



Pennsylvania Health Care Association  
2018 Annual Convention  
November 14, 2018

## **Session B-14: CMS's New Enforcement Policies and How to Use Them to the Facility's Advantage**

**Paula G. Sanders, Esquire**

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### **Civil Money Penalties Learning Objectives**

- Develop strategies for supporting successful "past noncompliance" for self-reported incidents
- Understand options for refuting adverse survey findings before Department of Health (DOH) and Centers for Medicare & Medicaid Services (CMS)
- Analyze hypothetical survey findings to use as teaching tools when you return to your facilities

## Determination of Findings and Potential to Foresee Abuse

"It has been reported that some facilities have identified that they are in compliance with F600 . . . - because they could not foresee that abuse would occur and they have "done everything to prevent abuse," such as conducted screening of potential employees, assessed residents for behavioral symptoms, monitored visitors, provided training on abuse prevention, suspended or terminated employment of the perpetrator, developed and implemented policies and procedures to prohibit abuse, and met reporting requirements. However, this interpretation would not be consistent with the regulation, which states that "the resident has the right to be free from verbal, sexual, physical, and mental abuse..."

## Know Your Regulators

DEPARTMENT OF HEALTH & HUMAN SERVICES  
Centers for Medicare & Medicaid Services  
Philadelphia Regional Office  
Suite 216, The Public Ledger Building  
150 S. Independence Mall, West  
Philadelphia, PA 19106-3413



Northeast Division of Survey & Certification

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Phone: 717-783-3790  
Fax: 717-772-3641

## Sanction Letters

- DOH imposes state sanctions against license and *recommends* federal sanctions to CMS
- CMS imposes sanctions against certification, often after time for state IDR has passed
  - CMS not required to follow DOH recommendation
- Challenges to federal CMP must include escrow of CMP

## How to Read the 2567

- What are the deficiencies?
- What are the regulatory violations?
  - Federal
  - State
- What is the best way to respond?

## How to Read State Tags

(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY MUST BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE	(X5) COMPLETE DATE
F 0157  SS=D	Continued from page 10  28 Pa. Code 201.18(b)(3) Management Previously cited 07/29/16  28 Pa. Code 201.18(e)(1) Management Previously cited 06/17/17, 05/17/17, 07/29/16  28 Pa. Code 211.5(g)(h) Clinical records  28 Pa. Code 211.12(c) Nursing services Previously cited 06/17/17  28 Pa. Code 211.12(d)(2) Nursing services Previously cited 07/29/16	F 0157		

## POC Disclaimer Language

- Preparation and submission of this POC is required by state and federal law. This POC does not constitute an admission for purposes of general liability, professional malpractice or any other court proceeding.

## “Required” POC Elements

- What corrective action(s) will be accomplished *for residents affected by the deficient practice*?
- How will you identify *other residents* having the *potential to be affected* by the *same deficient practice* and corrective actions?

## “Required” POC Elements

- What measures will be put in place or system changes will you make to ensure that the *deficient practice does not recur*?
- How will the corrective action be monitored to ensure the *deficient practice will not recur, i.e.*, what quality assurance programs will be established?
- Dates when the corrective action will be completed

## Strategies for Preparing Effective POCs

- Less is more
- Read the F Tags *and* the state tags
- Don't be afraid to have your POC rejected
- Be responsive and responsible
  - Don't overpromise
  - Don't admit liability

## Strategies for Preparing Effective POCs

- Don't go overboard with policies, procedures and plans of correction
- Keep your date of compliance as short as possible
  - Begin implementing corrective action during the survey and document corrections (*e.g.*, inservicing of staff)

## Post Survey Revisit

- Nature of deficiency dictates scope of revisit
- Required whenever S/S F-L level deficiencies exist
- 3<sup>rd</sup> Revisit subject to CMS Regional Office (RO) approval
- 4<sup>th</sup> Revisit subject to CMS Central Office (CO) approval

## Proving Past Noncompliance

- Identified during a current survey with a S/S at "G" or above, or SQC findings at a S/S at "F" that meets all of the following three criteria:
  1. Not in compliance with the specific regulatory requirement(s) at the time the situation occurred

"Revision of Civil Money Penalty ("CMP") Policies and CMP Analytic Tool (Rev: S&C 17 37 NH)(July 2017)

## Proving Past Noncompliance

2. The noncompliance occurred after the exit date of the last standard (recertification) survey and before the survey (standard, complaint, or revisit) currently being conducted

## Proving Past Noncompliance

3. There is sufficient evidence to support that the facility corrected the noncompliance and is in substantial compliance at the time of the current survey for the specific regulatory requirement(s)

## What is Sufficient Evidence?

- Resident?
- Other residents?
- Prevention?
- Monitoring?

