

**REMEDIES, NOT PENALTIES:
SEEKING BALANCE IN THE NURSING HOME ENFORCEMENT PROCESS**

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The federal survey and enforcement process for nursing homes that began in 1995 was adopted in an effort to promote consistency in the administration of surveys, and to discourage terminations through the use of intermediate sanctions. This enforcement theory holds that the imposition of remedies against nursing homes will cause them to quickly improve their systems, and, therefore, improve the quality of care that their residents receive. Thus, the underlying intent of Congress in creating “remedies” or “intermediate sanctions” was that the imposition of remedies against nursing homes would lead to a better quality of life for residents. Unfortunately, the current enforcement process often imposes penalties for the mere purpose of punishment, even when the penalty does not lead to the improvement of residents’ quality of life.

Penalties imposed against nursing homes are widely publicized. Not only must nursing homes make their survey results readily available to all visitors, but they are also now published on the internet. These survey results are used as the basis for costly litigation against the homes, press exposés, and government reports. The disdain with which the nursing home industry has been treated in the public eye has led to a demoralization of the caregivers who provide for some of our nation’s most needy people, and a flight of qualified workers from the field.

The Centers for Medicare & Medicaid Services (CMS) has a duty to impose remedies consistently and fairly in accordance with Congress’ intent. We believe that CMS has the opportunity under the guidance of a new administration to reevaluate and to improve the enforcement process. We offer the following points for consideration:

(1) Do Not Hold Homes Strictly Liable

While we understand that the federal regulations governing nursing homes are designed to judge outcomes, we do not believe that facilities should be held strictly liable for incidents that are absolutely beyond their control. The regulations and guidelines are inconsistent in their approach to this concept. For example, with regard to pressure sore development, a home is not to be

cited under F314 for a pressure sore that developed in-house if the sore was clinically unavoidable and the home can show evidence that rigorous preventative care was provided. However, with regard to abuse, even if a home follows all of the steps laid out by CMS in its abuse protocol and is not culpable in any way, CMS still instructs surveyors to cite the facility under F223. This means, for example, that if a nurse aide unexpectedly slaps a resident, the nursing home is to be cited even if the home had policies on all of the following and abided by those policies with regard to the incident: screening of potential new hires, training for new and existing employees, prevention of abuse, identification of possible incidents or allegations that need investigation, investigation of incidents and allegations, protection of residents during investigations, and reporting of incidents, investigations and facility response to the results of its investigation.

We believe that the practice of citing a facility for a regulatory deficiency when the facility is not to blame for the incident, and cannot implement any measures that are not already in place to prevent future instances from occurring is unfair and inconsistent with the underlying principles of the enforcement process. We believe that CMS should reexamine its regulations and guidelines to make sure that the approach to citing facilities is consistent. For example, the approach to abuse situations should be consistent with that of pressure sores, *i.e.*, a home should not be cited if the incident was due to circumstances outside of its control and where it had taken reasonable measures in accordance with CMS protocols to prevent the incident from occurring.

(2) Follow Guidance With Regard to Harm

CMS has provided surveyors with guidance to assist them in interpreting and applying the regulations governing nursing homes. This guidance, which is located in the State Operations Manual (SOM), however, is often times ignored in practice. For example, the SOM defines Level 3 noncompliance (a severity of G, H or I) as: “noncompliance that results in a negative outcome that has compromised the resident’s ability to maintain and/or reach his/her highest practicable

physical, mental and psychosocial well-being.... *This does not include a deficient practice that only could or has caused limited consequences to the resident.*" The SOM defines Level 2 noncompliance (a severity of D, E or F) as: "noncompliance that *results in no more than minimal physical, mental and/or psychosocial discomfort to the resident* and/or has the potential (not yet realized) to compromise the resident's ability to maintain and/or reach his/her highest practicable, mental and/or social well being..."

Yet despite this guidance, untold numbers of homes continue to be cited at a level of G or above for falls that result in minor cuts and bruises that have only a limited consequence to the resident. From an enforcement perspective, this designation often leads to the immediate imposition of remedies with no time to correct the alleged deficiency. This designation further labels the home as an entity that caused its residents "actual harm", a label that can lead to significant negative publicity and further undermines the public's confidence in the long-term care industry. (See, for example, the General Accounting Office's review which found that 25% of nursing homes had "caused harm" to their residents because those homes had received at least one citation at a level of G or above.) We believe that CMS needs to reaffirm its commitment to its own guidance, and issue a directive to its State Agencies supporting its definitions of harm in the SOM, and providing clear illustrative examples.

(3) Do Not Terminate Nurse Aide Training Programs Based on Survey Deficiencies

If a nursing home receives a citation for substandard quality of care, has a fine imposed against it in excess of \$5,000 or has a denial of payment of new admission imposed against it, then a federal statute prohibits the facility from training its own nurse aides at the home. The thought process behind this denial appears to be that a home, which receives one of the aforementioned penalties, must be such a poor provider that they should not be allowed to conduct such training. We believe that this law is counterintuitive and contrary to the goal of

implementing an enforcement process that ultimately leads to better care for residents.

We believe that CMS should join the provider community in petitioning Congress to revisit this law. If the point of imposing remedies is to foster improvement by the home, which will then lead to an enhanced quality of life for the residents, then denying the home the ability to effectively recruit and train nurse aides only hampers that effort.

(4) Do Not Deny Homes Due Process in the Administrative Setting

Numerous court decisions have held that a nursing home must exhaust its administrative appeals before it can gain access to judicial review. However, CMS has so severely limited the issues that a nursing home may administratively appeal that it results in a de facto denial of due process. For example, an administrative law judge (ALJ) has no jurisdiction to hear an appeal on a citation if no remedy has been imposed. This means that CMS may cite a home for actual harm, not impose a remedy, and the home has no ability to contest that determination, which will remain on its public record.

Current federal regulations also restrict ALJs and State hearing officers from reducing a civil money penalty to zero, or reviewing the exercise of discretion by CMS or the State to impose a civil money penalty. In addition, nursing homes are not allowed to appeal a finding that deficiencies posed immediate jeopardy to residents, the level of noncompliance, the imposition of State monitoring, nor are they allowed to question whether the surveyors followed CMS's rules regarding the conduct of a survey.

If the appeal process is to be meaningful, it must be fair and homes should be allowed to challenge any and all aspects of the deficiencies cited. We urge CMS to revisit its regulations that unfairly tie the hands of the nursing home community and prevent them from appealing remedies imposed against them in the enforcement system.

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