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Title of Rule: Revision to the Medical Assistance Rule Concerning Enforcement Remedies

Rule Number: MSB 09-07-27-A

Division / Contact / Phone: Long Term Benefits / Janice Brenner / 4758

**SECRETARY OF STATE
RULES ACTION SUMMARY AND FILING INSTRUCTIONS**

SUMMARY OF ACTION ON RULE(S)

1. Department / Agency Name: Health Care Policy and Financing / Medical Services Board
2. Title of Rule: MSB 09-07-27-A, Revision to the Medical Assistance Rule Concerning Enforcement Remedies, §8.435
3. This action is an adoption of: an amendment
4. Rule sections affected in this action (if existing rule, also give Code of Regulations number and page numbers affected):

Sections(s) 8.435, Colorado Department of Health Care Policy and Financing, Staff Manual Volume 8, Medical Assistance (10 CCR 2505-10).
5. Does this action involve any temporary or emergency rule(s)? No
If yes, state effective date: 5/30/2010
Is rule to be made permanent? (If yes, please attach notice of hearing). Yes

PUBLICATION INSTRUCTIONS*

Please replace current existing text from §8.435 ENFORCEMENT REMEDIES through §8.435.2.D.3.g with new text provided from §8.435 ENFORCEMENT REMEDIES through new text ending at §8.435.2.E.5.

This change is effective 05/30/2010

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STATEMENT OF BASIS AND PURPOSE

1. Summary of the basis and purpose for the rule or rule change. (State what the rule says or does and explain why the rule or rule change is necessary).

Section 8.435, Enforcement Remedies, was changed to reflect the changes to Section 25-1-107.5, C.R.S. (2009) as a result of the enactment of House Bill 09-1196. The additions to Section 8.435:

- Identification of the criteria for the use of the Nursing Home Penalty Cash Fund. The criteria now include measures that will benefit residents of nursing facilities by improving their quality of life.
- Specification that the amount to be spent each fiscal year for quality of life measures is governed by the criteria in Section 25-1-107.5.
- Specification of the role of the Nursing Facility Culture Change Accountability Board in recommending the allocation of the fiscal year amounts for quality of life measures.

Additionally, the rule was clarified to indicate that:

- The Department enforces these remedies only for non-State-operated Medicaid-only Class I nursing facilities.
- The Nursing Home Penalty Cash Fund contains, in addition to Civil Mondy Penalty (CMP) funds collected by the Department, CMP funds collected by the Centers for Medicare and Medicaid Services (CMS) for Class I nursing facilities other than non-State-operated Medicaid-only facilities.
- The Department and the Department of Public Health and Environment have joint responsibility for administering the Nursing Home Penalty Cash Fund.

The authority for this rule change is contained in House Bill 09-1196, Section 25.5-1-301 through 305, C.R.S. (2009) and Section 25-1-107.5, C.R.S (2009).

2. An emergency rule-making is imperatively necessary

- ☐ to comply with state or federal law or federal regulation and/or
- ☐ for the preservation of public health, safety and welfare.

Initial Review

02/19/2010

Final Adoption

04/09/2010

Proposed Effective Date

05/30/2010

Emergency Adoption

DOCUMENT #10

Explain:

3. Federal authority for the Rule, if any:

4. State Authority for the Rule:

25.5-1-301 through 25.5-1-303, C.R.S. (2009);
25-1-107.5, C.R.S. (2009)

Initial Review **02/19/2010**
Proposed Effective Date **05/30/2010**

Final Adoption **04/09/2010**
Emergency Adoption

DOCUMENT #10

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REGULATORY ANALYSIS

1. Describe the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

Nursing facility clients should benefit from expenditures for resident-centered care, including culture change, as HB 09-1196 identifies these as improving the quality of life of nursing facility residents. There are no additional costs to any clients or providers, as the expenditures come from the Nursing Home Penalty Cash Fund. The legislation prohibits expenditures from decreasing the fund below one million dollars, so that much money will remain available in case residents have to be relocated due to termination of the Medicaid provider agreement.

2. To the extent practicable, describe the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons.

Expenditures for education, training promotion and consultation related to resident-centered care are expected to improve the quality of life of nursing facility residents.

3. Discuss the probable costs to the Department and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

There are no identified costs to the Department. House Bill 09-1196 requires that as long as the balance in the Nursing Home Penalty Cash Fund remains at least one million dollars, the Department and the Department of Public Health and Environment shall distribute the following amounts from the fund each fiscal year for resident-centered care:

- For fiscal year 09/10: \$200,000

- From fiscal year 10/11 forward: up to 25% of the money deposited in the Fund the prior fiscal year

Up to ten percent of each fiscal year's distribution amount may be used to pay administration and operational costs of the Nursing Facility Culture Change Accountability Board, including expense reimbursement for board members.

