

## **4000 FINES AND SANCTIONS**

### **4001 Definitions**

As used in these regulations, the following definitions will apply, unless the context requires otherwise.

- a. "Agency" means the Division of Medical Services.
- b. "Act" means a bodily movement, and includes speech and the conscious possession or control of property.
- c. The verb "act" means either to perform an act or to omit to perform an act.
- d. "Actor" includes, where appropriate, a person who possesses something or who omits to act.
- e. "Civil Penalties" are an assessment of financial fines against licensee for violations of regulations.
- f. "Conduct" means an act or omission and its accompanying mental state.
- g. "Department" is the Department of Health and Human Services.
- h. "Director" is the Director of the Office of Long Term Care.
- i. "Element of the offense" means the conduct, the attendant circumstances, and the result of that conduct that:
  1. Is specified in the definition of the offense; or,
  2. Establishes the kind of culpable mental state required for commission of the offense; or,
  3. Negates an excuse or justification for the conduct.
- j. "Executive Director" is the Director of the Arkansas Department of Health and Human Services.
- k. "Facility/Licensee" is a long term care facility which is required to be licensed under Ark. Code Ann. § 20-10-224.
- l. "Knowingly" means a person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his

conduct when he is aware that it is practically certain that his conduct will cause such a result.

- m. "Law" includes statutes and court decisions.
- n. "Negligently" means a person acts negligently with respect to attendant circumstances or a result of his conduct when he should be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.
- o. "Omission" means a failure to perform and act, the performance of which is required by law.
- p. "Person", "actor", "defendant", "he", or "him" includes any natural person and, where appropriate, an organization as that term is defined in Ark. Code Ann. § 5-2-501(1).
- q. "Physical harm or physical injury" means the impairment of physical condition or the infliction of substantial pain.
- r. "Possess" means to exercise actual dominion, control, or management over a tangible object.
- s. "Purposely" means a person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.
- t. "Reasonably believes" or "reasonable belief" means the belief that an ordinary, prudent man would form under the circumstances in question and one not recklessly or negligently formed.
- u. "Recklessly" means a person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.
- v. "Regulation" means:
  - 1. Any state or federal regulation pertaining to licensure of a long term care facility.

2. Any state or federal regulation relating to Title XIX Medicaid certification.
- w. "Serious physical harm" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.
  - x. "Statute" includes the Constitution and any statute of this state, any ordinance of a political subdivision of this state, and any rule or regulation lawfully adopted by an agency of this state.
  - y. "Violation" means:
    1. Class A violations create a condition or occurrence relating to the operation and maintenance of a long term care facility resulting in death or serious physical harm to a resident or creating a substantial probability that death or serious physical harm to a resident will result therefrom.
    2. Class B violations create a condition or occurrence relating to the operation and maintenance of a long term care facility which directly threatens the health, safety, or welfare of a resident.
    3. Class C violations shall relate to administrative and reporting requirements that do not directly threaten the health, safety, or welfare of a resident.
    4. Class D violations shall relate to the timely submittal of statistical and financial reports to the Office of Long Term Care. The failure to timely submit a statistical or financial report shall be considered a separate Class D classified violation during any month or part thereof of noncompliance. In addition to any civil money penalty which may be imposed, the director is authorized after the first month of a Class D violation to withhold any further reimbursement to the long term care facility until the statistical and financial report is received by the Office of Long Term Care.

#### **4002 Civil Penalties**

The following listed civil penalties pertaining to classified violations may be assessed by the Director against long term care facilities. In the case of Class A violations, the following civil penalties shall be assessed at the amount outlined in these regulations. In the case of Class B, C, or D violations, the Director, in his discretion, may elect to assess the following civil penalties or may allow a specified period of time for correction of said violation.

- a. Class A violations are subject to a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for the first violation. A second Class A violation occurring within a six-month period from the first violation shall result in a civil

penalty of five thousand dollars (\$5,000). The third Class A violation occurring within a six-month period from the first violation shall result in proceedings being commenced for termination of the facility's Medicaid agreement and may result in proceedings being commenced for revocation of the licensure of the facility.

