

CMS and the State determine the seriousness of the deficiencies.

(b) *Determining seriousness of deficiencies.* To determine the seriousness of the deficiency, CMS considers and the State must consider at least the following factors:

(1) Whether a facility's deficiencies constitute—

(i) No actual harm with a potential for minimal harm;

(ii) No actual harm with a potential for more than minimal harm, but not immediate jeopardy;

(iii) Actual harm that is not immediate jeopardy; or

(iv) Immediate jeopardy to resident health or safety.

(2) Whether the deficiencies—

(i) Are isolated;

(ii) Constitute a pattern; or

(iii) Are widespread.

(c) *Other factors which may be considered in choosing a remedy within a remedy category.* Following the initial assessment, CMS and the State may consider other factors, which may include, but are not limited to the following:

(1) The relationship of the one deficiency to other deficiencies resulting in noncompliance.

(2) The facility's prior history of noncompliance in general and specifically with reference to the cited deficiencies.

§ 488.406 Available remedies.

(a) *General.* In addition to the remedy of termination of the provider agreement, the following remedies are available:

(1) Temporary management.

(2) Denial of payment including—

(i) Denial of payment for all individuals, imposed by CMS, to a—

(A) Skilled nursing facility, for Medicare;

(B) State, for Medicaid; or

(ii) Denial of payment for all new admissions.

(3) Civil money penalties.

(4) State monitoring.

(5) Transfer of residents.

(6) Closure of the facility and transfer of residents.

(7) Directed plan of correction.

(8) Directed in-service training.

(9) Alternative or additional State remedies approved by CMS.

(b) *Remedies that must be established.* At a minimum, and in addition to termination of the provider agreement, the State must establish the following 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 CMS'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 CMS, then that remedy, as imposed by the State under its Medicaid authority, may be imposed by CMS 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 CMS 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, CMS 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:

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- (i) Directed plan of correction.
- (ii) State monitoring.
- (iii) Directed in-service training.
- (2) CMS 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, CMS 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 CMS.
 - (iii) Civil money penalties of \$50–3,000 per day.
 - (iv) Civil money penalty of \$1,000–\$10,000 per instance of noncompliance.
- (2) CMS 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) CMS 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) CMS 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) CMS does and the State must do one or both of the following:
 - (A) Impose temporary management; or
 - (B) Terminate the provider agreement;
 - (ii) CMS 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, CMS 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 CMS 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 CMS 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 CMS 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 CMS does) either terminate