

HCCA
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Long-Term Care Survey,
Certification, and Enforcement Issues: CMS &
Provider Perspectives

The views expressed herein are those of the authors and do not necessarily reflect the position of the U.S. Department of Health and Human Services or the Office of the General Counsel

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Surveys

■ Types of surveys:

Standard (“annual”)
Abbreviated (“complaint”)

Extended
Partial Extended

Surveys

Types of surveys (cont.)

LSC

Post-survey revisit

Surveys

■ Revisits:

■ 3rd revisit only with CMS RO consent

■ 4th revisit only with CMS RO and CO consent

Surveys

■ Surveyors must cite to violations of the regulations, not the SOM.

Inadequate Survey Performance

- Will not invalidate adequately documented deficiencies
- Will not relieve a SNF of its obligations to meet all requirements for program participation
- SSA's failure to follow procedures will not invalidate otherwise legitimate determinations that a facility's deficiencies exist.
 - *Forest Glen Skilled Nursing Facility & Rehab.*, DAB No. 1887 (2003)
 - *Orchard Grove Extended Care Center*, CR541 (1998)

42 C.F.R. § § 488.318(b), 488.305(b)

What Is Compliance?

- **Substantial Compliance:**
 - Any identified deficiency poses no greater risk than potential for causing minimum harm
 - Levels A, B, C
- **Noncompliance:**
 - Any deficiency that causes a facility not to be in substantial compliance.
 - Levels D-L

Federal Scope and Severity Grid

Immediate Jeopardy to Resident Health or Safety	PoC J Required: Cat. 3 Optional: Cat. 1 Optional: Cat. 2	PoC K Required: Cat. 3 Optional: Cat. 1 Optional: Cat. 2	PoC L Required: Cat. 3 Optional: Cat. 1 Optional: Cat. 2
	PoC G Required* Cat. 2 Optional: Cat. 1	PoC H Required* Cat. 2 Optional: Cat. 1	PoC I Required* Cat. 2 Optional: Cat. 1 Optional: Temporary Mgmt.
Actual Harm that is not Immediate Jeopardy	PoC D Required* Cat. 1 Optional: Cat. 2	PoC E Required* Cat. 1 Optional: Cat. 2	PoC F Required* Cat. 2 Optional: Cat. 1
No Actual Harm with Potential For More than Minimal Harm That is not Immediate Jeopardy	A No Remedies Commitment to Correct Not on HCFA-2567	PoC B	PoC C
No Actual Harm with Potential For Minimal Harm	Isolated	Pattern	Widespread

Substandard quality of care
 Out of Compliance
 Substantial compliance

Substandard Quality of Care

- SQC \geq 1 deficiency at § 483.13, § 483.15, or § 483.25 at the levels F-L
- SQC triggers extended or partially extended survey
- SQC triggers mandatory reporting to State Board of NHAs, attending MD/DO for each affected resident

- 42 C.F.R. §488.325(h)

Substandard Quality of Care

- SQC results in denial or loss of NATCEP program
 - 42 C.F.R. §483.151(b)(2)(iii)
- SQC on last 3 standard surveys results in DPNA, State Monitoring
 - 42 C.F.R. §§ 488.417(b)(2), 488.422(b)
 - 42 C.F.R. §488.414(a)(1),(2)(3),

Immediate Jeopardy

- A situation in which the provider's noncompliance with one or more requirements of participation has caused, or *is likely to cause*, serious injury, harm, impairment, or death to a resident.

42 C.F.R. §488.301, *See*, App. Q, SOM

Immediate Jeopardy

- Components:
 - Harm (actual or likely)
 - *Liberty Commons*, DAB No.1294 (4th Cir.)(2007)
 - Immediacy
 - Culpability

Enforcement Actions

- Imposed by State
- Imposed by CMS
- Mandatory
- Discretionary

Enforcement Actions

- Termination
- CMP
- DPNA
- Directed in-service
- Directed Plan of Correction
- Transfer of residents
- Loss of NATCEP

Enforcement Actions

- CMP
 - \$50 - \$3,000 per day (no IJ)
 - \$3,040 - \$10,000 per day
 - \$1,000 - \$10,000 per instance

Enforcement Actions

- Except for immediate jeopardy or “Double G” situations, facilities are generally given an opportunity to correct deficiencies prior to the imposition of sanctions.

CMS & SSA

- SSA acts as CMS’ agent
 - Section 1864(a) of the Act
- Can state surveyors be treated as agents of Federal govt.?
 - Federal surveyors may not testify in civil actions without authorization, 45 C.F.R. § 2.3

CMS & SSA

■ Precedence of Determinations

- Noncompliance
- Termination
- Effective date (of certification as Medicare provider)

42 C.F.R. § 488.452

Informal Dispute Resolution

- Does not toll the federal appeals timetable
- Does not delay enforcement action
- 42 C.F.R. § 488.331(c)
 - provides for removal of deficiency from SOD and rescission of remedies

Informal Dispute Resolution

- Successful IDR (SNF) expunges deficiency from CMS 2567 and provides for rescission of enforcement action predicated on withdrawn deficiency but,
- 42 C.F.R. § 448.452(a)(2) gives precedence to CMS' findings of noncompliance where SSA and CMS disagree

■ *NHC, Healthcare - Manual, CR898 (2002)*

Informal Dispute Resolution

- SSA recommends removal of CMP following successful (for SNF) IDR, results?
 - Section 1819(h)(1) and (2) of the Act, 42 C.F.R. § 488.11(a)
 - *Bergen Regional Medical Center*, DAB NO. 1832 (2002)

Appeals

- Can there be an appeal if there are deficiency citations but no remedy is imposed?

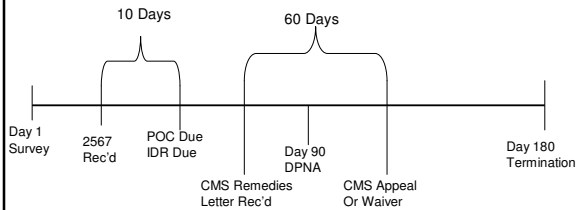
Appeals

- Allocation of the legal burden
 - CMS must establish its *prima facie* case
 - Provider must rebut CMS' case by a preponderance of the evidence

Waiver of Appeal?

- 60 days to decide to waive federal appeal rights
- Waiver reduces CMP by 35%
- If CMP >\$5,000, automatic loss of NATCEP

Critical Timeline



Appeals

- Challenging survey findings:
 - IDR
 - ALJ
 - DAB
 - Federal court

What To Expect At The Hearing

- Time
- Place
- Direct examination
- Cross examination
- Re-direct examination

Appeal or Settle?

- Considerations for providers when considering appeals:
