May 20, 1992.<sup>16</sup>

While the Provider acknowledges that this understanding was inaccurate, it asserts that at the time it was reinforced by both the Intermediary and the Board, which both persuaded the Provider to withdraw its March 19, 1992 appeal.

The Provider contends that the request it filed on August 11, 1993, for an exception to the TEFRA limits was also filed timely.<sup>17</sup> The Provider asserts this request was filed within 180

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<sup>16</sup> Exhibit P-Z.

<sup>17</sup> Provider’s Position Paper at 26.

days following the July 29, 1993 date of the Intermediary's first amended NPR. The Provider cites Care Unit Hospital of Dallas v. Mutual of Omaha, PRRB Dec. No. 95-D26, March 8, 1995, Medicare & Medicaid Guide (CCH) ¶ 43,222, vac'd and rem'd, HCFA Admin., May 5, 1995, Medicare & Medicaid Guide (CCH) ¶ 43,510 ("Care Unit Hospital of Dallas") where the Board recognized that the governing regulation, 42 C.F.R. § 413.40(e), does not require TEFRA exception requests to be filed within 180 days of the date of the original NPR.

Finally, the Provider argues that the Intermediary, in granting its request for an exception to the TEFRA limits, clearly considered the Provider's request to be timely filed.<sup>18</sup> Moreover, the following instruction in HCFA's letter dated June 25, 1992, reasonably was interpreted by the Intermediary as authorizing the Intermediary to take that action:

[i]n addition, for subsequent periods [i.e., cost reporting periods following fiscal year 6/30/89] where the bases of the adjustments are the same as in FY 1989, we are granting you the authority to compute adjustment amounts using the methodologies outlined in the enclosures. Please send our office an informational copy of any future adjustments granted to HMC [i.e., the Provider].

HCFA letter dated June 25, 1992.<sup>19</sup>

The Provider asserts that both itself and the Intermediary construed these instructions as confirming their understanding that until the 1989 TEFRA exception request was processed, it was unnecessary for the Provider to submit supporting documentation for the 1990 request. Moreover, both the Provider and the Intermediary interpreted this instruction as authorizing the Intermediary to grant the 1990 TEFRA exception request.

#### INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that its adjustment reversing the Provider's exception to the TEFRA cost limits is proper. The Provider did not file its request for the exception within the 180 day time requirement contained in 42 C.F.R. § 413.40(e).<sup>20</sup>

The Intermediary asserts that the original NPR pertinent to the subject cost report was dated September 24, 1991. The Provider did not submit its TEFRA exception request until August

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<sup>18</sup> Provider's Position Paper at 27.

<sup>19</sup> Exhibit P-Q.

<sup>20</sup> Intermediary's Position Paper at 13.

11, 1993, which is almost two years later.<sup>21</sup> The Provider's March 19, 1992 letter to the Board does not constitute a TEFRA exception request. The Board handles provider appeals and is not responsible for reviewing/granting TEFRA exception requests. The enabling regulation at 42 C.F.R. § 413.40(e) specifically requires providers to submit TEFRA exception requests to the intermediary.

The Intermediary contends that the regulations also clearly document the procedures to be followed in filing TEFRA exception requests. The Provider in the instant case did not follow the procedures as set forth. The Intermediary asserts that the Provider, the Intermediary, and the Board are all bound by Medicare laws, regulations and instructions.

