

INCREASING TRANSPARENCY & CONSUMER PARTICIPATION IN STATES' USES OF NURSING HOME CIVIL MONETARY PENALTY FUNDS

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Introduction

Federal Civil Monetary Penalties (CMPs) and state CMPs/fines are imposed by regulatory agencies if a nursing home does not comply with regulatory standards. They present an additional, valuable resource for fiscally constrained states to improve the quality of nursing home life and care. In particular, because federal CMPs are required by law to be used to fund projects or activities that benefit residents or that protect a resident and his/her assets if a facility is closing, they are a unique and potent resource to fund innovative activities that truly have a positive impact for nursing home residents. CMPs can amount to a great deal of money. Nursing homes can be fined up to \$10,000 a day until deficiencies are corrected. In these times of fiscal constraint, these funds offer an additional source of funding improvements in nursing home care and life for states facing budget crises.

The Long Term Care Community Coalition worked with consumers and long term care ombudsmen in four states to help them participate in the awarding of CMP funds in their states. The specific goals of the project were to increase consumer involvement and public transparency in handling of CMP expenditures for nursing home projects in the four states and to change state funding practices in these four states towards increasing the funding of projects tailored to benefit residents that will have a significant and, if possible, lasting benefit for nursing home residents.

Using strategies developed in New York State, LTCCC gave technical advice to these stakeholders as they developed their own goals and activities to meet these objectives. We expect that the experiences of these four states will be helpful to consumers and ombudsmen in other states who are interested in participating in the awarding of grants from CMP funds.

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www.nursinghome411.org www.ltccc.org www.assisted-living411.org

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Executive Summary

Federal Civil Monetary Penalties (CMPs) and state CMPs/fines are imposed by regulatory agencies if a nursing home does not comply with regulatory standards. They present an valuable resource to improve the quality of nursing home life and care. Because the federal CMPs are required by law to be used to fund projects or activities that benefit residents or that protect a resident and his/her assets if a facility is closing, they are a unique and potent resource to fund innovative activities that can make a difference in the lives of nursing home residents, such as culture change or other activities that improve the life and care of nursing home residents. A 2005 LTCCC study, *Funding for Innovation: A Review of State Practices with Civil Monetary Penalties*¹ found that some states did not use their CMP funds, many only offered the funds to nursing homes and others used the funds for nursing home projects that did not seem to have much value. In some cases, funds even appeared to be going to nursing homes for activities or services for which they were already being reimbursed by Medicaid. Because of these issues, the participation of consumers and their advocates in the process of developing the criteria for funding is crucial. With public participation, the likelihood of innovative and creative uses of the funds increases.

“CMPs... are a unique and potent resource to fund innovative activities that can make a difference in the lives of nursing home residents”

In the project presented in this report, LTCCC worked with consumers and long term care ombudsmen in four states (Georgia, Massachusetts, Pennsylvania and California) to help them increase transparency and consumer involvement in the awarding of CMP funds in their states. We believe that this report can help stakeholders in other states learn how to be effective participants as their states award grants and distribute CMP funds. This is especially important as the levying and use of CMPs is one of the long term care areas focused on in the new national healthcare reform law. The lessons learned from the project should be useful to a wide range of people and groups, since the project participants represented varied consumer-oriented stakeholders in diverse states: from state and local ombudsmen to volunteer organizations to paid consumer advocates.

Although the participants faced many obstacles to participating in their state's process for awarding CMP funds, such as states trying to use the funds to close their state's budget gap, volunteers having limited time to devote to the CMP activities and state and federal government withholding information, working with LTCCC helped them make major changes in their states. Among their many successes describe in this report:

¹ *Funding for Innovation: A Review of State Practices With Civil Money Penalties*, Mollot, Richard; Rudder, Cynthia; Shineman, Meghan; Harrington, Charlene and Tsoukalas, Theodore, 2006 (http://nursinghome411.org/CMPPProject/FundingInnov06b_c.pdf). [Henceforth *Funding for Innovation*.]

- The participants in Georgia were very successful in mounting a major, broad-based statewide grassroots advocacy effort to secure funds for the local ombudsmen program; they convinced their state agency not to propose that CMP funds only be used to help "special focus facilities" improve quality (as it proposed doing); and they developed a way to use some of the ombudsman funds for culture change activities.
- The participants in Massachusetts worked successfully on their state advisory committee to get culture change ideas into the proposal and convinced their state to require all nursing homes submitting a proposal for CMP funding to document that their resident and family councils were consulted and signed off on the proposal.
- The participants in Pennsylvania were able to receive information from the state on civil monetary penalties received and distributed by the state from 1991 to 2009 which was necessary to plan future activities.
- The participants in California succeeded in getting the state legislature to order an accounting and audit of the CMP accounts; publicized the findings and recommendations of the audit; and were able to obtain information from CMS on civil monetary penalties to help them in their campaign to publicize nursing home penalties.

“...the levying and use of CMPs is one of the long term care areas focused on in the new national healthcare reform law.”

The project report presents details on how LTCCC worked with each state, the goals and work plans that participants set for themselves, the obstacles they faced over the year and how they overcame these obstacles, achievements and lessons learned by each state and each state's planned future activities. In addition, the report has a detailed strategy for ombudsmen and consumer advocates, how providers can help, recommendations for improving state use of funds from LTCCC's original national study on the levying and use of CMPs around the country and official information from CMS on how states may use CMP funds. Individual participants from each state have also agreed to respond to questions from other stakeholders who are looking for ways to participate in this process in their states (the report provides contact information for those participants). For additional information and resources on CMPs visit www.nursinghome411.org.

INCREASING TRANSPARENCY & CONSUMER PARTICIPATION IN STATES' USES OF NURSING HOME CIVIL MONETARY PENALTY FUNDS

States Participating in the Project

Four different states were chosen. The consumer participants in the states were very diverse and the CMP process in each state was different.

Georgia

In Georgia, the participants included the state ombudsman and her staff, the staff from the Georgia Council on Aging and a representative from the Culture Change Network of Georgia. Georgia had no formal process for allocating CMP funds. The participants were already experienced in working with their state leaders.

Massachusetts

In Massachusetts, the participants were members of an all volunteer consumer group. The state already had an advisory council for the distribution of CMP funds that included a representative of this group. As a member, the group is involved in helping to write the request for proposals. In addition, one of the participants was also a steering committee member of the Massachusetts Culture Change Coalition.

Pennsylvania

In Pennsylvania, the participants included an advocacy group which is also a local ombudsman program. Pennsylvania had no formal or public process for awarding funds although some funds had clearly been awarded.

California

In California, the participants were staff of an advocacy group with a long record of advocating for long term care consumers and receiving information under the freedom of information law. The state has major fiscal problems.

Methodology

Meetings

A half-day face-to-face meeting was planned with each of the states. At this meeting, LTCCC staff members first discussed LTCCC's 2006 national study,² supported by the Commonwealth Fund, which identified and assessed state experiences with nursing home

² *Funding for Innovation.*

Civil Money Penalty (CMP) funds. The study examined the extent to which states were levying CMPs against nursing homes that have failed to meet minimum standards and how the states were using these funds. It focused on identifying uses of CMPs for projects and activities that improve resident care and quality of life in innovative ways, with the goal of identifying “best practices” and making recommendations for stakeholders and policymakers on how they can encourage their state’s use of the funds so that it benefits residents in ways that exceed statutory and regulatory requirements. The presentation included discussing the findings and recommendations for improving the distribution of CMP funds and how their state “measures up.”

LTCCC staff then presented an advocacy model for the participants to follow or modify as needed as they set out to work on participating in the use of CMP funds in their state. This model strategy is based upon the strategy used by LTCCC in New York State.³ The New York strategy included first identifying a broad range of consumer oriented stakeholders and then holding two meetings of the group. These meetings commenced with LTCCC staff presenting information on the importance of CMPs and their value for funding innovative projects to improve resident care and quality of life. Then the group brainstormed to identify priorities of how they would like to see the CMP funds used to improve nursing home care. The meetings concluded with the group setting priorities for how they did – and did not – want to see CMP funds used and developing a written Action Plan with recommendations for the use of CMPs and an agenda for implementing the Action Plan.

To implement this plan, an internet Discussion Board for NYS Stakeholders to speak to each other was set up. State policy makers and the public were informed about the summit and its recommendations. Meetings were held with state policy makers; a webpage featuring news and information on CMPs and developments in New York State was established. Articles were written and disseminated for stakeholders to publish in their newsletters and/or disseminate to their constituents. LTCCC published articles in its newsletters as well. Presentations were made at various public meetings and conferences.

Following the overview of LTCCC’s work in New York, the rest of the meeting time was used to develop an initial individualized work plan with detailed activities. Each state had unique characteristics. The work plan was developed based upon the abilities and priorities of the participants and their relationships with other stakeholders and the public (i.e., grassroots connections), state agencies, state legislature, governor, state news media and their regional office of CMS. A brainstorming session was held to think about their desired goals and priorities. The initial plans included a set of goals each state wanted to achieve by the end of a year, the tasks they needed to undertake to reach these goals and a timeline for completion of the tasks over the course of the year.

At the end of the meeting, dates were set for a series of conference calls, to be made every two months, for follow up technical assistance as they implemented their plans and to modify their work plans as circumstances changed.

³ The New York Community Trust funded LTCCC as it developed this model in New York State with other consumer stakeholders. See Attachment I below for more information.

Conference Calls

Conference calls provided technical assistance and advice on an ongoing basis, as needed, to troubleshoot any issues that arose, answer questions and monitor progress.

