AHCA Summaries: CMS Memos on Immediate Imposition of Remedies and Nurse Aide Training Program Waiver and Appeal Process

DRAFT S&C: 18-01-NH: Revised Policies regarding the Immediate Imposition of Federal Remedies- FOR ACTION

The memo S&C: 18-01-NH, which has been released as a draft, will ***replace*** the memo**, "**Mandatory Immediate Imposition of Federal Remedies and Assessment Factors Used to Determine the Seriousness of Deficiencies for Nursing Homes," (S&C: 16-31-NH), which was initially released July 22, 2016, and revised on July 29, 2016.

With the release of S&C: 16-31-NH in July 2016, CMS had expanded the criteria for immediate imposition of federal remedies (e.g. Civil Monetary Penalties - CMPs) as well as for their use prior to affording a facility an opportunity to correct deficiencies.

AHCA has been advocating for changes to this policy, emphasizing that the immediate imposition of remedies with no opportunity to correct should not be used if there is no actual harm to residents. Additionally, AHCA notes that the over-emphasis on the use of CMPs as a penalty and a remedy of first resort is harmful and counter to the intent of using remedies to ensure providers achieve and sustain compliance.

S&C: 18-01-NH provides the following revisions to Chapter 7 of the State Operations Manual (SOM) related to the immediate imposition of federal remedies, including:

1. Specifying that when the current survey identifies immediate jeopardy (IJ) that does not result in serious injury, harm, impairment or death, the CMS Regions may determine the most appropriate remedy;
2. Clarifying that past noncompliance deficiencies as described in §7510.1 of Chapter 7 are **not** included in the criteria for immediate imposition of remedies; and
3. For special focus facilities (SFFs), excluding any S/S level "F" citations under tags F812, F813 or F814 from the tags that require immediate imposition of remedies.

CMS states that the purpose of federal remedies is "to promote the initiative and responsibility of facilities to continuously monitor their performance and promptly achieve, sustain and maintain compliance with federal requirements," and that the choice of remedies should be based on whether the remedies will effectively bring about quick and sustained compliance.

Importantly, CMS also proposes that when selecting remedies, CMS Regional Offices (ROs) should consider the extent to which the noncompliance is a onetime mistake or accident, the result of larger systemic concerns, or a more intentional action or disregard for resident health and safety.

The proposed revisions to Chapter 7 include new language and criteria for mandatory immediate imposition of remedies, definitions of types of remedies, the timing of CMPs, and timelines for enforcement actions when IJ exists, among other topics.

CMS is seeking comment by December 1, 2017 on the draft S&C:18-01-NH **memo.** CMS will review public comments before issuing a final version.

AHCA is reviewing the memo and will provide CMS with detailed comments, incorporating feedback from appropriate Quality Cabinet committees.

Please share any comments with Sara Rudow, AHCA Director of Regulatory Services, by **Monday, November 13, 2017 at** SRudow@ahca.org.

You may also provide comments directly to CMS at dnh_triageteam@cms.hhs.gov by **December 1, 2017**.

S&C: 18-02-NH: Clarification Regarding Nurse Aide Training and Competency Evaluation Program (NATCEP/CEP) Waiver and Appeal Requirements

In S&C: 18-02-NH, CMS clarifies existing statutory and regulatory authority regarding waivers and appeals of nurse aide training and competency evaluation programs and nurse aide competency evaluation programs (NATCEP/CEPs - CNA training programs) prohibition or loss.

The NATCEP/CEP is a statutory requirement and is the standardized training program that all nurse aides must meet to work in a skilled nursing facility (SNF), nursing facility (NF) or a dually participating SNF/NF. States operate the approval process for the NATCEP/CEP programs.

Per statutory language (see Sections 1819(f)(2)(B)(iii)(I) and 1919(f)(2)(B)(iii)(I) of the Social Security Act (the Act), a facility may not operate a NATCEP/CEP program for two years if:

1) It is operating under a waiver for coverage by licensed nurses;
2) It has been subject to an extended survey or partial extended survey;
3) It has been assessed a CMP of at least $10,483 as adjusted by 45 CFR 102 (the final CMP amount determined to be owed); or,
4) It has been subject to imposition of a denial of payment, temporary manager, or termination.

An attachment included in the memo, "Attachment: Waiver and Appeals Authority Chart", provides details about the waiver and appeal authorities for disapproval or loss of NATCEP/CEP programs.

CMS has underscored that facilities may regain the ability to operate their program through specific waivers. CMS clarifies that states have statutory authority to waive NATCEP/CEP if they determine that specified circumstances are met, including if there is no other such program offered within a reasonable distance of the facility, that an adequate environment exists for operating the program in the facility, and that notice of such determination and assurances are made to the state long term care ombudsman.

CMS also explains that a facility may request a waiver of NATCEP/CEP loss if it has been assessed a CMP of at least $10,483 (as adjusted by 45 CFR 102) that was not related to the quality of care furnished to residents. This CMS policy defines 'quality of care furnished to residents' as the direct hands-on care and treatment that a health care professional or direct care staff furnished to a resident. According to the memo, this definition is not limited exclusively to Substandard Quality of Care (SQC) deficiencies,

although CMS does not in this policy specify what other tags beyond SQC deficiencies would be included.

Facilities should submit all waiver requests to the state, but in the case of waiver requests related to assessed CMPs, CMS makes the final decision after considering the state's input.

CMS also specifies that when NATCEP/CEP is lost due to an extended or partial extended survey as a result of SQC findings, the facility has the right to request an appeal of the findings. In addition, facilities may use informal dispute resolution (IDR) processes or request an independent IDR (IIDR) to dispute cited deficiencies. If the IDR or IIDR removes or reduces findings that required loss of NATCEP/CEP, the facility's program will be restored.

Any questions on this memo may be sent to dnh_triageteam@cms.hhs.gov.