

Center for Medicaid and State Operations/Survey & Certification Group

Ref: S&C-08-10

DATE: January 18, 2008

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Use of Interpretive Guidance by Surveyors for Long Term Care Facilities

Memorandum Summary

- The Centers for Medicare & Medicaid Services (CMS) has been asked to clarify the use of the Interpretive Guidance to Surveyors for Long Term Care Facilities in reviewing for compliance with the regulatory requirements for nursing homes.
- Surveyors must cite all deficiencies based on a violation of statutory and/or regulatory requirements.

Background: The Social Security Act mandates the establishment of minimum health and safety standards that providers and suppliers must meet in order to participate in the Medicare and/or Medicaid programs. Specific provision of the nursing home regulations at 42 C.F.R. Part 483 further refine this statutory obligation. CMS' authoritative interpretation of the regulatory language is found in the State Operations Manual (SOM). The SOM specifies that the interpretive guidelines serve as, and also provide surveyors with, specific survey protocols such as investigative protocols, definitions of regulatory terms, and interview probes that they can use during surveys to evaluate compliance with the regulations.

Discussion: The survey process is the best assurance we have that protections set forth in the nursing home requirements are being met and that residents are receiving quality services. CMS continuously investigates ways to improve the long term care survey process with the goal of improving the quality of care and quality of life of nursing home residents. Providing updated interpretive guidance to nursing home surveyors is one method used by CMS to improve the survey process. The interpretive guidance facilitates surveyors' consistent regulatory interpretation and determination of the gravity and pervasiveness of identified deficiencies; ultimately providing a consistent approach to the manner in which surveyors assess a nursing home's compliance with the requirements.

In providing new interpretive guidance, CMS is careful not to prescribe new requirements. Instead, the focus is on relaying to surveyors information consistent with the regulations and accepted standards of care. There are portions of the interpretive guidelines that specify such things as permissive duties or tools that facilities may be using to care for residents. Permissive duties are not requirements, and the lack of use of any particular tool does not, by itself, constitute sufficient grounds for the citation of a deficiency.

An example of a permissive duty is found in the guidance for 42 C.F.R. § 483.25(c) Pressure Sores. One section of this Guidance refers to repositioning as a common and effective intervention for individuals with a pressure sore or who are at risk of developing one. The Guidance provides, “The care plan for a resident at risk of friction or shearing during repositioning may require the use of lifting devices for repositioning.” This sentence indicates a permissive action by the facility but does not create a requirement that facilities use lift devices in order to prevent pressure sores, as the facility may have other interventions in place to avoid shearing and friction. The lack of use, by itself, does not create a deficient practice for a facility. Words like “should” or “may” create permissive standards, vs. words like “shall” and “must” that indicate requirements.

Conclusion: Surveyors should refer to SOM Section 2712 “Use of Survey Protocols in the Survey Process”¹ and Principle #5 in the Principles of Documentation² found in Exhibit 7A for clarification in using information found in the interpretive guidelines. Both sources make it clear that surveyors must base all cited deficiencies on a violation of statutory and/or regulatory requirements, rather than sections of the interpretive guidelines. The deficiency citation must be written to explain how the entity fails to comply with the regulatory requirements, not how the facility fails to comply with the guidelines for the interpretation of those requirements.

¹ State Operations Manual, § 2712 reads, in part, “Included in the survey protocols are interpretive guidelines that serve to interpret and clarify the CoPs, conditions for coverage, and requirements of participation for specific types of entities. The interpretive guidelines contain authoritative interpretations and clarification of statutory and regulatory requirements and are to be used to make determinations about a provider’s compliance with requirements. These interpretative guidelines define or explain the relevant statutes and regulations and do not impose requirements that are not otherwise set forth in statute or regulation.

The SA conducts the surveys in accordance with the appropriate protocols, and looks to the substantive requirements in the statute and regulations to determine whether a citation of noncompliance is appropriate. The SA bases any deficiency on a violation of the statute or the regulations. The decision of whether there is a violation of the statute or regulations must be based upon observations of the facility’s performance, practices, or conditions in the facility.”

² Principles of Documentation, Principle #5 reads, in part, “The deficiency citation demonstrates how the entity fails to comply with the regulatory requirements, not how it fails to comply with the guidelines for the interpretation of those requirements. These Guidelines were designed to assist surveyors to develop a better understanding of the requirements, to apply these requirements in a consistent manner across entities, and to suggest pathways for inquiry.

Although surveyors must use the information in Guidelines, they must be cautious in their use. Guidelines do not replace or supersede the law or regulation, and therefore, may not be used as the basis for a citation. However, they do contain authoritative interpretations and clarifications of statutory and regulatory requirements...Surveyors should carefully consider how the practice of the entity relate to the illustrations within the Interpretive Guidelines, and then compare the entity’s practice to the specific language and requirement of the regulation before determining that a deficiency exists.”

Effective Date: Immediately. Please ensure that all appropriate staff are fully informed within 30 days of the date of this memorandum.

Training: The information contained in this letter should be shared with all survey and certification staff, their managers, and the State/RO training coordinators.

/s/

Thomas E. Hamilton

cc: Survey and Certification Regional Office Management