

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
San Francisco Regional Office
90 Seventh Street, Suite 5-300 (5W)
San Francisco, CA 94103-6706



DIVISION OF MEDICAID & CHILDREN'S HEALTH OPERATIONS

August 31, 2017

Mari Cantwell
Chief Deputy Director, Health Care Programs
California Department of Health Care Services
P.O. Box 997413, MS 0000
Sacramento, CA 95899-7413

Dear Ms. Cantwell:

The U.S. Department of Health & Human Services Office of Civil Rights received a letter dated August 16, 2016 from the AARP, a non-profit organization representing the interests of persons age 50 and older, regarding the failure of the California Health and Human Services Agency (CHHS) to enforce administrative decisions pursuant to the Nursing Home Reform Act (NHRA), codified at 42 U.S.C. §§ 1395i-3(e)(3), 1396r(e)(3). Under the NHRA, states are directed to establish a system for adjudicating residents' appeals of involuntary transfers and discharges from nursing facilities in compliance with federal standards. AARP's letter focused on CHHS's failure to enforce the federal laws that protect vulnerable nursing home residents from being involuntarily removed from the facilities in which they reside, or "resident dumping."

I am writing today to remind your department of its obligations in this area and to reiterate guidance that we provided to the California Department of Public Health's Center for Health Care Quality (CDPH/CHCQ) on May 17, 2012 via Steve Chickering, the Associate Regional Administrator of the CMS Western Division of Survey and Certification (see enclosure).

The Medicaid state plan is defined at 42 CFR 430.10 as "a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements for title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department." §431.10(a) describes the basis and purpose of the State agency as "This section implements section 1902(a)(5) of the Act, which provides for designation of a single State agency for the Medicaid program." §431.200 states the State plan is required to "provide an opportunity for a fair hearing to any person whose claim for assistance is denied or acted upon promptly," including an appeals process for any person who "is subject to a proposed transfer or discharge from a nursing facility." §431.202 mentions, "A State plan must provide that the requirements of §§431.205 through 431.246 of this subpart are met." These sections include

the language found at §431.220(a)(3) that the State agency must grant an opportunity for a hearing to the following, "Any resident who requests it because he or she believes a skilled nursing facility or nursing facility has erroneously determined that he or she must be transferred or discharged." In addition, §431.246 includes, "The agency must promptly make corrective payments, retroactive to the date an incorrect action was taken, and, if appropriate, provide for admission or readmission of an individual to a facility if (a) The hearing decision is favorable to the applicant or recipient; or (b) The agency decides in the applicant's or recipient's favor before the hearing."

As noted in our 2012 letter, CMS cannot advise either CDPH or DHCS on which department should enforce Transfer/Discharge Appeals (TDA) and Refusal to Readmit (RTR) decisions because CMS statute is silent about which state entity is responsible. However, the CMS regulations are clear that the state agency must promptly make corrective actions.

If you have any questions, please contact Cheryl Young at 415-744-3598 or via email at Cheryl.Young@cms.hhs.gov.

Sincerely,

/s/

Henrietta Sam-Louie
Associate Regional Administrator
Division of Medicaid & Children's Health Operations

Enclosure

cc: Steven Chickering, CMS Western Division of Survey & Certification
Anne Blackfield, CMS Centers for Medicaid & CHIP Services



DEPARTMENT OF HEALTH & HUMAN SERVICES
CENTERS FOR MEDICARE & MEDICAID SERVICES
Consortium For Quality Improvement and Survey & Certification Operations
Western Division of Survey & Certification

Refer to: WCDSC-PP

May 17, 2012

Debby Rogers, Deputy Director
Center for Health Care Quality
1615 Capitol Avenue, MS 0512
Sacramento, CA 95814

Dear Ms. Rogers,

Thank you for CDPH's inquiry dated October 7, 2011 requesting guidance and direction from our office regarding whether State Survey Agencies are responsible for enforcing Transfer/Discharge Appeal (TDA) and Refusal to Readmit (RTR) hearing decisions. I apologize for the extended period since your initial request.

The State plan is defined at 42 CFR 430.10 as "a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements for title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department." §431.10(a) describes the basis and purpose of the State agency as "This section implements section 1902(a)(5) of the Act, which provides for designation of a single State agency for the Medicaid program." 431.200, states the State plan is required to "provide an opportunity for a fair hearing to any person whose claim for assistance is denied or acted upon promptly," including an appeals process for any person who "is subject to a proposed transfer or discharge from a nursing facility." §431.202 mentions, "A State plan must provide that the requirements of §§431.205 through 432.246 of this subpart are met." These sections include the language found at §431.220(a)(3) that the State agency must grant an opportunity for a hearing to the following, "Any resident who requests it because he or she believes a skilled nursing facility or nursing facility has erroneously determined that he or she must be transferred or discharged." In addition, §483.246 includes, "The agency must promptly make corrective payments, retroactive to the date an incorrect action was taken, and, if appropriate, provide for admission or readmission of an individual to a facility if (a) The hearing decision is favorable to the applicant or recipient; or (b) The agency decides in the applicant's or recipient's favor before the hearing."

The CMS cannot advise CDPH or DHCS which department should enforce TDA/RTR decisions, as CMS statute is silent on which State entity is responsible. However, the CMS regulations are clear that the State Agency must promptly make corrective actions.

Denver Regional Office
1600 Broadway, Suite 700
Denver, CO 80202

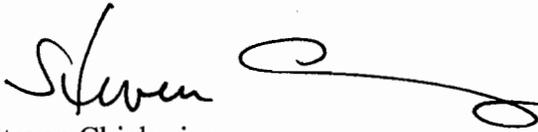
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90 7th Street, Suite 5-300 (5W)
San Francisco, CA 94103-6707

Seattle Regional Office
2201 Sixth Avenue, RX-48
Seattle, WA 98121

One statement in the letter mentions that CDPH staff will cite facilities at the “D” level for findings of inappropriate discharge and refusal to readmit. Although this level of deficiency may fit some situations, our office does not want the CDPH District Offices to feel this is the only severity and scope designation that can be used. We encourage CDPH Licensing and Certification personnel to review Appendix P, section IV-E, Psychosocial Outcome Severity Guide, including the portion subtitled, Application of the Reasonable Person Concept. Other severity and scope levels may apply, including a “G” level deficiency (severity level 3, actual harm that is not immediate jeopardy).

Thank you for your attention to this matter. If you have further questions, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven", followed by a long, horizontal flourish that ends in a small loop.

Steven Chickering
Associate Regional Administrator
Western Division of Survey and Certification

cc: SMA