## Hypos

- Care plan for 2 person assist, only 1 person does transfer
- Medication error: wrong medication given
- Allegation of physical abuse

# FEDERAL ENFORCEMENT TRENDS

## Federal Scope and Severity Grid

	<b>Isolated</b> <b>J</b>	<b>Pattern</b> <b>K</b>	<b>Widespread</b> <b>L</b>
<b>Immediate Jeopardy To Resident Health Or Safety</b>	PoC Required: Cat. 3 Optional: Cat. 1 Optional: Cat. 2	PoC Required: Cat. 3 Optional: Cat. 1 Optional: Cat. 2	PoC Required: Cat. 3 Optional: Cat. 1 Optional: Cat. 2
<b>Actual Harm That Is Not Immediate Jeopardy</b>	PoC Required: Cat. 2 Optional: Cat. 1	PoC Required: Cat. 2 Optional: Cat. 1	PoC Required: Cat. 2 Optional: Cat. 1 Optional: Temporary Mgmt
<b>No Actual Harm With Potential For More Than Minimal Harm That Is Not Immediate Jeopardy</b>	PoC Required: Cat. 1 Optional: Cat. 2	PoC Required: Cat. 1 Optional: Cat. 2	PoC Required: Cat. 2 Optional: Cat. 1
<b>No Actual Harm With Potential For Minimal Harm</b>	<b>A</b> No PoC No remedies Commitment to Correct Not on CMS-2567	<b>B</b> No remedies	<b>C</b> No remedies

## Impact of Inflation Adjustment Act

- CMS CMPs for surveys have increased astronomically

	Pre-August 2016	August 1, 2016	February 3, 2017	2018
Cat.2 Per Day	\$50 - \$3,000	\$103 - \$6,188	<b>\$105 - \$6,289</b>	
Cat. 2 Per Instance	\$1,000 - \$10,000	\$2,063 - \$20,628	<b>\$2,097 - \$20,965</b>	
Cat. 3 Per Day	\$3,050 - \$10,000	\$6,291 - \$20,628	<b>\$6,394 - \$20,965</b>	
Cat. 3 Per Instance	\$1,000 - \$10,000	\$2,063 - \$20,628	<b>\$2,097 - \$20,965</b>	

## Financial Hardship Requests

- Possible reduction of CMPs or 12 month repayment plan
- Analytic tool options: facility's documentation proves that:
  - (1) "the facility lacks sufficient assets to pay the CMP without having to go out of business," or
  - (2) "the facility does not lack sufficient assets to pay the CMP without having to go out of business."

## Financial Hardship Requests

- “[N]ot CMS's intent to impose CMPs that could, in and of themselves, put providers out of business.”
- Providers can file “compelling evidence of financial hardship,” which CMS “is willing, in the interest of the Medicare and Medicaid programs and their beneficiaries, to consider.”
- Must be filed within 15 days of CMS CMP letter

## DEPARTMENT OF HEALTH ENFORCEMENT TRENDS

## DOH CP "Guideline"



### Civil Penalty Assessment Guideline

Please be advised that the Secretary of Health has directed the Pennsylvania Department of Health (DOH), Bureau of Facility Licensure and Certification, Division of Nursing Care Facilities (Division), to assess civil penalties (CPs) against long term care facilities in accordance with the full authority authorized by section 817 of the Health Care Facilities Act (HCFA), 35 P.S. § 448.817.

**Significantly, any facility with a Division survey exit date on or after January 1, 2017, may be subjected – when warranted – to CPs calculated on a per instance or per day basis, or both, pursuant to 35 P.S. § 448.817.**

When determining whether CPs are warranted, DOH will consider the facility's compliance history, including but not limited to the following:

- Whether the facility's violations resulted in harm or death to a resident;
- The facility's most current deficiency report;
- The threat or potential threat to resident health and safety;
- The number of residents at risk or affected by the noncompliance;
- The facility's plan of correction;
- Similar survey findings where sanctions were imposed, and
- Repeat noncompliance in the same or similar regulatory categories.

This guidance preserves DOH's discretion to take into consideration other mitigating or aggravating circumstances.

DOH recognizes these changes may result in higher CPs to facilities. The purpose of this is to impress upon long-term care facilities the need to provide quality care to and a safe environment for its residents.