Group Conference Call

At the end of the project year, all states participated in a group call. Each state was asked to state its goals, any obstacles faced, how they overcame any obstacles, any successes/achievements, lessons learned and future activities.

Material

LTCCC staff developed or found material needed by the states as they worked toward their goals. See attachment section for materials given to the states.

State Summaries⁴

Georgia

Two facts in Georgia led to the development of goals: (1) It was unclear how CMP funds were being used, if at all and (2) The state fiscal crisis put the local ombudsman programs in jeopardy.

Goals and Activities

To secure CMP funds for local ombudsmen programs.

To develop a process for soliciting proposals, reviewing proposals and awarding funds to make the system more accountable and transparent.

To encourage culture change in the state's nursing homes.

Based upon their relationships and past experiences, the participants in Georgia developed a list of tasks for each goal such as meeting with the Governor's staff to urge the use of some of the funds for the ombudsman program; possible mobilization of other advocacy

⁴ See the Attachment Section VII for a list of all individual state participants with contact information (as available).

groups; getting information on the current state process for awarding competitive grants and finding out whether this process applies to CMP grants; and deciding whether they want to suggest that this state process be used for CMP grants. See Attachment Section for a copy of Georgia's work plan.

Obstacles

The state legislature attempted to use all the CMP funds to balance the state budget.

The state agency overseeing CMP funds was interested in awarding the funds to “Special Focus Facilities” (homes identified by regulators as having persistent, serious problems and needing more intense scrutiny to either resolve their problems or be effectively shut down), believing that this was the purpose of the CMP funds.

Overcoming Obstacles & Meeting Goals

The participants were very successful in mounting a major broad-based statewide grassroots advocacy effort to secure funds for the local ombudsmen program by meeting with legislators and publishing information in newsletters.

When the legislature wanted to put the CMP funds into the state general budget, project participants worked to make sure this was not done by giving them material on the appropriate uses of CMPs (see Attachment Section: Material From CMS) and convincing the state that if they did this they might lose the money altogether. They became proactive. LTCCC also was asked to speak to CMS staff to further convince the state that they could not use the funds in this manner.

Using material from CMS on how CMP funds may be used, they convinced their state agency not to propose that CMP funds be used to help "special focus facilities" improve quality as it had originally proposed.

They met with many different state agencies: they met with staff from their state agency to discuss the state granting process; they met with staff in the governor's budget office to explain CMP funds and how they can be used; and they met with legislative leaders.

They brought in a board member of the Georgia Culture Change Summit and invited her to join the group.

After getting information on the state's existing process to distribute grants, decided that this is the process they want to suggest be used for CMP funds.

Achievements

They succeeded in getting funds allocated (\$1.6 million of the \$12 million in the state's CMP fund) for the local ombudsman programs.

They succeeded in getting some of the funds for culture change activities. Because the state was so focused on its fiscal problems, it did not develop a process for allocating the rest of the funds. In order try to get some of the funds used for culture change activities, the participants developed a way to use some of the ombudsman funds for culture change activities. Since it became clear the local programs could not use all of the \$1.6 million before the end of the fiscal year, as required, they developed a process to use any leftover funds for other ombudsman-related purposes, including promoting culture change and reached out to other groups for ideas on using these leftover funds by the local programs to encourage culture change. Among the projects that are now being supported by these funds, are the following activities related to support of culture change in Georgia nursing homes:

- Culture Change in Nursing Homes Symposia (2 day long workshops) - A partnership with the University of Georgia to educate providers and develop public policy recommendations. Stakeholders planning the events are Valdosta State University, Georgia Council on Aging, area agencies on aging, Culture Change Network of Georgia, local ombudsmen, Aging Services of Georgia, and Georgia Health Care Association.
- Culture Change Summit of Georgia - Scholarships for up to 15 long-term care ombudsmen to attend a day-long educational workshop.
- Virtual Dementia Tour training - Scholarships for up to 13 long-term care ombudsmen (one per local program) to attend a train-the-trainer event and kits provided for each ombudsman local program to use in future training events.
- Culture change web-based curriculum - Culture Change Coalition of Georgia will develop a series of web-based training modules for ombudsman staff and volunteers focused on culture change principles and practices and accessible on the www.georgiaombudsman.org website.

Lessons Learned and Future Activities

A major lesson learned was that it is important to understand the politics in your state. They did not want to do something that would affect their relationships with state leaders. They felt they had to "tread lightly."

They brought many different people together; they communicated well with each other;

they thought about who had what relationship with who; who would be the best messenger on which issue.

The Georgia participants believed they had laid the groundwork for developing a formal process for distributing the CMP funds. They will be working on this in the future.

Massachusetts

Massachusetts was in a different situation from Georgia. The state had already created an advisory committee to develop an application for the use of CMP funds. The consumer participants in the present project, all volunteers, were already represented on this committee. In addition, one of their members was on the steering committee of the state's culture change coalition.

