

COLORADO

Part 28. ENFORCEMENT REMEDIES

28.1 Sections 25-2-107.5 and 25.5-6-205, C.R.S. provide the authority for the Department to recommend to the Department of Health Care Policy and Financing that a civil money penalty imposed against a nursing facility that violates federal regulations for participation in the Medicaid program as enumerated in 42 USC 1396r(h) (2006).

28.2 Collection, enforcement, and assessment of a civil money penalty pursuant to this chapter and the denial of Medicaid payments, shall be the responsibility of the Department of the Health Care Policy and Financing and shall be made upon recommendation of the Department of Public Health and Environment pursuant to section 25.5-6-205, C.R.S.

28.3 Definitions. For purposes of this part, the following definitions shall apply:

(a) "Deficiency" or "violation" means any failure to comply with a requirement of participation for which the facility is required to take some form of corrective action.

(b) "Enforcement remedy or remedies" means any remedy or combination of remedies, in accordance with 42 USC 1396r(h) and sections 25-1-107.5 and 25.5-6-205, C.R.S., which may be imposed by the Department or recommended by the Department for imposition by the Department of Health Care Policy and Financing against any nursing facility which fails to meet any one of the enumerated requirements for participation in the Medicaid program. Remedies include, but are not limited to:

(1) a plan of correction,

(2) a directed plan of correction,

(3) monitoring of a facility by the state survey agency,

(4) full or partial bans on admissions,

(5) denial of payment under the state Medicaid plan with respect to any individual admitted to the nursing facility involved after such notice to the public and the facility as may be provided for by law,

(6) civil money penalties,

(7) temporary management,

(8) termination of the facility's participation under the state plan, and

(9) receivership as provided by section 25-3-108, C.R.S.

(c) "HCPF" means the Colorado Department of Health Care Policy and Financing.

(d) "Nursing facility" means any skilled or intermediate nursing care facility which receives federal and state funds under the Title XIX of the federal Social Security Act.

(e) "Nursing Home Penalty Cash Fund" means the fund created pursuant to section 25.5-6-205, C.R.S.

(f) "Plan of correction" means a written plan prepared by the facility and approved by the department that describes the actions the facility will take to correct noted deficiencies and specifically sets the date the corrective action will be accomplished.

(g) "Requirements of participation" means those requirements of participation in the medicaid program as enumerated in 42 USC 1396r (h) of the federal Omnibus Budget Reconciliation Act of 1987, 1989, and 1990, regulations promulgated pursuant to those acts, and section 25-1-107.5, C.R.S.

(h) "Secretary" means the secretary of the federal department of Health and Human Services.

(i) "Scope" means the frequency of the occurrence of the deficiency in one of the following levels:

(1) Level 1. The deficiency exists in only one or a limited number of cases.

(2) Level 2. The deficiency exists in more than a limited number of cases, but no pattern can be identified.

(3) Level 3. The deficiency exists in more than a limited number of cases and indicates a pattern.

(4) Level 4. The deficiency occurs in sufficient number among residents or staff or with sufficient regularity that it can be considered systemic/pervasive.

(j) "Severity" means the seriousness of the deficiency in one of the following levels:

(1) Level 1. Any deficiency not meeting the criteria for Levels 2, 3, or 4.

(2) Level 2. Any deficiency which may result in a negative outcome to the resident or residents.

(3) Level 3. Any deficiency which has resulted in a negative outcome to the resident or residents.

(4) Level 4. Any deficiency which has a high probability that serious harm or serious injury to residents could occur at any time, or already has occurred and may well occur again if residents are not protected effectively from the harm, or the threat is not removed.

(k) "Temporary management" means the temporary utilization of a substitute manager pursuant to either an agreement between the licensee and the department or pursuant to section 25-3-108, et seq., C.R.S.

(l) "Negative outcome" means that the impact of the facility's deficient practice on the resident or residents is:

(1) The physical, mental or psychosocial deterioration of the resident or residents, or

(2) The ability of the resident or residents to achieve the highest practicable physical, mental, or psychosocial well-being has been compromised.

(m) "Repeat deficiency" means a subsequent deficiency with comparable circumstances or the same tag number, unless the department determines that the circumstances of the previous deficiency are so dissimilar that it would not be proper to consider the deficiency to be a repeat.