- b. Class B violations are subject to a civil penalty not to exceed one thousand dollars (\$1,000). A second Class B violation occurring within a six-month period shall be subject to a civil penalty of two thousand dollars (\$2,000). A third Class B violation occurring within a six-month period from the first violation shall result in proceedings being commenced for termination of the facility's Medicaid agreement and may result in proceedings being commenced for revocation of the licensure of the facility. All Class B violations shall be based on a point system as contained in these regulations.
- c. Class C violations are subject to a civil penalty not to exceed five hundred dollars (\$500) for each violation. Each subsequent Class C violation within a six-month period from the first violation shall subject the facility to a civil money penalty double that of the preceding violation until a maximum of one thousand dollars (\$1,000) per violation is reached. All Class C violations shall be based on a point system as contained in these regulations.
- d. Class D violations are subject to a civil penalty not to exceed two hundred fifty dollars (\$250) for each violation. Each subsequent Class D violation occurring within a six-month period from the first violation shall subject the facility to a civil penalty double that of the preceding violation until a maximum of five hundred dollars (\$500) is reached. All Class D violations shall be based on a point system as contained in these regulations.
- e. In no event may the aggregate civil penalties assessed for violations in any one (1) month exceed five thousand dollars (\$5,000).

#### **4003 Factors in Assessment of Civil Penalties**

In determining whether a civil penalty is to be assessed and in affixing the amount of the penalty to be imposed, the Director shall consider:

- a. The gravity of the violation including the probability that death or serious physical harm to a resident will result or has resulted;
- b. The severity and scope of the actual or potential harm;
- c. The extent to which the provisions of the applicable statutes or regulations were violated;
- d. The "good faith" exercised by the licensee. Indications of good faith include, but are not limited to:

1. Awareness of the applicable statutes and regulations and reasonable diligence in securing compliance;
  2. Prior accomplishments manifesting the licensee's desire to comply with the requirements;
  3. Efforts to correct; and,
  4. Any other mitigating factors in favor of the licensee.
- e. Any relevant previous violations committed by the licensee; and,
- f. The financial benefit to the licensee of committing or continuing the violation.

The Director shall assign value points to conditions or occurrences and said value points shall represent a base to which the above considerations shall be applied by the Director prior to assessment of monetary civil penalty. Each value point shall represent a base assessment of one dollar (\$1.00).

#### **4004 Right to Assess Civil Penalties not Merged in Other Remedies**

Assessment of a civil penalty provided in this section shall not affect the right of the Office of Long Term Care to take other such action as may be authorized by law or regulation.

#### **4005 Class A Violations**

- a. Class A violations are:
1. Violations which create a condition or occurrence relating to the operation and maintenance of a long term care facility which results in death or serious harm to a resident; or,
  2. Violations which create a condition or occurrence relating to the operation and maintenance of a long term care facility which creates a substantial probability that death or serious physical harm to a resident will result from the violation.
- b. The following Class A violations and the points assigned to each are provided and are subject to the conditions set out in Section 4003:
1. Death of a Resident (2,500)

Any condition or occurrence relating to the operation of a long-term care facility in which the conduct, act or omission of a person or actor

purposely, knowingly, recklessly or negligently results in the death of a resident shall be a Class A violation.

2. Serious Physical Harm to a Resident (2,500)

Any condition or occurrence relating to the operation of a long term care facility in which the conduct, act or omission of a person or actor purposely, knowingly, recklessly or negligently results in serious physical harm to a resident shall be a Class A violation.

3. Probability of Death or Serious Physical Harm

The following conduct, acts or omissions, when not resulting in death or serious physical harm, but which create a substantial probability that death or serious physical harm to a resident will result therefrom are conditions or occurrences relating to the operation of a long term care facility which are Class A violations.

A Poisonous Substances

Two thousand five hundred (2,500) points shall be assigned when a facility fails to provide proper storage of poisonous substances.

B Falls by Residents

One thousand five hundred (1,500) points shall be assigned when a facility fails to maintain require direct care staffing, or a safe environment and this failure directly causes a fall by a resident. (Examples: equipment not properly maintained, or a fall due to personnel not responding to patient requests for assistance.)

C Assaults

Two thousand five hundred (2,500) points shall be assessed when a facility fails to maintain required direct care staffing or measures are not taken when it is known that a resident is combative and assaultive with other residents, and this failure causes an assault upon a resident of the facility by another resident. A Class A violation shall also exist when a facility fails to perform adequate screening of personnel and this failure causes an assault upon a resident by an employee of the facility.

D Permanent Injury to an Extremity

Two thousand two hundred fifty (2,250) points shall be assigned when a facility personnel improperly apply physical restraints

contrary to published regulations or fail to check and release restraints as directed by physician's orders or regulations.