4. Compare the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction.

Action is required due to the enactment of House Bill 09-1196.

5. Determine whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

There are no costs identified with the proposed rule changes.

6. Describe any alternative methods for achieving the purpose for the proposed rule that were seriously considered by the Department and the reasons why they were rejected in favor of the proposed rule.

No alternative methods were considered. The rule reflects House Bill 09-1196.

8.435 ENFORCEMENT REMEDIES

8.435.1 DEFINITIONS

Civil Money Penalty (CMP) means any penalty, fine or other sanction for a specific monetary amount that is assessed or enforced by the Department for a Class I non-State-operated Medicaid-only Nursing Facility or by the Centers for Medicare and Medicaid Services (CMS) for all other Class I nursing facilities.

Deficiency means a nursing facility's failure to meet a participation requirement specified in 42 C.F.R. Part 483 Subpart B. No amendments or later editions are incorporated. Copies are available for inspection from the following person at the following address: Custodian of Records, Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, Colorado 80203-1714. Any material that has been incorporated by reference in this rule may be examined at any state publications repository library.

Enforcement Action means the process of the Department imposing against a Class I non-State operated Medicaid-only nursing facility one (or more) of the remedies for violation of federal requirements for participation as a ~~Medicaid-only~~ nursing facility enumerated in the Federal Omnibus Reconciliation Act of 1987, 1989, and 1990, 42 U.S.C. 1396r(h). No amendments or later editions are incorporated. Copies are available for inspection from the following person at the following address: Custodian of Records, Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, Colorado 80203-1714. Any material that has been incorporated by reference in this rule may be examined at any state publications repository library.

Immediate Jeopardy means a situation in which the nursing facility's non-compliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment or death to a resident.

Medicaid-Only Nursing Facility means a nursing facility that is reimbursed by Medicaid, but not Medicare.

Nursing Home Penalty Cash Fund means the account that contains the money collected from CMPs imposed by the Department and also the amount transmitted by CMS from CMPs imposed by CMS. CMS computes the amount to be transmitted, the Medicaid portion, by applying the percentage of Medicaid clients in the nursing facility to the total CMP amount.

8.435.2 GENERAL PROVISIONS

8.435.2.A. The Department enforces remedies for Class I Non-State-Operated Medicaid-Only Nursing Facilities and CMS enforces remedies for all other Class I nursing facilities, pursuant to 42 C.F.R. 488.330. Class I nursing facilities are subject to one or more of the following remedies when found to be in substantial non-compliance with program requirements:

1. Termination of the Medicaid provider agreement.
2. ~~Civil Money Penalties (CMP).~~
3. Denial of payment for new admissions of Medicaid clients.
4. Temporary management.
5. Transfer of residents.
6. Transfer of residents in conjunction with facility closure.

7. The following three remedies with imposition delegated to the Department of Public Health and Environment (DPHE):

- a. State monitoring.
- b. Directed plan of correction.
- c. Directed in-service training.

8.435.2.B. The following factors shall be considered by the Department in determining what remedy will be imposed on the Class I non-State-operated Medicaid-only nursing facility:

1. The scope and severity of the Deficiency(ies).
2. The most serious Deficiency in relationship to other cited Deficiencies.
3. The nursing facility's past Deficiencies and willingness to become compliant with program rules and regulations.
4. The recommendation of DPHE pursuant to Section 25-1-107.5, C.R.S. (2005).
5. The requirements and guidelines for selecting remedies in 42 C.F.R. Sections 488.408-414. No amendments or later editions are incorporated. Copies are available for inspection from the following person at the following address: Custodian of Records, Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, Colorado 80203-1714. Any material that has been incorporated by reference in this rule may be examined at any state publications repository library.

8.435.2.C. Enforcement Guidelines for Class I Non-State-Operated Medicaid-Only Nursing Facilities

1. At the Department's discretion, nursing facilities may be given an opportunity to correct Deficiencies before remedies are imposed or recommended for imposition except as stated below.
2. ~~AN~~Nursing facilities shall not be given the opportunity to correct Deficiencies prior to a remedy being imposed or recommended for imposition under the following:
 - a. Nursing facilities with Deficiencies of actual harm or of greater severity on the current survey, and
 - i) Deficiencies of actual harm or of greater severity on the previous standard survey, or
 - ii) Deficiencies of actual harm or of greater severity on any type of survey between the current survey and the last standard survey.
 - b. Nursing facilities, previously terminated, with Deficiencies of actual harm or of greater severity on the first survey after re-entry into the Medicaid program.
 - c. Nursing facilities for which a determination of Immediate Jeopardy is made during the course of a survey.
 - d. Nursing facilities with a per instance CMP imposed due to non-compliance.

