

SUNSET REVIEW

OF THE

NURSING HOME PENALTY CASH FUND

Submitted by
Colorado Department of Regulatory Agencies
June 1992

June 5, 1992

The Honorable Bob Schaffer
Joint Sunrise/Sunset Review Committee Chairman
Room 348, State Capitol Building
Denver, Colorado 80203

Dear Senator Schaffer:

We have completed our evaluation of the Nursing Home Penalty Cash Fund and are pleased to submit this written report which will be the basis for my office's oral testimony before the Joint Legislative Sunrise/Sunset Review Committee. The report is submitted pursuant to section 24-34-104(8)(a), Colorado Revised Statutes, which states in part:

The Department of Regulatory Agencies shall conduct an analysis and evaluation of the performance of each division, board, or agency or each function scheduled for termination under this section... The Department of Regulatory Agencies shall submit a report and such supporting materials as may be requested, to the Sunrise and Sunset Review Committee, created by joint rule of the Senate and House of Representatives, no later than July 1 of the year preceding the date established for termination...

The report discusses the question of whether there is need for the regulation provided pursuant to sections 25-1-107.5 and 26-4-122 C.R.S. The report also discusses the effectiveness of the regulatory program in carrying out the intention of the statute and makes recommendations for statutory and administrative changes if the program is continued.

Sincerely,

Steven V. Berson
Executive Director

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EXECUTIVE SUMMARY

The statutes creating the Nursing Home Penalty Cash fund were enacted July 1, 1989 to comply with federal requirements mandated in the Omnibus Budget Reconciliation Act of 1987. Full implementation was initially delayed in hopes of receiving federal regulations relating to this requirement to ensure full compliance. Because no federal regulations were forthcoming, the Colorado Department of Health began a series of public meetings throughout the state to ensure public input. The Colorado Department of Social Services followed the Colorado Department of Health's process with its own development of regulations closely tied to the health regulations.

Full implementation occurred in January of 1992. At the time of publishing this report, no nursing home has received a penalty pursuant to this statute. Thus, with no publication of federal regulations and no penalties assessed, most recommendations for change are premature.

The Department of Regulatory Agencies recommends the continuation of this program and the creation of a three year sunset to ensure compliance with federal regulations when issued.

I. THE SUNSET PROCESS

The imposition of sanctions, including civil money penalties, upon a nursing facility when such a facility violates a federal regulation for participation in the medicaid program by the Colorado Department of Health in accordance with section 25-1-107.5, C.R.S., and the Colorado Department of Social Services in accordance with section 26-4-122, C.R.S. shall be terminated on July 1, 1993, unless continued by the General Assembly pursuant to C.R.S. 24-34-104(22)(c)(I). During the year prior to that date, it is the responsibility of the Colorado Department of Regulatory Agencies to conduct a Sunset Review and Evaluation of this penalty fund. During this review, the Colorado Department of Health and the Colorado Department of Social Services must demonstrate that there is a need for the continued existence of the fund and that the regulation it provides is the least restrictive consistent with the public interest. The Department's findings and recommendations are submitted via this report to the Joint Legislative Sunrise and Sunset review Committee of the Colorado General Assembly. (Statutory criteria used in Sunset Reviews may be found in Appendix A of this report.)

This sunset review was comprehensive in nature. It included review of related federal regulations, state regulations, discussions with appropriate staff from the Colorado Department of Health and the Colorado Department of Social Services and interested community resources.

This Sunset Report is the first to be performed on this penalty fund since its inception in 1989.

II. BACKGROUND

In 1986 Congress commissioned the National Institute of Medicine to conduct a study on the provision of services and care to residents of long term care facilities in the United States. Based on the results of this study, the Omnibus Budget Reconciliation Act of 1987 (Obra 87) mandated sweeping reforms in our nation's nursing homes.

Prior to the passage of Obra 87, the primary method of enforcement was the threat of decertification from medicaid and medicare. This enforcement system was found to have little impact on chronically deficient nursing care facilities. Thus the Institute of Medicine's recommendation to create sanctions at the state level to more effectively ensure compliance with the reform measures was implemented through the Obra 87 legislation.

With the passage of Obra 87, each state was mandated by law to establish, at a minimum, the following remedies for violations of the federal regulations for participation in the medicaid program:

- a. denial of payment under the State plan with respect to any individual admitted to the facility after deficiencies have been noted and the facility has been notified.
- b. a civil money penalty assessed against the facility for each day in which the facility is not in compliance with specified regulations.
- c. the appointment of temporary management to oversee the operation of the facility and to assure the health and safety of the residents when necessary.