E Nosocomial Infection

Two thousand five hundred (2,500) points shall be assigned when a facility does not follow or meet nosocomial infection control standards as outlined by regulations or as ordered by the physician.

F Medical Services

Two thousand five hundred (2,500) points shall be assigned when a facility fails to secure proper medical assistance or orders from a physician.

G Decubitus Ulcers

Two thousand five hundred (2,500) points shall be assigned when a facility does not take decubitus ulcer measures as ordered by the physician and such failure results in death or serious injury to a resident, or facility personnel fail to notify the physician of such ulcers.

H Treatments

Two thousand five hundred (2,500) points when facility personnel perform treatment(s) contrary to a physician's order and such treatment results in death or serious injury to the resident.

I Medications

Two thousand five hundred (2,500) points shall be assigned when facility personnel knowingly withhold medication from a resident as ordered by a physician and such withholding of medication(s) results in death or serious injury to a resident, or the facility personnel fail to order and/or stock medication(s) prescribed by the physician and the failure to order and/or stock medication(s) results in death or serious injury to the resident.

J Elopement

One thousand eight hundred and fifty (1,850) points shall be assigned when a facility does not provide necessary supervision of residents to prevent a resident from wandering away from the facility and such failure results in death or serious injury to a resident, or a facility does not provide adequate measures to ensure

that residents with an elopement history do not wander away from the facility. (Examples of preventative measures include but are not limited to documentation that an elopement history has been discussed with the family of the resident, alarms have been placed on exit doors, personnel have been trained to make additional efforts to watch the resident with such history, and the physician of such a resident has been made aware of such history.)

**K Failure to Provide Heating or Air Conditioning**

Two thousand five hundred (2,500) points shall be assigned when a facility fails to reasonably maintain its heating and air conditioning system as required by regulation. Isolated incidents of breakdown or power failure shall not be considered a Class A violation under this section.

**L Natural Disaster/Fire**

Two thousand (2,000) points shall be assigned when a facility does not train staff in fire/disaster procedures as required by regulations or when staffing requirements are not met.

**M Life Safety Code System**

Two thousand five hundred (2,500) points shall be assigned when a facility fails to maintain the required life safety code systems. Isolated incidents of breakdown shall not be considered a Class A violation under this section if the facility has immediately notified the Office of Long Term Care upon discovery of the problem and has taken all necessary measures to correct the problem.

**4006 Class B Violations**

- a. The following conduct, acts or omissions, when not resulting in death or serious physical harm to a resident, or the substantial probability thereof, but creates a condition or occurrence relating to the operation and maintenance of a long term care facility which directly threatens the health, safety or welfare of a resident.

1. Nursing Techniques

One thousand (1,000) points shall be assigned when:

- A. Medications or treatments are improperly administered or withheld by nursing personnel.

- B. There is a failure to feed residents who are unable to feed themselves.
- C. There is a failure to change or irrigate catheters as ordered by a physician or use irrigation sets and solutions which are outdated or not protected from contamination.
- D. There is a failure to obtain physician orders for the use, type and duration of restraints, or the improper application of a physical restraint, or failure of facility personnel to check and release the restraint as specified in regulations.
- E. Staff knowingly fails to answer call lights.
- F. There is a failure to turn or reposition residents as ordered by a physician or as specified in regulation.
- G. There is a failure to provide rehabilitative nursing as ordered by a physician or as specified in regulation.

2. Poisonous Substances

Seven hundred and fifty (750) points shall be assigned when a facility fails to provide proper storage of poisonous substances and this failure threatens the health, safety, or welfare of a resident.

3. Falls by Residents

Seven hundred and fifty (750) points shall be assigned when a facility fails to maintain required direct care staffing, or a safe environment and this failure directly threatens the health, safety, or welfare of a resident.

4. Assaults

One thousand (1,000) points shall be assigned when a facility fails to maintain required direct care staffing or measures are not taken when it is known that a resident is combative and assaultive with other residents and these measures threaten the health, safety, or welfare of a resident.

5. Improper Use of Restraints

One thousand (1,000) points shall be assigned when facility personnel apply physical restraints contrary to published regulations or fail to check and release restraints as directed by physician's order or regulations and such failure threatens the health, safety, or welfare of a resident.

6. Medical Services

One thousand (1,000) points shall be assigned when a facility fails to secure proper medical assistance or orders from a physician and this failure threatens the health, safety, or welfare of a resident.