March 30, 2018

## DOH CMPs

- Per day
- Per instance
- Both per day and per instance
- Typically not posted on DO web site until appeals have been resolved or after appeal period has past

## Options for Refuting Findings

- IDR or IIDR
  - 10 days from receipt of 2567
  - Must still file POC
  - Can only challenge federal tags
  - Limited ability to challenge scope and severity
  
- Federal IIDR
  - 10 days from receipt of federal CMP
  - Does not impact right to get 35% CMP reduction

## Options for Refuting Findings

- Waiver of federal appeal rights
  - Must be filed within 60 days of receipt of federal CMP
  - Results in 35% reduction of federal CMP
  
- State sanctions
  - Appeal to the State Health Facility Hearing Board within 30 days of state sanction
  - No automatic reduction
  - No automatic stay

## Options for Refuting Findings

- Federal appeal
  - Must be filed within 60 days of receipt of federal CMP
  - Must escrow total CMP amount unless a waiver is granted

## Mandatory Referrals

- CMS refers all CMPs to DOJ pursuant to a Memorandum of Understanding
- DOH/DHS statutorily required to report immediately to the PA Attorney General (AG) or local law enforcement whenever it has “reasonable cause to believe” that a care dependent adult has suffered bodily injury or been unlawfully restrained” *See, Act 28 of 1995, Neglect of Care-Dependent Person, 18 Pa.C.S. § 2713, Act 53 of 2018, amending 18 Pa.C.S. § 2713, and creating criminal abuse*

# Mandatory Referrals

- Referrals to state licensing boards
  - Substandard quality of care
    - NHA
    - Discretionary: other professionals (DON, physicians, nurses)
- Referrals to DHS for Preventable Serious Adverse Events (PSAEs)



### Federal Regulatory Groups for Long Term Care Facilities

\* Substandard quality of care = one or more deficiencies with s/s levels of F, H, I, J, K, or L in Red

