

remedies or approved alternatives to the following remedies:

- (1) Temporary management.
- (2) Denial of payment for new admissions.
- (3) Civil money penalties.
- (4) Transfer of residents.
- (5) Closure of the facility and transfer of residents.
- (6) State monitoring.

(c) *State plan requirement.* If a State wishes to use remedies for noncompliance that are either additional or alternative to those specified in paragraphs (a) or (b) of this section, it must—

(1) Specify those remedies in the State plan; and

(2) Demonstrate to HCFA's satisfaction that those remedies are as effective as the remedies listed in paragraph (a) of this section, for deterring noncompliance and correcting deficiencies.

(d) *State remedies in dually participating facilities.* If the State's remedy is unique to the State plan and has been approved by HCFA, then that remedy, as imposed by the State under its Medicaid authority, may be imposed by HCFA against the Medicare provider agreement of a dually participating facility.

[59 FR 56243, Nov. 10, 1994; 60 FR 50118, Sept. 28, 1995]

§ 488.408 Selection of remedies.

(a) *Categories of remedies.* In this section, the remedies specified in § 488.406(a) are grouped into categories and applied to deficiencies according to how serious the noncompliance is.

(b) *Application of remedies.* After considering the factors specified in § 488.404, as applicable, if HCFA and the State choose to impose remedies, as provided in paragraphs (c)(1), (d)(1) and (e)(1) of this section, for facility noncompliance, instead of, or in addition to, termination of the provider agreement, HCFA does and the State must follow the criteria set forth in paragraphs (c)(2), (d)(2), and (e)(2) of this section, as applicable.

(c) *Category 1.* (1) Category 1 remedies include the following:

- (i) Directed plan of correction.
- (ii) State monitoring.
- (iii) Directed in-service training.

(2) HCFA does or the State must apply one or more of the remedies in Category 1 when there—

(i) Are isolated deficiencies that constitute no actual harm with a potential for more than minimal harm but not immediate jeopardy; or

(ii) Is a pattern of deficiencies that constitutes no actual harm with a potential for more than minimal harm but not immediate jeopardy.

(3) Except when the facility is in substantial compliance, HCFA or the State may apply one or more of the remedies in Category 1 to any deficiency.

(d) *Category 2.* (1) Category 2 remedies include the following:

(i) Denial of payment for new admissions.

(ii) Denial of payment for all individuals imposed only by HCFA.

(iii) Civil money penalties of \$50-3,000 per day.

(iv) Civil money penalty of \$1,000-\$10,000 per instance of noncompliance.

(2) HCFA applies one or more of the remedies in Category 2, or, except for denial of payment for all individuals, the State must apply one or more of the remedies in Category 2 when there are—

(i) Widespread deficiencies that constitute no actual harm with a potential for more than minimal harm but not immediate jeopardy; or

(ii) One or more deficiencies that constitute actual harm that is not immediate jeopardy.

(3) HCFA or the State may apply one or more of the remedies in Category 2 to any deficiency except when—

(i) The facility is in substantial compliance; or

(ii) HCFA or the State imposes a civil money penalty for a deficiency that constitutes immediate jeopardy, the penalty must be in the upper range of penalty amounts, as specified in § 488.438(a).

(e) *Category 3.* (1) Category 3 remedies include the following:

(i) Temporary management.

(ii) Immediate termination.

(iii) Civil money penalties of \$3,050-\$10,000 per day.

(iv) Civil money penalty of \$1,000-\$10,000 per instance of noncompliance.

(2) When there are one or more deficiencies that constitute immediate jeopardy to resident health or safety—

(i) HCFA does and the State must do one or both of the following:

(A) Impose temporary management;

or
(B) Terminate the provider agreement;

(ii) HCFA and the State may impose a civil money penalty of \$3,050–\$10,000 per day or \$1,000–\$10,000 per instance of noncompliance, in addition to imposing the remedies specified in paragraph (e)(2)(i) of this section.

(3) When there are widespread deficiencies that constitute actual harm that is not immediate jeopardy, HCFA and the State may impose temporary management, in addition to Category 2 remedies.

(f) *Plan of correction.* (1) Except as specified in paragraph (f)(2) of this section, each facility that has a deficiency with regard to a requirement for long term care facilities must submit a plan of correction for approval by HCFA or the State, regardless of—

(i) Which remedies are imposed; or

(ii) The seriousness of the deficiencies.

(2) When there are only isolated deficiencies that HCFA or the State determines constitute no actual harm with a potential for minimal harm, the facility need not submit a plan of correction.

(g) *Appeal of a certification of non-compliance.* (1) A facility may appeal a certification of noncompliance leading to an enforcement remedy.

(2) A facility may not appeal the choice of remedy, including the factors considered by HCFA or the State in selecting the remedy, specified in § 488.404.

[59 FR 56243, Nov. 10, 1994; 60 FR 50118, Sept. 28, 1995, as amended at 64 FR 13360, Mar. 18, 1999]

§ 488.410 Action when there is immediate jeopardy.

(a) If there is immediate jeopardy to resident health or safety, the State must (and HCFA does) either terminate the provider agreement within 23 calendar days of the last date of the survey or appoint a temporary manager to remove the immediate jeopardy. The

rules for appointment of a temporary manager in an immediate jeopardy situation are as follows:

(1) HCFA does and the State must notify the facility that a temporary manager is being appointed.

(2) If the facility fails to relinquish control to the temporary manager, HCFA does and the State must terminate the provider agreement within 23 calendar days of the last day of the survey, if the immediate jeopardy is not removed. In these cases, State monitoring may be imposed pending termination.

(3) If the facility relinquishes control to the temporary manager, the State must (and HCFA does) notify the facility that, unless it removes the immediate jeopardy, its provider agreement will be terminated within 23 calendar days of the last day of the survey.

(4) HCFA does and the State must terminate the provider agreement within 23 calendar days of the last day of survey if the immediate jeopardy has not been removed.

(b) HCFA or the State may also impose other remedies, as appropriate.

(c)(1) In a NF or dually participating facility, if either HCFA or the State finds that a facility's noncompliance poses immediate jeopardy to resident health or safety, HCFA or the State must notify the other of such a finding.

(2) HCFA will or the State must do one or both of the following:

(i) Take immediate action to remove the jeopardy and correct the non-compliance through temporary management.

(ii) Terminate the facility's participation under the State plan. If this is done, HCFA will also terminate the facility's participation in Medicare if it is a dually participating facility.

(d) The State must provide for the safe and orderly transfer of residents when the facility is terminated.

(e) If the immediate jeopardy is also substandard quality of care, the State survey agency must notify attending physicians and the State board responsible for licensing the facility administrator of the finding of substandard quality of care, as specified in § 488.325(h).

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