Goals & Activities

To make the process more transparent.

To make information available to the public on: how much money is available; what criteria are being used for the distribution of funds; who the funds are going to; and how the funds are being used.

A long range goal was to make public the information on the number of facilities receiving CMPS and information on the violations these facilities received.

To use the CMP funds for a proposal on culture change.

To make sure that the interest of families were included in the proposal for awarding CMP funds.

Since they sat on the state advisory committee, their first task was to present their goals to this committee for buy-in. Other tasks involved bringing other groups together to work towards these goals. As the year progressed, it became clear that it was important to focus on making the RFP (request for proposals from nursing homes) written so that it included language to make sure that culture change projects were funded. This became the major goal; others were put on the "back burner."

Obstacles

It was very difficult trying to get the state to focus on transparency and the state had the last say on the committee.

Being volunteers, the participants had limited time to work on these issues.

Overcoming Obstacles and Meeting Goals

Presented their goals to the state advisory committee, to other consumer groups and to the state Culture Change Coalition.

Suggested ways to make the system transparent to the state.⁵

Decided to focus on developing the RFP as the major goal, putting the other goals on the “back burner.”

Thus, they focused on: using the CMP funds for culture change and making sure that interest of families were included in the proposal for awarding CMP funds.

Worked to get modifications to the proposal, related to culture change and the participation of families, accepted by the CMP Advisory Board and the State.

Suggested language to the state on inclusion of families and residents⁶

Worked to add to the qualifications needed for the coordinator position – experience in culture change.

One of the members of the group, as a member of the state advisory committee, will be interviewing people for the coordination position. She will be focusing on the need for this person to have some experience in culture change.

Achievements

Worked successfully on the state advisory committee to get culture change ideas into the proposal.

Originally the proposal for the use of CMP funds solely focused on clinical issues; now it has been expanded to also focus on quality of life and consistent assignments.⁷

⁵ "Here's one idea to facilitate transparency which is open for discussion. We could develop a short, one-page document to include on the state website (or other appropriate location). The info sheet would include the following: basic background on CMP funds, QLP [Quality of Life Program] goals, total CMP funds available, portion used for QLP initiatives, and the remainder reserved for special needs. The info would also include a listing of organizations/projects receiving funds and the award amount. This info could be updated quarterly or annually, whatever makes sense."

⁶"Selected providers must demonstrate commitment to the program by documenting agreement with and participation in culture change by resident and family councils and staff, both how they got "buy-in" from their nursing home community for the program and that the community is supporting the program. Also, the following goal of the proposal was included: "...Family ... fully participate and are engaged in the lives of residents...".

⁷According to the proposal: "... the principles of Continuous Quality Improvement (CQI) and Culture Change are understood and used by all nursing home staff in order to continuously improve quality of care and

Additionally, the state included funds for a 2010 state culture change coalition conference and a culture change newsletter.

Convinced the state to require all nursing homes applying for funding to document that their resident and family councils agreed with and were participatory in the culture change process.

Lessons Learned and Future Activities

The providers on the state advisory committee were very helpful. Given the political climate in Mass, providers are very open (culture change network and the Pioneer Network were helpful in bringing this about).

Providers in Mass helped to push the participants' goals forward on the committee.

They will be focusing on making the amounts and grants public.

Pennsylvania

Pennsylvania was in a completely different situation from both Georgia and Massachusetts. In Pennsylvania, there was little or no information available on how much CMPs are collected or how their use is decided.

Goal & Activities

Because of this lack of information and transparency, the advocates in this state decided on the following goals:

To identify the amount of CMPs that had been collected and spent and how decisions were made about collections and expenditure.

quality of life for all nursing home residents" and that, "The QLP will use a competitive review process to award Civil Money Penalty (CMP) funds to selected nursing homes for proposals on implementing or enhancing Consistent Staff Assignments in the facility." The state group was convinced that clinical improvements couldn't occur without consistent assignments and that this culture change initiative should be the primary focus of the QLP Program. Partly due to the state group's urging, the advisory board decided that the overarching goal of QLP was engagement in culture change to improve the quality of life of residents, accomplished through consistent staffing and building an infrastructure in which continuous quality improvement can occur.

To make the information regarding CMPs transparent, once identified.

To make recommendations regarding a process for awarding CMP funds.

Obstacles

The advocates struggled to obtain any information from the state and federal governments about CMP amounts that had been collected and spent over the past 10 years.

There are many different agencies in Pennsylvania that are involved in CMPs and each sent the advocates to the other. It took almost six months to get the information they requested. They went from state agency to state agency.

Although Pennsylvania had a "Right to Know" law with specific time frames for response to requests, each agency requested extensions and the federal government did not respond at first and then sent a notice stating that the request was being processed and that the advocates would be charged a large sum (several hundred dollars).