The Colorado General Assembly responded to these requirements with a series of Obra related bills during the 1989 special session of the legislature. The lack of authority to impose civil money penalties was the only mandated requirement that did not already exist in Colorado law. Thus SB 5 specifically mandated that the Colorado Department of Health and the Colorado Department of Social Services develop remedies which could be assessed against nursing care facilities in compliance with the standards promulgated in Obra 87 as summarized above.

While the statutory deadline set by Congress for complying with these reforms passed well over a year ago, final regulations to be developed by the Health Care Financing Administration have not been finally published. Yet states have been forced to meet their own deadlines without federal guidance. This places states in the position of promulgating regulations knowing that their programs may require overhauling once the final federal regulations are published. It should be noted that failure to adopt and implement Obra reforms has subjected at least one state, California, and its health care agency and personnel to civil suit and has put its federal funding in jeopardy.

III. CURRENT REGULATORY SYSTEM

Review of Statute

Section 25-1-107.5 C.R.S. authorizes the Colorado Department of Health, as the state agency responsible for certifying skilled and intermediate nursing facilities which receive state and federal funds under Title XIX of the federal Social Security Act to adopt rules and regulations necessary to create a series of remedies complying with the requirements of the Omnibus Reconciliation Act of 87, as amended, which may be imposed by the Colorado Department of Social Services pursuant to section 26-4-122 C.R.S.

The remedies established shall include all those required by federal law including civil money penalties.

The rules and regulations promulgated by the Department of Health to impose civil money penalties shall include the following:

- a.) That the penalty shall accrue from the day the Colorado Department of Social Services finds the facility in violation of federal regulations and shall not be less than one hundred dollars nor more than ten thousand dollars with the legal rate of interest and
- b.) That the criteria for assessing the violation shall include:
 - 1. the period of time over which the criteria occurred;
 - 2. the frequency of the violation
 - 3. nursing facility's history concerning the particular violation being assessed;
 - 4. the nursing facility's intent or reason for the violation;
 - 5. the effect, if any, of the violation on a resident's health, safety, security, or welfare;
 - 6. other violations that increase the threat to the resident's health, safety, security, and welfare;
 - 7. the accuracy and extent of the records and the availability of the records of the facility to the department;

8. the number of additional violations occurring during the same period of time.

In accordance with the rules and regulations promulgated by the Department of Health, the Colorado Department of Health is authorized to recommend to the Colorado Department of Social Services an appropriate civil money penalty. The Colorado Department of Social Services is then authorized to assess, enforce and collect the civil money penalty and credit the nursing home penalty cash fund with the proceeds. Both departments have authority to administer the cash fund although the Colorado Department of Social Services has final authority.

This authority includes the responsibility of both departments to establish circumstances under which the funds are distributed to protect the health, safety, security, and welfare of residents of the nursing homes.

The Colorado Department of Social Services is authorized to promulgate rules and regulations to ensure proper administration of the nursing home penalty cash fund. Circumstances that shall be considered as a basis of distributing cash funds include the following:

- a. the relocation of residents to other facilities;
- b. the maintenance of the operation of a nursing facility pending correction of violations;
- c. the closure of a nursing facility; and
- d. the reimbursement of residents for personal funds lost.

None of the funds in the penalty cash fund can be used for the administration of this program.

Section 26-4-122 C.R.S. establishes, under the Colorado Department of Social Services, due process requirements prior to the denial of medicaid payments or the assessment of a civil money penalty against a nursing facility. Prior to such denial or civil money penalty assessment, the Colorado Department of Social Services shall offer a nursing facility the opportunity for a hearing pursuant to section 24-4-105, C.R.S. In conjunction with the authority to offer such a hearing, the Colorado Department of Social Services shall provide any nursing facility the opportunity for an appeal; govern the procedures for such an appeal, including 30 days notice prior to the collection of any civil money penalty; and promulgate any other rules and regulations necessary to implement this section. In addition, all monies and interest which accumulate in the fund shall remain in the fund or be used for the above stated purposes. These monies are not to be transferred to the general fund or any other fund at any point in time.