7. Decubitus Ulcers

One thousand (1,000) points shall be assigned when a facility does not take decubitus ulcer measures as ordered by the physician and such failure threatens the health, safety, or welfare of a resident, or facility personnel fail to notify the physician of such ulcers and this failure threatens the health, safety, or welfare of a resident.

8. Treatments

One thousand (1,000) points shall be assigned when facility personnel perform treatments contrary to a physician's order and such treatment threatens the health, safety, or welfare of a resident.

9. Medications

One thousand (1,000) points shall be assigned when facility personnel withhold physician ordered medication(s) from a resident and such withholding threatens the health, safety, or welfare of a resident, or facility personnel fail to order or stock medication(s) prescribed by the physician and this failure threatens the health, safety, or welfare of a resident.

10. Elopement

One thousand (1,000) points shall be assigned when a facility does not provide necessary supervision of residents to prevent a resident from wandering away from the facility and such failure threatens the health, safety, or welfare of a resident, or a facility does not provide adequate measures to ensure that residents with a history of elopement do not wander away from the facility and such failure threatens the health, safety, or welfare of a resident.

11. Food on Hand

One thousand (1,000) points shall be assigned when there is an insufficient amount of food on hand in the facility to meet the menus for the next twenty-four (24) hour period and this failure threatens the health, safety, or welfare of a resident.

12. Nursing Equipment/Supplies

One thousand (1,000) points shall be assigned if equipment and supplies to care for a resident as ordered by a physician are not provided, or if the facility does not have sufficient equipment and supplies for residents as specified by regulation and these conditions threaten the health, safety, or welfare of a resident or residents.

13. Falls

Seven hundred and fifty (750) points shall be assigned when it is determined that falls occurred in a facility as a result of the facility's failure to maintain required direct care staffing or a safe environment as set forth in regulation and this failure threatens the health, safety, or welfare of a resident.

14. Call System

One thousand (1,000) points shall be assigned when a facility fails to maintain a resident call system or the call system is not functioning for a period of twenty-four (24) hours. If call system cords are not kept within reach of resident then it will be determined that the facility has failed to maintain a resident call system and this failure threatens the health, safety, or welfare of a resident.

15. Heating and Air Conditioning

One thousand (1,000) points shall be assigned when a facility fails to maintain its heating and air conditioning system as required by regulation and such failure threatens the health, safety, or welfare of a resident. Isolated incidents of breakdown or power failure shall not be considered a Class B violation under this section.

16. Dietary Allowance

Seven hundred and fifty (750) points shall be assigned when it is determined that the minimum dietary needs of a resident are not being met as ordered by the physician.

17. Resident Rights

Seven hundred fifty (750) points shall be assigned when facility personnel fail to inform a resident of his Resident Rights as outlined in regulation, or facility personnel fail to allow a resident to honor or exercise any of his rights as outlined in regulation or statute.

18. Sanitation

Seven hundred and fifty (750) points shall be assigned when it is determined that regulations relating to sanitation are not met.

19. Administrator

Seven hundred fifty (750) points shall be assigned when it is determined that a facility does not have a licensed administrator as required by regulation.

20. Director of Nurses

Seven hundred and fifty (750) points shall be assigned when it is determined that a facility does not have a Director of Nursing (DON) as required by regulation for five or more consecutive days.

**4007 Class C Violations**

a. Class C violations are related to administrative and reporting requirements that do not directly threaten the health, safety, or welfare of a resident.

b. The following examples of Class C violations and the points assigned to each are provided for illustrative purposes and are subject to the conditions set out in Section 4003.

1. Quarterly Staffing Reports

Three hundred and fifty (350) points shall be assigned when a facility does not submit quarterly staffing reports within ten (10) days following the deadline given for submission of these reports.

2. Overbedding

Five hundred (500) points shall be assigned when a facility is found to exceed their licensed bed capacity.

3. False Reporting

Five hundred (500) points shall be assigned when it has been determined that a report, physician orders, nurses notes, or other documents or records which the facility is required to maintain has been intentionally falsified.

4. Resident Trust Funds

Five hundred (500) points shall be assigned when it is determined that the facility's records reflect that resident trust funds have been

misappropriated by facility personnel or if the resident has been charged for items for which the facility must provide at not cost to the resident.

5. Denied Access to Facility

Five hundred (500) points shall be assigned when it is determined that personnel from the Arkansas Department of Health and Human Services, the United States Department of Health and Human Services, or any other agency personnel authorized to have access to any long term care facility have been denied access to the facility, or any facility document or record.