Overcoming the Obstacles and Meeting Goals

Using the Pennsylvania "Right to Know Law," they requested information from the state on the amount of CMP money the state collected each year for the last 10 years (Medicaid portion); the balance in the CMP account; the amount distributed over the last 10 years; information on State rules and process on how funds are to be used; details on how funds, if any, have been distributed, including any projects funded and the recipients.

Using the Freedom of Information Law, they requested information from the federal Centers for Medicare and Medicaid Services (CMS) on all due and payable letters sent to facilities in the state and data from comparative surveys from 2007 to the present.

They researched funding opportunities for funding to meet the rest of the goals.

The participants had to be persistent; they wrote letter after letter and made phone calls. After LTCCC contacted local federal authorities, the state participants were told of the process for asking for a waiver of fees. Finally, after six months, information was received.

Achievements

Although it took six months, they received information from the state on civil monetary penalties received by state from 1991 to 2009; all disbursements from the fund; and a description of the one grant funded.⁸

They found that there seems to be no clear system for awarding grants from CMP funds.

They feel that they have been successful in finally getting a sense of the landscape to permit them to conduct other activities to meet their goals.

They feel they now have the knowledge of how to proceed and who to pressure as they continue work on their goals in the future.

Lessons Learned and Future Activities

The participants learned that there are so many different agencies in the state that are involved in CMPs and none are involved in any leadership capacity.

They now know how to get the information they need in the future in a more timely way by going to the right agency and requesting waivers of any fees.

Since these participants felt they could not continue without some additional funding, they are committed to putting together grant proposals to raise funds to work on helping to develop a process for awarding the grants and to organizing other groups to work with them.

California

In California, most of the civil monetary penalties are state fines. The participants in this state have long received information on state fines and have publicized them in on their website. Although the state had been reporting collections of fines, when this group looked into using CMP funds to preserve funding for the state ombudsman program, the state said it did not have enough funds (though the funding proposed for the ombudsman program was a small fraction of the funds that were supposed to be in the account).

⁸ Found that the CMP totaled \$6,810,934.72 as of 2009. Found that only one project has been funded with CMP funds: reduction of physical and chemical restraints. This project is now in its 14th year. It is unclear how much of the CMP account was used for this project which first was funded with intergovernmental transfer funds with CMP funds being added in 2008.

Goals & Activities

Preserve the local ombudsman program by getting the state to use CMP funds.

Verify how much CMS has issued and collected in federal CMPs by getting “Due & Payables”⁹ from CMS; getting the legislature to order accounting and audit of the two Special Deposit Fund Accounts to determine whether the funds are being properly managed by the CA Department of Public Health and how much money is in the accounts.

Once the information is received, get it out to organizations that joined in campaign to use CMPs for California Long Term Care Ombudsman Program; pressure state and CMS to levy and collect fines to increase pool of CMP money for LTCOP funding (in short term, due to the state’s defunding of program); inform state legislature and news media (to increase transparency and accountability re. levying, collecting and use of CMPs).

Publicize federal enforcements and CMPs in a report card.

Obstacles

Although a FOIA request was made to CMS for information on CMPs issued against individual California nursing homes for the last four years, the information was not forthcoming. After filing a lawsuit, information on federal enforcements was received, including federal CMPs for the past four years.

The state ombudsman office did not offer support for local ombudsman funding.

Overcoming Obstacles and Meeting Goals

Waited a year and then sued CMS for the information. A settlement was reached; they received the information and all lawyers' fees were paid.

Working with other groups, they urged the legislature to order accounting and audit of the two Special Deposit Fund Accounts.

Achievements

Succeeded in getting the state legislature to order an accounting and audit of the Special Deposit Fund accounts. They were particularly successful in getting the legislature to expedite this audit.

⁹ Letters sent to nursing homes stating that they are fined and owe money.

Publicized the findings of the report which was released in June. The audit found that Department of Public Health isn't collecting fines against nursing homes for abuse and neglect. In addition, the audit found that due to poor internal controls, DPH overstated the fund balance in the federal citation penalty account since 2004. DPH overstated the amount in the account by \$9.9 million in fiscal year 2008-09 and that the federal account is nearly insolvent. DPH's failure to collect the fines is also jeopardizing the ability to use the citation accounts to help fund the long term care ombudsman program.

Among the report's twenty-one recommendations: seek legislation authorizing the state to require facilities that want to contest the monetary penalty to pay the penalty upon its appeal, which could then be deposited into an account within the special deposit fund. The original monetary penalty deposited, plus interest accrued in the account, should then be liquidated in accordance with the terms of the decision; continue to take steps to eliminate its backlog of appeals awaiting a citation review conference; seek legislation amending its citation review conference process to more closely reflect the federal process by prohibiting facilities from seeking a delay of the imposition of monetary penalties on the grounds that the citation review conference has not been completed before the effective date of the monetary penalty; seek legislation authorizing it to periodically revise the current penalty amounts to reflect an inflation indicator, such as the Consumer Price Index; and Public Health should establish a policy that discourages settling appealed monetary penalties for a better term than had the facility not contested the citation and paid the penalty within the timeframe specified in law to receive a 35 percent reduction.