28.4 If the Department, as a result of a standard survey, extended survey, or verified complaint or other investigation by the Department at any time upon reasonable cause, determines that a facility

fails to meet the requirements of participation as defined herein and further determines that such failure places the health or safety of the facility's residents in serious and immediate jeopardy, the Department shall take immediate action to remove such jeopardy and correct the deficiency, by either:

(a) temporary management, or

(b) termination of the facility's participation in the state plan.

28.4.1 In addition to the action taken pursuant to 28.4, the Department may apply any other remedy as provided by law or regulation.

28.4.2 If the Department, as a result of a standard survey, extended survey, or verified complaint or other investigation by the Department at any time upon reasonable cause, determines that a facility fails to meet the requirements of participation and further determines that such failure does not place the health or safety of the facility's residents in serious and immediate jeopardy, the Department may take action to correct the deficiency including the application of any remedy designed to minimize the length of time between the identification of a deficiency indicating failure to meet a requirement of participation and the correction of that deficiency. Such a remedy shall not be limited to those remedies enumerated in 28.3(b).

28.5 In determining which remedies to apply, the Department shall consider the severity of the deficiency and shall, in addition to any other remedies provided by law or regulation, impose the remedies provided by 28.3(b) as follows:

(a) For a deficiency of severity Level 1, the Department shall impose the remedy specified in 28.3(b)(1) and may impose the remedies specified in 28.3(b)(2). For a repeat deficiency within a fifteen (15) month period, the Department shall impose the remedy specified in 28.3(b)(1), or (2), and may impose the remedy specified in 28.3(b)(6).

(b) For a deficiency of severity Level 2, the Department shall impose the remedies specified in 28.3(b)(1), or (2), and may impose the remedies specified in 28.3(b)(3) and/or (6). For a repeat deficiency within a fifteen (15) month period, the Department shall impose the remedies specified in 28.3(b)(1) or (2) and may impose the remedies specified in 28.3(b)(3) and/or (6).

(c) For a deficiency of severity Level 3, the Department shall impose the remedies specified in 28.3(b)(1) or (2), and if the scope of the deficiency is Level 4, shall impose the remedies specified in 28.3(b)(3) or (4) or (5) or (6), and may impose any available remedies. For a repeat deficiency within a fifteen (15) month period, the Department shall impose the remedies specified in 28.3(b)(1) or (2), and (3), or (4), or (5), or (6) and may impose any available remedy.

(d) For a deficiency of severity Level 4, the Department shall impose the remedies specified in 28.3(b)(1) or (2), and (6) and (7) or (8). In addition, the Department may impose any other available remedy. For a repeat deficiency within a fifteen (15) month period, the Department shall impose the remedies specified in 28.3(b)(2) and (6) and (7) or (8). In addition, the Department may impose any available remedy.

28.6 The Department shall make a recommendation in a timely manner to HCPF that a civil money penalty be assessed against a facility for failure to comply with a requirement of participation if the Department determines that a civil money penalty is an appropriate remedy.

(a) The Department shall consider all mitigating factors, including but not limited to, a change of ownership of the facility subject to the approval of the Department as provided in 6 CCR 1011-1, Chapter II.

(b) A civil money penalty shall not be recommended under circumstances where the relevant deficiency occurred for reasons outside the nursing facility's reasonable control or despite reasonable, good faith efforts to avoid the deficiency.

28.7 Pursuant to 25-1-107.5, C.R.S., if the Department determines that recommendation of a civil money penalty is appropriate, the Department shall adopt criteria for determining the amount of the penalty to be recommended for assessment by HCPF. Such criteria shall include, but need not be limited to, consideration of the following factors:

(a) The period of time over which the violation occurred;

(b) The frequency of the violation;

(c) The nursing facility's history concerning the type of violation for which the penalty is assessed;

(d) The nursing facility's intent or reason for the violation;

(e) The effect, if any, of the violation on residents' health, safety, security, or welfare; i.e., severity;

(f) The existence of other violations, in combination with the violation for which the penalty is assessed, which increase the threat to residents' health, safety, security, or welfare;

(g) The accuracy, thoroughness and availability of records regarding the violation which the nursing facility is required to maintain; and

(h) The number of additional related violations occurring within the same time span as the violation in question.

28.7.1 In determining the amount of a civil money penalty, multiple violations of different requirements of participation resulting from a single act shall be considered as one violation. However, this shall not preclude their consideration under 28.7(f) or (h) above.

28.7.2 Any civil money penalty which is recommended to HCPF for imposition by that Department shall be not less than \$100 nor more than \$10,000 for each day the facility is found to have been in violation of the federal regulations. Penalties assessed shall include interest at the statutory rate.