F540 Definitions	483.12 Freedom from Abuse, Neglect, and Exploitation	483.24 Quality of Life
<b>483.10 Resident Rights</b>	F600 *Free from Abuse and Neglect	F675 *Quality of Life
F550 *Resident Rights/Exercise of Rights	F602 *Free from Misappropriation/Exploitation	F676 *Activities of Daily Living (ADLs)/ Maintain Abilities
F551 Rights Exercised by Representative	F603 *Free from Involuntary Seclusion	F677 *ADL Care Provided for Dependent Residents
F552 Right to be Informed/Make Treatment Decisions	F604 *Right to be Free from Physical Restraints	F678 *Cardio-Pulmonary Resuscitation (CPR)
F553 Right to Participate in Planning Care	F605 *Right to be Free from Chemical Restraints	F679 *Activities Meet Interest/Needs of Each Resident
F554 Resident Self-Admin Meds-Clinical/ly Aopropriate	F606 *Not Emolov/Enasea Staff with Adverse Actions	F680 *Qualifications of Activty Professional
F555 Right to Choose/Be Informed of Attending Physician	F607 *Develop/Implement Abuse/Neglect, etc. Policies	
F557 Respect, Dignity/Right to have Personal Property	F608 *Reporting of Reasonable Suspicion of a Crime	<b>483.25 Quality of Care</b>
F558 *Reasonable Accommodations of Needs/Preferences	F609 *Reporting of Reasonable Suspicion of a Crime	F684 *Quality of Care
F559 *Choose/Be Notified of Room/Roommate Change	F610 *Investigate/Prevent/Correct Alleged Violation	F685 *Treatment/Devices to Maintain Hearing/Vision
F560 Right to Refuse Certain Transfers		F686 *Treatment/Svcs to Prevent/Heal Pressure Ulcers
F561 *Self Determination	<b>483.15 Admission, Transfer, and Discharge</b>	F687 *Foot Care
F562 Immediate Access to Resident	F620 Admissions Policy	F688 *Increase/Prevent Decrease in ROM/Mobility
F563 Right to Receive/Devis Visitors	F621 Equal Practices Regardless of Payment Source	F689 *Free of Accident Hazards/Supervision/Devices
F564 Inform of Visitation Rights/Facial Visitation Privileges	F622 Transfer and Discharge Requirements	F690 *Bowel/Bladder Incontinence, Catheter, UTI
F565 *Resident/Family Group and Response	F623 Notice Requirements Before Transfer/Discharge	F691 *Colostomy, Urostomy, or Ileostomy Care
F566 Right to Perform Facility Services or Refuse	F624 Preparation for Safe/Orderly Transfer/Discharge	F692 *Nutrition/Hydration Status Maintenance
F567 Protection/Management of Personal Funds	F625 Notice of Bed Hold Policy Before/Upon Transfer	F693 *Tube Feeding Management/Restore Eating Skills
F568 Accountancy and Records of Personal Funds	F626 Permitting Residents to Return to Facility	F694 *Parenteral/IV Fluids
F569 Notice and Conveyance of Personal Funds	<b>483.20 Resident Assessments</b>	F695 *Respiratory/Tracheostomy care and Suctioning
F570 Surety Bond - Security of Personal Funds	F635 Admission Physician Orders for Immediate Care	F696 *Prostheses
F571 Limitations on Charges to Personal Funds	F636 Comprehensive Assessments & Timing	F697 *Pain Management
F572 Notice of Rights and Rules	F637 Comprehensive Assmt After Significant Change	F698 *Dialysis
F573 Right to Access/Purchase Copies of Records	F638 Quarterly Assessment At Least Every 3 Months	F699 *PHASE-3 Trauma Informed Care
F574 Required Notices and Contact Information	F639 Maintain 15 Months of Resident Assessments	F700 *Bedrails
F575 Required Postings	F640 Encoding/Transmitting Resident Assessment	<b>483.30 Physician Services</b>
F576 Right to Forms of Communication with Privacy	F641 Accuracy of Assessments	F710 Resident's Care Supervised by a Physician
F577 Right to Survey Results/Advocate Agency Info	F642 Coordination/Certification of Assessment	F711 Physician Visits- Review Care/Notes/Order
F578 Request/Refuse/Discontinue Treatment-Formulate Adv DI	F644 Coordination of PASARR and Assessments	F712 Physician Visits-Frequency/Timeliness/Alternate NPPs
F579 Posting/Notice of Medicare/Medicaid on Admission	F645 PASARR Screening for MD & ID	F713 Physician for Emergency Care, Available 24 Hours
F580 Notify of Changes (Injury/Decline/Room, Etc.)	F646 MD/ID Significant Change Notification	F714 Physician Delegation of Tasks to NPP
F582 Medicaid/Medicare Coverage/Liability Notice	<b>483.21 Comprehensive Resident Centered Care Plans</b>	F715 Physician Delegation to Dietitian/Therapist
F583 Personal Privacy/Confidentiality of Records	F655 Baseline Care Plan	
F584 *Safe/Clean/Comfortable/Homelike Environment	F656 Develop/Implement Comprehensive Care Plan	<b>483.35 Nursing Services</b>
F585 Grievances	F657 Care Plan Timing and Revision	F725 Supplement Nursing Staff
F586 Resident Contact with External Entities	F658 Services Provided Meet Professional Standards	F726 Competent Nursing Staff
	F659 Qualified Persons	F727 RN 8 Hrs/7 days/Wk, Full Time DON
	F660 Discharge Planning Process	F728 Facility Hiring and Use of Nurse
	F661 Discharge Summary	F729 Nurse Aide Registry Verification, Retraining



## Federal Regulatory Groups for Long Term Care Facilities

\* Standardard quality of care = one or more deficiencies with s/s levels of F, H, I, J, K, or L in Red