Received information from CMS on civil monetary penalties.

Lessons Learned & Future Activities

It is important to set up relationships with state officials. In California, the participants were familiar with the state audit process. They worked closely with key legislators and a special audit committee to obtain authorization for the audit and for it to be assigned high priority. The audit was successful because the participants thoroughly documented its need and the specific issues to be examined by the state auditor.

Work on legislation to force state to implement recommendations from the audit.

Monitor the collection of the fines by getting all the federal enforcement data.

Work on legislation to restore funding to the local ombudsmen programs.

Once the local ombudsmen funding is restored; work on encouraging other uses for the CMP funds.

Summary and Conclusions

The participants in this project varied in many ways. Although all were advocates for nursing home residents, they varied in terms of being volunteer organizations versus having paid staff and working within and outside the state governments and with and without providers. The status of the states on both their collection and use of CMP funds also varied. One had already created an advisory group that included our state participants, one included our participants in their discussions and two had very opaque processes.

As noted above, all participants faced many obstacles to meeting their goals. A major obstacle for some was in just getting the information they needed to proceed.

Pennsylvania was significantly stymied by the delays in accessing the information the advocates were seeking. California had to resort to a lawsuit when, after a year, CMS did not send information required under FOIA.

Another state, Massachusetts, took a long time to release information on why the state believed that the state rules prohibit transparency contracts. Another major obstacle involved fiscal crises. Two of the states faced severe fiscal issues that made the use of the CMP funds for improving nursing home care and/or

encouraging culture change difficult if not impossible. Yet, one of the states, Georgia, figured out a way to do so by using "left-over" local ombudsmen funds directly for innovative ways to improve nursing home care and encourage culture change. California, after being told that the civil monetary penalty account was empty, was successful in getting the state to require an account and audit of the two Special Deposit Fund Accounts to determine whether the funds were being properly managed by the Department of Public Health and how much money was actually in the accounts. The resulting report laid bare the state's problems and suggested many ways to solve them.

For Massachusetts, a major obstacle was the lack of time since all were volunteers.

Even with these obstacles, all the states had a number of major accomplishments. Georgia was able to get \$1.6 million to support the local ombudsmen programs, using some of that specifically for culture change activities; Massachusetts was able to frame the state RFP (request for proposals) in ways that focus on culture change and includes family and resident "buy-in;" Pennsylvania was finally able to get information from and identify appropriate state and federal agencies responsible for CMP collection and disbursement; and California was able to fight back provider legislation to use funds for technical assistance and was able to get a state audit conducted on the civil monetary fund accounts.

It is important to recognize that an undertaking such as this will take time. For some states just getting the necessary information to become a participant in the process may take months. Pennsylvania participants felt that before information is requested, a careful understanding of both the applicable access to records rules and responsible agencies from

One of the lessons of this project for all advocates is that it is important to spend time on developing relationships with other groups who will work with together to meet the goals set.

whom to request the needed information was crucial. Much time can be wasted in not knowing which state agency has the information and who in the federal government can both give the information and waive the fees for freedom of information requests from not-for-profits. Just this task may take time. Know your state, as it may be necessary to focus first on laying the necessary groundwork before attempting all of the goals at once.

Another lesson learned by these participants is to know your state in terms of the political “lay of the land. For instance, are providers open to helping meet the goals set? It seems that in Massachusetts they are; whereas in California the amount of CMPs actually collected was a secret, perhaps because of the negative light it might shed on the state survey agencies.

Attachments

I. Summary of the process LTCCC used to encourage NY State to implement recommendations from our national study: Funding For Innovation: A Review of State Practices With CMPs

Background

Prior to 2004, New York State did not impose federal CMPs. Only state fines were collected. Since CMPs permitted higher fines (state fines are up to \$2000 per deficiency), LTCCC advocated for changes in state law to permit the state to impose CMPs and use the funds to improve nursing home care. Once CMPs were collected, New York State used a process they had developed for other grants to distribute the funds. This process involves the development of a Request for Proposal (RFP) by the Department of Health staff, notification to all nursing home providers of the RFP and the posting of the RFP on its website. In addition, DOH takes questions from applicants prior to submission and answers to all questions are posted on DOH's website. Proposals are rated by trained DOH staff and higher scores receive funding. Since LTCCC was involved in encouraging the state to collect CMPs rather than only state fines and to use them creatively to improve nursing home care, and since we had conducted a national survey of states' use of CMP funds, we were eager to influence this process by encouraging the state to implement the recommendations from our national study.