Regulatory Response in Colorado

As previously indicated, Federal law specifically states that failure of the Health Care Financing Administration (H.C.F.A.) to adopt regulations to comply with the enforcement laws does not prevent the responsibility of the states to adopt regulations to implement Obra 87. Although H.C.F.A. officials have provided mixed responses to requests for specific guidance on whether states must go forth with their rulemaking, congressional committees have indicated that states must respond to Obra mandates regardless of the delays which have occurred on the federal level with compliance schedules. Failure to adopt and implement Obra requirements could impact on the state's ability to receive substantial federal funds.

This position by the federal government creates a situation in which Obra 87 provides some broad requirements for compliance with the federal mandate to create a penalty fund, but leaves the specific details to be established by federal regulations. Since these details are not yet finalized, the Colorado Departments of Health and Social Services have been forced to promulgate state regulations without federal regulations available to establish specifics of interpretation of the law.

For example, the Colorado Department of Social Service, through its Attorney General, has interpreted the federal law relating to civil money penalties to require retroactive application of penalties from the time a nursing home deficiency begins rather than at the time notice to the nursing home occurs. This particular aspect of the law could be interpreted differently through the not yet released federal regulations and thus require statutory changes to the Colorado Department of Social Service's regulations. Interpretation of federal law is clearly established only at the time federal regulations are finalized.

In response to this need, the Colorado Department of Health has conducted over thirty meetings in Denver as well as outlying areas during a four month period in 1990. The Colorado Department of Health reports that providers, advocates, consumers, health care professionals, local health department personnel, legislators and members of the public have participated extensively.

Staff from the Health Facilities Division of the Colorado Department of Health first went before the Board of Health in November of 1990 to request a public rulemaking hearing date. The outcome of this request was two public hearings held on January 16 and February 20, 1991 at which time draft regulations were presented and public testimony was heard.

As a result of the extensive public testimony, the Health Facilities staff requested that the Colorado Board of Health continue the vote on the regulations as presented at the February meeting to the March 1, 1991 meeting.

The regulations were voted on and passed at the March meeting of the Board of Health with an implementation date of May 1, 1991. (See 6 C.C.R. 1011-1, Chapter V, Part 29)

The Health Care Financing Administration's Office of Survey and Certification through its state contract with the Health Facilities Division of the Colorado Department of Health has implemented a new survey process to assess nursing facilities compliance with statutory and regulatory requirements for participation in the Medicaid and Medicare programs. This survey process responds to regulatory changes initiated by Obra 87 and its amendments. The underlying theme of the nursing home reform movement, as reflected in these changes, is to assist each resident to attain or maintain the highest possible physical, mental and psychological well-being. The new survey is oriented toward evaluating outcome of services and whether the services are actually providing a standard of care resulting in improved physical, mental and psychological well-being.

Because the penalties are based on the outcomes of this new survey process which was implemented October 1, 1990 nationwide, and since there has been no federal guidance in this area, the Director of the Division of Health Facilities recommended that the Board of Health accept a delayed effective date for full implementation. This recommendation was suggested on the premise that it would give providers an opportunity to become familiar with the new survey process one time prior to full implementation with associated penalties. During this interim period, all pre-existing remedies have continued to be available. The delayed effective date for full implementation was scheduled for January 1, 1992.

After the Health Department regulations were finalized, the Colorado Department of Social Services began the process of promulgating regulations relating to assessment, collection and enforcement of the penalties. Again public comment and board members of the Colorado Department of Social Services expressed some concerns. After public rulemaking hearings and extensive discussion at the board level, the rules were adopted in November of 1991. Because of the unique structure of the Colorado statute, the Colorado Departments of Health and Social Services have worked closely on implementation strategies due to the interlocking nature of the statute.

There has been a great deal of opposition to the concept of civil money penalties both in Colorado and nationwide. Because of this new requirement, there has been a higher incidence of challenges to deficiencies imposed by the Medicaid surveying teams in order to decrease the potential for the ultimate imposition of civil money penalties.

In Colorado some of the primary concerns voiced at public hearings can be summarized as follows:

- 1) **Issue:** Providers strongly suggested that civil money penalties be used as a last resort after all other penalties had failed.

Response: The intent of the establishment of civil money penalties by the federal government was not only to encourage a quick response from providers in correcting deficiencies but even more importantly, to deter future deficiencies from occurring at all.

- 2) **Issue:** Providers suggested an appeal procedure be made a part of the regulation.