28.7.3 Any such civil money penalty shall accrue from the date the facility receives written notice from the Department regarding its recommendation of a civil money penalty. In the event the Department determines that a violation is life threatening to one or more residents or creates a direct threat or serious adverse harm to the health, safety, security, rights or welfare of one or more residents, a penalty shall be imposed for each day the deficiencies which constitute the violation are found to exist. The period of time during which the civil money penalty accrues shall be as follows:

(a) No longer than six (6) months in the case of non-serious or non-immediate threat.

(b) Until the Department verifies the deficiency is corrected or the facility notifies the Department that the deficiency is corrected, whichever is earlier.

(1) If the facility acts in a timely and diligent manner to correct the violation in accordance with a plan of correction as agreed to by the Department, the Department shall recommend to HCPF that the penalty be suspended or reduced for the period of the plan of correction.

(2) In the event the facility has not corrected the violation, pursuant to the notice provided by the facility, the penalty shall be reinstated at an increased amount retroactive to the date the penalty was tolled.

(3) For the purposes of this provision, the plan of correction must contain a reasonable and appropriate plan of action and timetable to completely correct the deficiency. This provision (plan of correction) shall not apply in cases of repeat deficiencies or those with a severity level of 4.

28.8 The Department shall notify the facility, by personal service, first class mail, or electronic transmission ("fax"), of its recommendation of the imposition of a civil money penalty and the amount of any such penalty not later than the fifth day following the last day of the inspection or survey on which the deficiencies which constitute the violation were found. The notice shall explain the deficiencies that are the basis for the recommendation and shall provide instructions for responding to the notice, including that the facility submit a written plan of correction.

28.8.1 After notice pursuant to 28.8 above, a facility may notify the Department of the correction of the deficiency for which the civil money penalty is being recommended. Such initial notice to the Department may be given by telephone, electronic transmission

("fax"), or in person, but shall be documented by a writing postmarked within five (5) business days of the initial notification to the Department.

28.8.2 It shall be the responsibility of HCPF pursuant to section 25.5-6-205, C.R.S., to provide for an appeal process for any facility which has a civil money penalty assessed against it for failure to meet a requirement of participation.

28.9 If a facility fails to correct a deficiency or deficiencies within three (3) months after the date the facility is found by HCPF to be out of compliance with a requirement of participation pursuant to 25-1-107.5, C.R.S., the Department shall recommend to HCPF denial of payment under the state plan with respect to any individual admitted to the facility. involved after such notice to the public and the facility as is provided for by the state.

28.10 If a facility has provided a substandard quality of care to the residents as evidenced by three consecutive standard surveys, the Department shall take the actions set forth in (a) and (b) below and may take any such additional action allowed by statute or regulation, including recommending that a civil money penalty be imposed by HCPF.

(a) Recommend to HCPF that payment be denied under the state plan with regard to any individual admitted to the facility involved after such notice to the public and to the facility as may be provided for by the state; and

(b) Monitor the facility until such time as it has demonstrated to the satisfaction of the Department that it is in compliance with the requirements and that it has the management capacity to remain in compliance.

28.11 Nothing in this Part shall preclude the Department from recommending alternative remedies as provided by law so long as such remedy or remedies are deemed to be at least as effective in correcting the violation and deterring future violations as those remedies enumerated in the federal Omnibus Budget Reconciliation Act of 1987, 1989, and 1990, 42 USC 1396r(h).

28.11.1 Nothing in this Part shall be construed as limiting, negating, or superseding any other remedy available for use by the Department to correct a deficiency or deficiencies. In recommending or selecting a particular remedy, the primary consideration shall be the selection of the remedy or remedies most likely to achieve correction of the relevant deficiency and long-term compliance.

28.12 The Department shall, in conjunction with HCPF, establish circumstances under which the funds of the Nursing Home Penalty Cash Fund may be disbursed in order to protect the health or property of residents. Those circumstances shall include, but not be limited to, the following:

(a) relocating residents to other facilities if necessary;

(b) maintaining the operation of a facility pending completion of a plan of correction or directed plan of correction;

(c) maintaining the operation of a facility pending closure; and

(d) reimbursing residents for personal funds lost.

28.12.1 Neither the Department nor HCPF may use money from the Nursing Home Penalty Cash Fund to pay the costs of administration of those departments.

28.12.2 At the end of the fiscal year, all unexpended and unencumbered moneys remaining in the Nursing Home Penalty Cash Fund must remain in the fund and may not be transferred or credited to the general fund.