3. The Class I non-State-operated Medicaid-only nursing facility shall be notified of any adverse action and may appeal these actions pursuant to 10 C.C.R. 2505-10, Section 8.050.
 - a. Advance notice for state monitoring is not required.
 - b. The advance notice requirement for other remedies is two days when Immediate Jeopardy exists and 15 days in other situations, with the exception of CMP.
 - c. The notice requirement for CMP is in accordance with 42 C.F.R. Sections 488.434 and 488.440. No amendments or later editions are incorporated. Copies are available for inspection from the following person at the following address: Custodian of Records, Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, Colorado 80203-1714. Any material that has been incorporated by reference in this rule may be examined at any state publications repository library.

8.435.2.D. Enforcement Actions

1. Termination of the Medicaid provider agreement:
 - a. Shall be effective within 23 days after the last day of the survey if the nursing facility has not removed the Immediate Jeopardy as determined by DPHE.
 - b. May be rescinded by the Department when DPHE notifies the Department that an Immediate Jeopardy is removed.
2. Denial of payment for new Medicaid admissions shall end on the date DPHE finds the nursing facility to be in substantial compliance with all participation requirements.
3. CMP
 - a. CMP amounts range in \$50 increments from \$50-\$3,000 per day for Deficiencies that do not constitute immediate jeopardy, but either caused actual harm or caused no actual harm with the potential for more than minimal harm, and from \$3,050 to \$10,000 per day for Deficiencies constituting immediate jeopardy, or \$1,000 to \$10,000 per instance as recommended by DPHE.
 - b. CMPs are effective on the date the non-compliance began ~~or the date of the "per instance" occurrence.~~
 - c. If the nursing facility waives its right to an appeal in writing within 60 calendar days from the date the CMP is imposed, the CMP shall be reduced by 35%, notwithstanding the provisions of 10 C.C.R. 2505-10, Section 8.050.
 - d. The CMP shall be submitted to the Department by check or subsequent Medicaid payment to the provider shall be withheld until the CMP is satisfied.
 - e. Upon notice to the Department of change in ownership or intent to terminate the Medicaid agreement, the Department shall withhold all Medicaid payments to satisfy any CMP that has not been paid in full.
 - f. ~~All CMPs collected shall be transmitted by the Department to the state treasurer to be credited to the Nursing Home Penalty Cash Fund.~~

- gf. Payment of CMP shall not be an allowable cost on the nursing facility's annual Med-13 cost reports as described in 10 C.C.R. 2505-10, Section 8.441.

8.435.2.E. Nursing Home Penalty Cash Fund

1. All CMPs collected from non-State-operated Medicaid-only nursing facilities shall be transmitted by the Department to the state treasurer to be credited to the Nursing Home Penalty Cash Fund.
 - a. The Medicaid portions of CMPs imposed by CMS and transmitted to the State shall be credited to the Nursing Home Penalty Cash Fund.
2. The Department and DPHE have joint authority for administering the Nursing Home Penalty Cash fund, with final authority in the Department.
 - a. For measures aimed at improving the quality of life of residents of nursing facilities, the Nursing Facility Culture Change Accountability Board shall review and make recommendations to the departments regarding the use of the funds in the Nursing Home Penalty Cash Fund available for quality of life measures as specified in Section 8.435.2.E.4.b.
3. The maximum amount of funds to be distributed from the Nursing Home Penalty Cash Fund each fiscal year for the purposes in Section 8.435.2.E.4.b is specified in Section 25-1-107.5, C.R.S.
4. As a basis for distribution of funds from the Nursing Home Penalty Cash Fund:
 - a. The Department and DPHE shall consider the need to pay costs to:
 - 1) Relocate residents to other facilities when a nursing facility closes
 - 2) Maintain the operation of a nursing facility pending correction of violations;
 - 3) Close a nursing facility;
 - 4) Reimburse residents for personal funds lost.
 - b. The Nursing Facility Culture Change Accountability Board shall review and recommend distribution of funds for measures that will benefit residents of nursing facilities by improving their quality of life at the facilities, including:
 - 1) Consumer education to promote resident-centered care in nursing facilities;
 - 2) Training for state surveyors, supervisors and the state and local long-term care ombudsman, established pursuant to article 11.5 of Title 26, C.R.S., regarding resident-centered care in nursing facilities;
 - 3) Development of a newsletter and web site detailing information on resident-centered care in nursing facilities and related information;
 - 4) Education and consultation for purposes of identifying and implementing resident-centered care initiatives in nursing facilities.
 - c. Expenses to administer and operate the accountability board, including reimbursement of expenses of accountability board members.
 - 1) This expense shall not exceed 10 percent of the fiscal year amount authorized under Section 435.2.E.3.
5. The Department and DPHE shall consider the recommendations of the Nursing Facility Culture Change Accountability Board regarding the use of the funds

available each fiscal year for quality of life improvement purposes specified in Section 8.435.2.D.4.b.