Activities to Implement Recommendations

Holding a "Stakeholders Summit"

1. Identified consumer stakeholders in the state by creating a broad list of any consumer group that might have an interest, including local and state ombudsmen.
2. Sent each group a one page letter asking if they wanted to participate in a "Stakeholders Summit." The letter gave a brief introduction to CMPs and their importance and then discussed the role of consumers in working with the state as it develops criteria and evaluates the use of the funds as well as write proposals for funding themselves (for consumer-driven projects to improve resident care and quality of life). Attached is a copy of that letter.
3. Held two "Stakeholders Summits."
 - a. First Summit: After participants were given an overview of CMPs and findings from LTCCC's national study, the groups began to discuss basic priorities of how they would like to see the funds used to improve nursing home care and which, if any, of the LTCCC recommendations they supported.
 - b. Second Summit: Priorities were set and the group developed written recommendations for the use of CMPs ("Action Plan" and an agenda for both

implementing the recommendations of both the national study and these priorities). Copies are attached.

Implementing the Action Plan

1. Informed state policy makers and the public about the Summit and its recommendations.
 - a. The recommendations and the Action Plan were sent to key government officials including: legislative leaders, governor's office, officials in NY Department of Health (responsible for the expenditure and evaluation of CMP funds) and the State Office of Aging.
 - b. Meetings were held with Department of Health staff, Center for Medicare and Medicaid Services (CMS) regional staff, the director of the State Office of Aging and legislative leaders to discuss the recommendations.
 - c. On-going meetings and conference calls were held with Department of Health staff to keep them informed of the recommendations.
 - d. A dedicated Webpage featuring news and information on CMPs and developments in New York State was set up.
 - e. Wrote and disseminated articles for stakeholders to publish in their newsletters and/or disseminate to their constituents. We published these articles in our newsletters.
 - f. Issued a press release on the Summit and its recommendations.
 - g. Made presentations at various public meetings and conferences.
2. Working with the Department of Health

The first Request for Proposals (RFP), for use of the funds, developed by the Department had few if any of the recommendations of the group. Funds were only open to nursing homes whose pressure ulcer rates for high risk residents averaged ten percent or more and focused on putting in a technological system related to pressure sores.¹⁰

- a. Met with the new leadership in the Department of Health and worked with them to develop a second RFP that would include our recommendations.
- b. Set up a series of meetings and conference calls to work on developing the second RFP.
- c. Set up a conference call with DOH staff and regional CMS staff to discuss one issue that our state was concerned with. State staff was not sure the CMP funds could be given to non-nursing homes. CMP staff stated that projects conducted by non-nursing home could be funded.

The second RFP included a number of our recommendations:

- I. Funding was open to non-nursing home groups.

¹⁰ This RFP was written prior to a change in governorship and Department of Health staff. We hoped that the new staff appointed by the new Governor might be more open to our suggestions.

- II. All projects conducted by nursing homes would have to include documentation of community support (i.e., resident/family councils).
 - III. The possible uses for the funds were expanded to include quality of life as well as care, thereby encouraging more creative ideas including culture change.
3. Working with the Stakeholders
 - a. An internet Discussion Board for Stakeholders to speak to each other was set up.
 - b. Publicized the second RFP to all the stakeholders and urged them to apply for funding.
 - c. Since no consumer stakeholders had applied for funding, we developed an online survey to find out why.

Future Work

1. Developing Future RFPs

Using the information gathered on the survey, we worked with DOH staff to develop the third RFP in a way that was more friendly to non-nursing home applicants such as: enlarging the amount of the funding (several groups did not apply for funding because the cap made it fiscally impossible); decrease or ameliorate some of the onerous reporting requirements (small groups do not have the support staff needed); and provide funding to organizations that would help small consumer groups develop proposals or and meet the reporting requirements. We are awaiting the third RFP.

2. Evaluating Use of Funds

Meet with DOH staff to discuss:

- a. How to make sure that funds are not going to nursing homes for what they are already being reimbursed for.
- b. How to make sure that funds are not going to nursing homes to comply with minimum requirements.
- c. How to evaluate the success of the funded projects.
- d. Should funds go to homes with major care problems?

The group supported most of the recommendations made in LTCCC's national report.

II. Strategies for Stakeholders¹¹

OMBUDSMEN/ADVOCATES

1. Educate the policy makers in your state. Strong collection and beneficial use of CMPs/fines depends on backing and “buy in” of state policy makers. You can use the information from this project as a basis for making the case to policy makers in your state. If possible, bring together other groups and individual consumers to join meetings with policy makers, or provide them with talking points to use on their own. Advocate for legislation that will require fines collected to be used for programs that improve resident quality of life.
 - a. Meet with legislators
 - b. Meet with government agencies
 - c. Meet with your governor

2. Educate the public in your state. It is crucial for the public to know that fines against nursing homes can be a source of funding for programs or projects that could improve nursing home care and quality of life. Use the findings from this project to develop your own materials. Learn about how CMPs/fines are levied, collected and used in your state. Put this information in:
 - a. Any newsletter you publish
 - b. Your web site (feel free to link to CMP Project page on www.nursinghome411.org).
 - c. An article in newsletters of other groups or communities.
 - d. Letters to the editor in local papers
 - e. Articles in local papers

3. Promote grassroots action. Develop steps the public can take to advocate for implementation of the recommendations of this project. Urge individuals to:
 - a. Write letters (if possible, using sample letters you have written) to policy makers in your state – legislators, the governor, aging agencies, health department, etc.
 - b. Write letters to the editor of local papers.
 - c. Meet with their political representatives (as mentioned above under “educate the policymakers in your state.”).

