CHAPTER 2: INTERMEDIATE SURVEY SANCTIONS

Surveyors nationwide have become comfortable issuing sanctions. There appears to be a more frequent issuing of condition-level citations leading to sanctions. There also appears to be an increase in validation surveys resulting in condition-level citations following surveys by the various accrediting organizations CHAP, The Joint Commission and the Accreditation Commission for Health Care (ACHC).

Even with alternative sanctions, CMS continues to have the authority to terminate an agency's provider agreement if the agency isn't in substantial compliance. Failure to be in substantial compliance is defined as a "the failure to meet" one or more CoPs. CMS may terminate an agency provider number if the agency doesn't correct deficiencies within a reasonable time — no more than 60 days — even if the deficiencies are standard-level citations.

It is the federal government's responsibility to assure that agencies do all they can to promote the quality of care and the health and safety of all patients serviced. The guidance for taking on this responsibility is listed in the most recent version of the CoPs.

If you aren't familiar with all the sanctions CMS has at its disposal, it's important to read this section carefully so you understand a variety of the risks you'll be exposed to during your next survey. The penalties are severe.

CMS goals/expectations for sanctions

1. **All agencies will stay in "substantial" compliance with all conditions and individual state laws.** CMS believes having the threat of sanctions will be a significant deterrent for agencies. It expects agencies to make every effort to maintain substantial compliance. The process put into place requires agencies to have policies and procedures that either avoid deficient practices or correct the identified deficient practices. Agencies are expected to be able to identify issues within the organization and make the necessary correction prior to having a surveyor issue a citation and/or sanction.
2. **Every deficiency is expected to be corrected promptly.** While you would hope not to be cited at all, if there is a potential citation discussed at the exit conference, that possible issue should be addressed immediately. Don't wait for a statement of deficiencies, hoping the deficiency doesn't show up. If there is a questionable practice leading to an expected deficiency, act on it. Be assured, the "State and the CMS regional office will take steps to bring about compliance quickly … in accordance with 42 CFR §488.800 – §488.865."

3. **Patients will receive the care they need to attain and maintain the highest functional capacity.** CMS refers to the sanctions as incentives for agencies to maintain compliance. There is no regulation requiring every state agency to confer with CMS or CMS regional offices prior to issuing sanctions. There are some states where this action (sanctions) can be taken with a timely reporting to the regional office. There is no readily available list of states that have been given this authority.

Ultimately, sanctions recommended by the state are reviewed by the CMS regional office for confirmation that the documented findings are supported by the report submitted by the state surveyor.

Remember: Although the agency MUST be timely with any response to the state or regional office, a timely response by the state or regional office is not required by law to prepare a timely response. Therefore, an untimely response does NOT invalidate enforcement action.

CMS also can cite agencies with costly civil monetary penalties or terminate an agency's provider number if deficiencies involve immediate jeopardy.

Sanctions for agencies with deemed status

The deeming status granted by CHAP, The Joint Commission and the ACHC can exempt agencies from routine CMS surveyor site visits. The exception to this would be surveys by the state agency due to complaints or the required sample validation surveys. During these state agency surveys, agencies are subject to all available sanctions. See information regarding validation surveys later in this document.

According to Chapter 10 of the State Operations Manual, a deemed agency "loses its deemed status when a condition-level finding is cited on a complaint or validation survey." Although the deemed status accreditation protects against sanctions during routine survey findings by the AO (accrediting organization), if a deemed status agency happens to find itself in a complaint or validation survey, sanctions will be an option for the state or federal surveyor.

However, since there is considerable expense in becoming accredited and deemed, terminating accreditation and deemed status could be a way to contain costs. With profit margins shrinking and costly changes on the horizon, more and more agencies are considering discontinuing their deemed status. Deemed status only can be restored if full compliance is determined to be in place.

Remember: Deemed status is a strictly voluntary measure and isn't necessary to participate in the Medicare program. When deemed status comes to an end for reasons such as non-payment, failed accreditation or deemed status survey, it does not mean those agencies forfeit their provider number. At the point of discontinuing — voluntarily or based on decision of the accrediting organization — the agency relationship with the accrediting organization, the agency will need to immediately prepare for a state survey (due to the change). A CMS 855A Medicare Provider Enrollment Form also should be submitted to the MAC as an update.

What is a branch?

There is much confusion in the industry regarding the differences between branches and drop stations. Determining if an agency would be considered a branch or drop station, one must think about the agency's ability to adequately supervise the location and its staff in promoting the highest level of care to patients it serves. The branch must be located within the geographical location serviced by the parent office and must be close enough to share the same administration, supervision and services on a daily basis.

Every branch is assigned an identification number. These unique ID numbers allow CMS to monitor and measure the quality of care provided to patients serviced by

the branch.

Effect of sanctions on branch

A branch office does not need to independently meet the CoPs. For example, the office doesn't need a separate board of directors and professional advisory committee (PAC).

However, the office must maintain patient care that preserves the safety and well-being of the patient through agency policies and procedures protecting those patient rights.

The branch office may be subject to an unannounced survey at any time, whether or not the parent agency is being surveyed. The office also may be included in the survey of the parent location. Deficiencies found within the branch apply to the entire organization. For instance, if a sanction is imposed on a branch location, the parent agency — and all branches associated with the parent agency — would be subject to all sanctions imposed.

Decisions to sanction agencies with branches in multiple states would be determined in the state in which the parent office resides.

What factors are considered in determining sanctions?

The state agency determines the number of sanctions and degree of sanction based strictly on whether the citation is condition-level or repeat standard-level. Repeat standard-level citations are those citations issued in the past that the agency has failed to correct. These repeat standard-level citations aren't required to be patient related.

Such citations could include failing to appropriately complete an annual program evaluation, failing to properly document board or professional advisory minutes, not having an updated CLIA waiver, etc.

Determining whether to issue a citation is not solely based on the survey.

Determining deficiencies and the degree of sanction warranted also could be based on other reporting programs, other evaluative programs and other procedures or mechanisms. These could include, for example, accurate and timely reporting on OASIS and complaints generated and validated by a state inspection that could prompt the issuance of an intermediate sanction.

A number of factors are taken into consideration when determining the type of sanction that will be issued. Some factors include:

- Seriousness of deficiency and whether the deficiencies pose immediate jeopardy to patient health and safety;
- The nature, incidence, degree, manner and duration of the deficiencies or noncompliance;
- The presence of repeat deficiencies;
- The agency's compliance history in general;
- Any history of repeat deficiencies at either the parent or branch location;
- Whether the deficiencies are directly related to a failure to provide quality patient care;
- Whether the agency is part of a larger organization with documentation of performance problems, such as a long-term care facility or hospital; and
- Whether the deficiencies indicate a system-wide failure of providing quality care.