Finally, the Intermediary rejects the Provider's argument that even if the March 19, 1992 letter to the Board does not constitute a TEFRA exception request, that its August 11, 1993 letter was timely filed because it was issued within 180 days of the July 29, 1993 first amended NPR. While the Provider cites Care Unit Hospital of Dallas in support of this argument, the Intermediary notes that the HCFA Administrator vacated and remanded that decision.<sup>22</sup> The Intermediary explains that cost report reopening rules are found at 42 C.F.R. §§ 405.1885-.1889. When a cost report is reopened and revised, and there is a question as to which issues may be appealed from a revised NPR, the reopening regulations clearly apply and supersede any other regulation. The appeal of a revised NPR is limited to those issues revised in the NPR and it is those revised items that are subject to further appeal. As the Board has held in many other previous cases, a revised NPR does not reopen the entire cost report to appeal nor does it extend the 180-day appeal period for any earlier NPR. A revised NPR merely reopens those issues adjusted by the revised NPR and only those adjustments may be appealed. In the instant case, the initial NPR indicated that the Provider exceeded its TEFRA target amount. The Provider had the opportunity to submit its TEFRA exception request within 180 days of that NPR but chose not to do so. Instead the Provider is claiming that since the August 11, 1993 TEFRA exception request was submitted within 180 days of the July 29, 1993 first amended NPR, the TEFRA exception request was timely filed. This argument is erroneous. The circumstances that precipitated the TEFRA penalty were a result of the original NPR and not the first amended NPR. The Provider's 180 day period to request an exception to the TEFRA target limits commenced from the issuance of the original NPR. This position agrees with HCFA's comments in the above cited HCFA Administrator Decision.

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<sup>21</sup> Exhibit I-8.

<sup>22</sup> Exhibit I-16.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:1. Law - 42 U.S.C.:

- § 1395x(v) - Reasonable Cost
- § 1395ww(b) - Rate of Increase in Target Amounts for Inpatient Hospital Services

2. Regulations - 42 C.F.R.:

- § 405.1801(a) - Definitions
- § 405.1807 - Effect of Intermediary Determination
- §§ 405.1835-.1841 - Board Jurisdiction
- §§ 405.1885-.1889 - Reopening a Determination or Decision, Notice of Reopening, Effect of a Revision
- § 412.302(c)(1)(v) - Obligated Capital Cost-Notification to Intermediary
- § 413.9 - Cost Related to Patient Care
- § 413.40(e) - Hospital Requests Regarding Applicability of the Rate of Increase Ceiling
- § 413.40(i)(2) - Request for Adjustment
- § 413.86(j) - Adjustment of a Hospital's Target Amount or Prospective Payment Hospital-Specific rate-(1) Misclassified Operating Costs-(i) General Rule

3. Program Instructions-Provider Reimbursement Manual, Part I (HCFA Pub. 15-1):

- § 2803ff - Excluded Hospitals and Excluded Units

4. Case Law:

Care Unit Hospital of Dallas v. Mutual of Omaha, PRRB Dec. No. 95-D26, March 8, 1995, Medicare & Medicaid Guide (CCH) ¶ 43,222, vac'd and rem'd, HCFA Admin., May 5, 1995, Medicare & Medicaid Guide (CCH) ¶ 43,510.

Palo Verde v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Arizona, PRRB Dec. No. 98-D3, October 24, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,738, rev'd HCFA Admin., December 29, 1997, Medicare & Medicaid Guide (CCH) ¶ 46,052.

5. Other:

56 Fed. Reg. 43241-43243 (August 1991).

Provider letter dated May 20, 1992.

HCFA letter dated June 25, 1992.

Intermediary Letter dated October 26, 1995.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties' contentions, evidence presented, and analysis of the controlling laws and regulations, finds and concludes that the Intermediary's adjustment reversing the Provider's exception to the TEFRA cost limits for its 1990 cost reporting period was improper. HCFA directed the Intermediary to reverse the adjustment to the TEFRA ceiling because the Provider did not submit a request for an exception within 180 days of the Intermediary's NPR, based upon HCFA's interpretation of 42 C.F.R. § 413.40(e). However, HCFA should have accepted a letter written by the Provider on March 22, 1992, as a timely request based upon the Intermediary's initial NPR and, notwithstanding, should accept a more formal request submitted by the Provider within 180 days of an amended NPR.