Response: The Colorado Department of Social Services is responsible for assessing and collecting any penalties. This ensures any provider who is assessed a penalty an opportunity to use the appeal system already established through the Administrative Procedures Act.

- 3) **Issue:** The current regulations promulgated by the Colorado Department of Social Services established that a fine begins to accrue at the date on which the deficiency began regardless of the date of notice to the facility that the deficiency exists. This is a great concern to providers who express serious concern about interpretation of the regulations and the potential for subjectivity of surveyors.

In other words, a provider could implement a policy that they believe fully complies with the regulations in January; receive a survey in December of the same year and be found out of compliance and be fined for the entire period between January and December. This possibility is of great concern to providers who believe that interpretation of requirements is of a subjective nature.

Response: The Board of the Colorado Department of Social Services expressed concern about this issue also at the fall meeting at which the regulations were adopted.. The Assistant Attorney General stated that this retroactive fining requirement was established by federal law and therefore, must be reflected in state law to comply. Recommendation two will give the Colorado Department of Social Services an opportunity to change the retroactive nature of the penalties if and when federal regulations permit.

To date, there have been no civil money penalties assessed against a nursing home. The brief period of time during which full implementation of this program has existed prevents a complete evaluation and identification of actual problems.

IV. RECOMMENDATIONS

RECOMMENDATION 1: CONTINUE PROGRAM.

The General Assembly should allow the nursing home penalty fund pursuant to section 25-1-107.5 C.R.S. and section 26-4-122 C.R.S. to continue.

Discussion: This fund is established as mandated by Obra 87 and is in its infancy. As federal regulations are finalized, there will be a probable necessity to amend the currently approved regulations both in the Colorado Department of Health and the Colorado Department of Social Services. Until federal regulations are finalized, a significant revision to the state law is unnecessary and inefficient in terms of cost.

In addition, the final state regulations were fully implemented in January of 1992, and no penalties have yet been assessed so problem areas are not yet identified.

RECOMMENDATION 2: CREATE FLEXIBILITY IN STATUTE TO RESPOND TO POTENTIAL FEDERAL REGULATORY CHANGES IN RELATION TO RETROACTIVE FINING AUTHORITY.

The General Assembly should amend section 25-1-107.5 by repealing section (2)(b)(I) and replacing it with the following new section:

(I) THAT THE DATE A PENALTY IS ASSESSED AGAINST THE FACILITY AND THE AMOUNT OF THE PENALTY SHALL BE ESTABLISHED BY REGULATIONS PROMULGATED BY THE DEPARTMENT OF SOCIAL SERVICES.

Discussion: Section (2)(b)(I) currently states the following:

(I) That the penalty assessed against the facility shall accrue from the date the facility is found by the department of social services to be in violation of federal regulations and shall not be less than one hundred dollars nor more than ten thousand dollars, with the legal rate of interest for each day the facility violates federal regulations for participation under Title XIX of the federal Social Security Act, as amended; and ...

As more thoroughly discussed on page 8 of this report, the retroactive nature of the authority to impose fines has the potential of creating serious conflict between surveyors and nursing

homes due to differences in interpretation. Unless violations threaten the well-being of residents, the accrual of fines should begin upon notification to the nursing home to ensure fairness and reduce the potential for conflict. This recommendation enables the Colorado Department of Social Services to comply with federal regulations through their own regulations. The change will also enable needed changes to occur at the point in time the federal regulations relating to this issue are finalized. This statutory change will authorize changes to be made through state rulemaking procedures rather than through statutory revision.

RECOMMENDATION 3: ESTABLISH A THREE YEAR SUNSET.

The General Assembly should establish a sunset of this statute on July 1, 1996.

Discussion: Because the federal regulations have not yet been finalized and the imposition of penalties has not yet occurred, it becomes necessary to revisit this program in a brief period to evaluate actual implementation problems and statutory inconsistencies with the final federal regulations.

APPENDIX A1

SUNSET STATUTORY EVALUATION CRITERIA

- (I) Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulations;
- (II) If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- (III) Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices of the Colorado Department of Regulatory Agencies and any other circumstances, including budgetary, resource and personnel matters;
- (IV) Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- (V) Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- (VI) The economic impact of regulation and, if national economic information is available, whether the agency stimulates or restricts competition;
- (VII) Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- (VIII) Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;
- (IX) Whether administrative and statutory changes are necessary to improve agency operations to enhance public interest.