F730 Nurse Aide Perform Review – 12hr/Year In-service	F806 Resident Allergies, Preferences and Substitutes	483.85 (PHASE-3) Compliance and Ethics Program
F731 Waiver-Licensed Nurses 24hr/Day and RN Coverage	F807 Drinks Avail to Meet Needs/Preferences/ Hydration	F895 (PHASE-3) Compliance and Ethics Program
F732 Posted Nurse Staffing Information	F808 Therapeutic Diet Prescribed by Physician	
<b>483.40 Behavioral Health Services</b>	F809 Frequency of Meals/Snacks at Bedtime	<b>483.90 Physical Environment</b>
F740 Behavioral Health Services	F810 Assistive Devices - Eating Equipment/Utensils	F906 Emergency Electrical Power System
F741 Sufficient/Competent Staff-Behav Health Needs	F811 Feeding Asst- Training/Supervisor/Resident	F907 Soace and Equipment
F742 *Treatment/Svc for Mental/Psychosocial Concerns	F812 Food Procurement, Store/Prepare/Serve - Sanitary	F908 Essential Equipment, Safe Operating Condition
F743 *No Pattern of Behavioral Difficulties Unless Unavoidable	F813 Personal Food Polvc	F909 Resident Bed
F744 *Treatment Service for Dementia	F814 Dispose Garbaee & Refuse Properly	F910 Resident Room
F745 *Provision of Medically Related Social Services		F911 Bedroom Number of Residents
<b>483.45 Pharmacy Services</b>	<b>483.65 Specialized Rehabilitative Services</b>	F912 Bedrooms Measure at Least 90 Square Ft/Resident
F755 Pharmacy Svcs/Procedures/Pharmacist/Records	F825 Provide/Obtain Specialized Rehab Services	F913 Bedrooms Have Direct Access to Exit Corridor
F756 Drug Reiminen Review, Report Irregular, Act On	F826 Rehab Services- Physician Order/Qualified Person	F914 Bedrooms Assure Full Visual Privacy
F757 *Drug Reiminen Is Free From Unnecessary Drugs	<b>483.70 Administration</b>	F915 Resident Room Window
F758 *Free From Unnac. Psychotropic Meds/PRN Use	F835 Administration	F916 Resident Room Floor Above Grade
F759 *Free of Medication Error Ratesof 5% or More	F836 License/Comply w/Fed/State/Local Law/Prof Std	F917 Resident Room Bed/Furniture/Closet
F760 *Residents Are Free of Significant Med Errors	F837 Governing Body	F918 Bedrooms Equipped/Near Lavatory/Toilet
F761 Label/Store Drugs & Biologicals	F838 Facility Assessment	F919 Resident Call System
<b>483.50 Laboratory, Radiology, and Other Diagnostic</b>	F839 Staff Qualifications	F920 Requirements for Dining and Activity Rooms
F770 Laboratory Services	F840 Use of Outside Resources	F921 Safe/Functional/Sanitary/Comfortable Environment
F771 Blood Blank and Transfusion Services	F841 Responsibilities of Medical Director	F922 Procedures to Ensure Water Availability
F772 Lab Services Not Provided On-Site	F842 Resident Records- Identifiable Information	F923 Ventilation
F773 Lab Svcs Physician Order/Notifly of Results	F843 Transfer Agreement	F924 Corridors Have Firmly Secured Handrails
F774 Assist with Transport Arrangements to Lab Svcs	F844 Disclosure of Ownership Requirements	F925 Maintains Effective Pest Control Program
F775 Lab Reports in Record-LabName/Address	F845 Facility closure-Administrator	F926 Smoking Policies
F776 Radioloew/Other Diagnostic Services	F846 Facility closure	<b>483.95 Training Requirements</b>
F777 Radioloew/Diag. Svcs Ordered/Notifly Results	F849 Hospice Services	F940 (PHASE-3) Training Requirements - General
F778 Assist with Transport Arrangements to Radioloew	F850 *Qualifications of Social Worker >120 Beds	F941 (PHASE-3) Communication Training
F779 X-Ray/Diagnostic Report in Record-Sign/Dated	F851 Payroll Based Journal	F942 (PHASE-3) Resident's Rights Training
<b>483.55 Dental Services</b>	<b>483.75 Quality Assurance and Performance Improvem</b>	F943 Abuse, Neglect, and Exploitation Training
F790 Routine/Emergency Dental Services in SNFs	F865 QAPI Program/Plan, Disclosure/Good Faith Attempt	F944 (PHASE-3) QAPI Training
F791 Routine/Emergency Dental Services in Nfs	F866 (PHASE-3) QAPI/QAA Data Collection and Monitoring	F945 (PHASE-3) Infection Control Training
<b>483.60 Food and Nutrition Services</b>	F867 QAPI/QAA Improvement Activities	F946 (PHASE-3) Compliance and Ethics Training
F800 Provided Diet Meets Needs of Each Resident	F868 QAA Committee	F947 Required In-Service Training for Nurse Aides
F801 Qualified Dietary Staff	<b>483.80 Infection Control</b>	F948 Training for Feeding Assistants
F802 Sufficient Dietary Support Personnel	F880 Infection Prevention & Control	F949 (PHASE-3) Behavioral Health Training
F803 Menus Meet Res Needs/Preo in Advance/Followed	F881 Antibiotic Stewardship Program	
F804 Nutritive Value/Appear. Palatable/Prefer Temp	F882 (PHASE-3) Infection Preventionist Qualifications/Role	
F805 Food in Form to Meet Individual Needs	F883 *Influenza and Pneumococcal Immunizations	

Report-30: LTC-Rule Job Aid

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# Questions

Paula G. Sanders, Esquire  
 Principal & Co-Chair, Health Care Practice Group  
 Post & Schell, PC  
 psanders@postschell.com  
 717-612-6027

www.postschell.com

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