The Board finds that the Intermediary issued its initial NPR for the subject cost reporting period on September 24, 1991. On March 19, 1992, within 180 days of that NPR, the Provider sent a letter to the Board with a copy to the Intermediary explaining the Provider's intent to request an exception to the TEFRA limits. The letter also explained that the Provider was waiting to learn the results of the exception request it filed for its 1989 cost reporting period before filing its request for 1990. The Provider explained its belief, albeit incorrect, that the 1989 request, if approved, may be rolled forward to the 1990 cost report. (Exhibit I-5)

The Board finds that HCFA's rejection of the Provider's March 19, 1992 letter as a timely request for an exception is inappropriate in the instant case. The letter shows that the Provider did not have a total understanding of the exceptions process. However, it also represents a positive action that was timely taken to obtain an exception. HCFA's argument that the letter is factually not a request places form over substance and conflicts with statutory and regulatory provisions that require Medicare to pay providers the reasonable and necessary costs they incur furnishing services to Medicare beneficiaries. 42 U.S.C. § 1395x(v), 42 C.F.R. § 413.9. The Board notes there are no arguments in this case regarding the amount of allowable program costs incurred by the Provider above the TEFRA limit that are otherwise reimbursable. HCFA approved exceptions to the TEFRA limits for the Provider's 1989 and 1991 cost reporting periods on the same basis that the Provider requested an exception for its 1990 cost reporting period, which was accepted and paid by the Intermediary.

In effect, the Board distinguishes the Provider's actions in the instant case from a situation where an informed provider makes a lackluster attempt to obtain an exception within the 180 day time limitation or where any provider takes no action within the 180 day period. The Board finds that the Intermediary also contemplated the Provider's March 19, 1992 letter as acceptable cause to grant the Provider's request for 1990. Not only did the Intermediary effectuate the adjustment and pay the Provider, as noted above, but in a letter to HCFA dated October 26, 1995 (Exhibit P-V), the Intermediary states:

[t]he provider notified both the PRRB and the intermediary (within 180 days of the NPR) of their intent to appeal the 1988 and 1990 TEFRA rates pending the determination of the previously submitted 1989 TEFRA exception request.

The provider did not receive contrary instructions from the PRRB or intermediary, and therefore, thought it was appropriate to file the FY 1988 and 1990 TEFRA adjustment requests after issuance of the FY 1989 NPR.

I request that you reconsider your December 20, 1994 [denial] letter in light of the provider's position . . .

Intermediary letter dated October 26, 1995 (Emphasis added).

In the Board's opinion, it is the failure of the agency, HCFA, and its agent, the Intermediary, to provide timely and corrective feedback to an obviously naive Provider that consequently evokes a decision in favor of the Provider. The Provider's letter of March 19, 1992, as well as a follow-up letter to the Intermediary dated May 20, 1992, gave ample evidence of misunderstanding on the part of the Provider regarding the appeals process; yet, there is no evidence that the faulty assumption was addressed even to the point of a HCFA response which reinforced the false assumption harbored by the Provider. Specifically, on June 25,

1992, HCFA advised the Intermediary that it had approved the Provider's request for an exception to the TEFRA limits for its 1989 cost reporting period. This letter also granted the Intermediary the authority to determine subsequent period exception amounts as follows:

[i]n addition, for subsequent periods where the bases of the adjustments are the same as in FY 1989, we are granting you the authority to compute adjustment amounts using the methodologies outlined in the enclosures. Please send our office an informational copy of any future adjustments granted to HMC [i.e., the Provider].

HCFA letter dated June 25, 1992.

The Board also believes this situation is closely related to the common law concept of detrimental reliance, and its broader doctrine of promissory estoppel. While the Board recognizes that the doctrine of promissory estoppel has not fared well when applied to administrative law, the fact that the essence of the doctrine, that "injustice can be avoided only by enforcement of promise", Black's Law Dictionary 1379 (4th ed. 1968), is apropos, by analogy, in the instant case.

Moreover, the Board notes that the Administrator recently interpreted the regulations in such a manner as to apply an equitable solution to a TEFRA exception request similar to that of the instant case. In Palo Verde v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Arizona, PRRB Dec. No. 98-D3, October 24, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,738, rev'd HCFA Admin., December 29, 1997, Medicare & Medicaid Guide (CCH)

¶ 46,052 ("Palo Verde") the Board took the plain meaning of 42 C.F.R. §§ 405.1835-1841 to deny its jurisdiction over an issue that, in its opinion, had not been timely filed. The Administrator reversed the Board, noting that, ". . .under the language of 42 C.F.R § 405.1841(a), once a timely appeal of a determination has been filed, the Board is not limited to hearing only matters which are raised within three years." And further, relevant to TEFRA exception requests, ". . . [42 C.F.R §] 413.40(e)(5) provides that the appeal of a TEFRA exception is considered good cause for an extension of the 180-day period for appeal from an NPR." The Board adds that 42 C.F.R.

§ 413.40(e) addresses the 180 day time requirement for filing requests, and subsection (g) *Exceptions*, addresses the circumstances under which HCFA makes an adjustment to a provider's costs. Neither provision describes the exact composition of a request for an exception to the TEFRA limits. Therefore, the Board finds no reason to reject the Provider's March 19, 1992 letter based upon its content. In contrast, the Board notes 42 C.F.R. § 413.40(i)(2) regarding provider requests for an "adjustment" to the TEFRA limits. These regulatory provisions are explicit. They not only address the timeliness requirement for filing a request for an adjustment, but also itemize the exact data to be submitted with the request.

Therefore, applying what appears to be the Administrator's reasoning in Palo Verde to the

instant case, and accepting the Provider's March 19, 1992 letter to the Board as constituting the intent, if not the exact form of an appeal, then that letter would toll the Provider's 180 day period for filing a more formal exception request, which it did on August 11, 1993. Moreover, it would allow the Intermediary to grant the exception, which it did in an amended NPR dated March 22, 1994, pursuant to the "promise" of HCFA in their June 25, 1992 letter to the Intermediary "granting authority to compute adjustment amounts using the methodologies outlined . . . ." Such action will also mitigate the failure of the Intermediary and HCFA to refute or correct the Provider's obvious misunderstandings.

The Board also finds that the Provider is entitled to file for an exception to the TEFRA ceiling from the final determination that is the subject of this appeal.

Specifically, HCFA cited 42 C.F.R. § 413.40(e) as the controlling authority for denying the Provider's request. (Exhibit I-9) HCFA explained that the regulation requires TEFRA exception requests to be filed within 180 days of an "initial" NPR. The Board finds, however, that 42 C.F.R. § 413.40(e) does not distinguish an initial NPR from an amended or revised NPR, as follows:<sup>23</sup>

*(e) Hospital requests regarding applicability of the rate of increase ceiling. A hospital may request an exemption from, or exception or adjustment to, the rate of cost increase ceiling imposed under this section. The hospital's request must be made to its fiscal intermediary no later than 180 days from the date of the intermediary's notice of program reimbursement.*

42 C.F.R. § 413.40(e) (Emphasis added).

Therefore, the Board finds that the Provider is entitled to file an exception request with HCFA for a determination based upon its merits, based upon the Intermediary's revised NPR dated January 31, 1996. This NPR directly affected the provider's TEFRA ceiling and is the basis of this appeal. The Board, having concluded that an exception request may be filed based upon an amended or revised NPR, finds that the pertinent January 31, 1996 NPR has been held "open" by the Provider's appeal in accordance with 42 C.F.R. § 405.1807, which states, in part "[t]he [intermediary's] determination shall be final . . . unless . . . (c) A Board hearing is requested." And, by the same authority, the Board finds that the 180 day period for filing TEFRA exception requests has been tolled. The Board notes that 42 C.F.R. § 413.40(e) grants providers 180 days from an NPR to submit a TEFRA exception request, and that an NPR is synonymous with a "final determination" pursuant to 42 C.F.R. § 405.1801(a). Therefore, 42 C.F.R.

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<sup>23</sup> The Board notes that HCFA did change its regulations to specifically require exception requests to be filed within 180 days of an initial NPR. However, this change was not made until Federal fiscal year 1996, and is not applicable to the instant case.

§ 413.40(e) effectively grants providers 180 days from a final determination to submit a request for an exception to the TEFRA limits and, with respect to the instant case, there has been no final determination regarding the Provider's TEFRA ceiling.

DECISION AND ORDER:

HCFA's denial of the Provider's exception request was improper and is reversed. The Provider's exception request is remanded to HCFA for a determination based upon its merits.

Board Members Participating:

Irvin W. Kues  
James G. Sleep  
Henry C. Wessman, Esquire

Date of Decision: June 04, 1998

FOR THE BOARD:

Irvin W. Kues  
Chairman