6. Reporting of Unusual Occurrences/Accidents

Five hundred (500) points shall be assigned when it has been determined that any facility did not report any unusual occurrences or accidents in a timely manner as mandated by regulation.

7. Posting of Survey Results

Five hundred (500) points shall be assigned when it has been determined that a facility failed to post, in the appropriate manner, the results of any survey, sanction, or survey/sanction cover letter issued by the Department.

8. Residents' Council

Five hundred (500) points shall be assigned when a facility fails to comply with the establishment and operation of a Residents' Council as defined by regulation or statute.

**4008 Class D Violations**

- a. Class D violations are defined as the failure of any long term care facility to submit in a timely manner a statistical or financial report as required by regulation.
- b. All Class D violations shall be assigned two hundred and fifty (250) points.

**4009 Notification of Violations**

- a. If upon inspection or investigation the Office of Long Term Care determines that a licensed long term care facility is in violation of any sanction regulation herein described, any federal or state law or regulation, then it shall promptly serve by certified mail or other means that gives actual notice, a notice of violation upon the licensee when the violation is a classified violation as described in Ark. Code Ann. § 20-10-205.

- b. Each notice of violation shall be prepared in writing and shall specify the exact nature of the classified violation, the statutory provision or specific rule alleged to have been violated, the facts and grounds constituting the elements of the classification, and the amount of the civil penalty assessed by the Director, if any.
- c. The notice of violation issued to a long term care facility by the Director of the Office of Long Term Care shall be classified according to the nature of the violation and shall indicate the classification on the face thereof as follows.
- d. The notice shall also inform the licensee of the right to a hearing under Ark. Code Ann. § 20-10-208 when civil penalties are imposed, and the right to a hearing under Ark. Code Ann. § 20-10-303 with regards to licensure and certification.

The request for a hearing under Ark. Code Ann. § 20-10-208 must be received by the Executive Director of the Arkansas Department of Health and Human Services within ten (10) working days after receipt by the facility of the Notice of Violation.

The request for a hearing under Ark. Code Ann. § 20-10-303 must be in writing and must be submitted to the chairman of the Long Term Care Facility Advisory Board.

- e. The Department shall provide a fair and impartial hearing officer for appeals.

#### **4010 Hearings on the Imposition of Civil Money Penalties**

- a. A licensee may contest the imposition of civil penalty by sending a written request for hearing to the Executive Director of the Arkansas Department of Health and Human Services who shall designate a Hearing Officer to preside over the case and make findings of fact and conclusions of law in the form of a recommendation to the Executive Director of the Arkansas Department of Health and Human Services.
- b. The Executive Director of the Arkansas Department of Health and Human Services shall review the case and make the final determination or remand the case to the Hearing Officer for further findings of law or facts.
- c. The request for hearings must be received by the Executive Director of the Arkansas Department of Health and Human Services within ten (10) working days after receipt by the facility of the Notice of Violation.
- d. The Hearing Officer shall commence the hearing within forty-five (45) days of receipt of the request for hearing.

- e. The Executive Director of the Arkansas Department of Health and Human Services shall issue a final decision within ten (10) working days after the close of the hearing.
- f. Assessments shall be delivered to the Office of Long Term Care within ten (10) working days of the receipt of the Notice of Violation or within ten (10) working days of receipt of the final determination by the Executive Director of the Arkansas Department of Health and Human Services in contested cases. Checks should be made payable to the State of Arkansas.
- g. Facilities failing to pay duly assessed civil penalties shall be subject to a corresponding reduction in succeeding Medicaid vendor payment or initiation of proceedings to revoke the facility's license or both.
- h. All monies collected by the licensing agency pursuant to these regulations shall be deposited in the Long Term Care Trust Fund as specified in Ark. Code Ann. § 20-10-205.

#### **4011 Denial of Admissions**

- a. The Director may deny Medicaid payment for new admissions to a long term care facility issued a Class A or B violation until such time the Director determines that such facility has corrected the violation and is in substantial compliance with all applicable regulations.
- b. If a denial of payment is place into effect, the Director shall notify the Administrator of the facility in writing by certified mail or other means which gives actual notice, that denial of payment for new admissions shall continue until the Director makes a determination that the facility has corrected the violation and is in substantial compliance with all applicable regulations.
- c. The facility may request an immediate hearing by sending a written request to the Executive Director of the Arkansas Department of Health and Human Services. The Department shall provide a fair and impartial Hearing Officer within ten (10) days of receipt of such request.