4. Participate in the decision-making process on how to use the funds to improve nursing home care and quality of life.

¹¹ See *Funding For Innovation*.

5. If your state is already using the funds and/or begins to use the funds after your advocacy:
 - a. Propose projects or programs for funding that meet the study's recommendations for states.
 - b. Request to be part of the review process for both selection and evaluation of programs/activities.
 - c. Request information on CMPs/ fines levied and collected in your state – use this information to continue informing the public.
6. Additional recommendation for Long Term Care Ombudsmen and others who might have government affiliation:
 - a. Use your position in state government and/or your government contacts to influence the state to implement civil money penalties (if they are not doing so already) and to use the funds as recommended by this study to improve resident care.
 - b. Request to be part of review process in both project selection and evaluation.

PROVIDERS & PROVIDER ORGANIZATIONS

If you are working with providers urge them to:

1. Promote quality of care so that CMPs/fines do not need to be levied.
2. Work with other stakeholders to ensure that CMPs/fines collected are appropriately used to improve the resident experience.
3. Disseminate these materials and other information on CMPs/fines. Distribute information:
 - a. At conferences.
 - b. On-line.
 - c. Through communications with your members (such as newsletters).
4. Meet with government agencies.
 - a. Give them input on what types of projects would most improve the lives of your residents.
 - b. Promote the use of CMPs/fines to improve quality of life and consumer involvement.
5. Advocate for legislation that will require fines collected to be used for programs that improve resident quality of life.
6. Propose projects for funding that meet the recommendations for states (see above).

III. Recommendations From National Study¹²

Remove Variations in CMPs/fines Issued and Collected

- Establish consistency in the way that CMPs/fines are issued and collected for violations of federal and state quality regulations.
- For states that are not using CMPs/fines, use this sanction when appropriate. Work with CMS to establish a training program for state surveyors on the use of CMPs/fines.

Use of Funds from CMPs/Fines

- Absolutely require that funds be used for purposes directly related to nursing home residents.
- Expend funds for CMPs/fines primarily for special projects & programs that stimulate resident quality of care and quality of life that can ultimately be replicated.
- Limit the use of funds for relocation, temporary management, other licensing and certification activities, and state emergencies to what is necessary.
- Ensure that the state survey and certification agency responsible for levying the CMPs/fines retains control over how those funds are used and is accountable for how they are used.
- Remove state requirements that restrict the use of funds (such as putting the funds in the state general fund) or prevent the funds from being used for projects to improve quality.

Ensure Access to Information about CMPs/Fines

- Improve collection of data about CMPs.
- Publish annual summary reports on the amount of funds available from CMPs/fines, the specific uses of the funds by year, the organization receiving funds, and details on the project evaluations. This information should include:
 - Whether there is a special account set up
 - A quarterly account balance
 - The process for applying to use the funds
 - How the funds are used
- The state's evaluation of the program project
Ensure that these reports are distributed to long term care ombudsmen and advocates.
- State ombudsmen should include information about use of CMPs/fines in routine training offered to local ombudsmen, and offer them suggestions about how to inform the public about these enforcement actions.

¹² *Id.*

Process of Using State CMPs/Fines

- Involve a wide range of knowledgeable stakeholders in setting the criteria for and guidelines for the use of funds including residents and family members, ombudsmen, family council members, members of citizen advocacy groups, providers, and individuals with grant-making experience.
- Establish a public process including public notice of fund availability with a clear annual timeline for applications for funding of innovative projects and an objective review process.
- Establish a broad based advisory committee composed of stakeholder groups such as consumer advocates, ombudsman, providers, etc to establish priorities for the use of funds and to advise on the selection of specific projects.
- Allocate sufficient funds for projects/activities /programs so that they can make a substantial, lasting impact and potentially a widespread impact.
- Allocate funds for programs/projects that are practical and can be sustained and/or replicated by others after the funding has ended.
- Authorize funds for innovative projects that go beyond regulatory requirements and ordinary budget items to improve residents' quality of care and quality of life, encourage person directed care, promote consumer advocacy and involvement and stimulate and support the spread of "culture change."
- Target consumer focused projects such as work with family councils, resident councils, consumer advocacy organizations, and ombudsman projects. Establish an evaluation process for all projects, using outside evaluation experts if possible.
- Encourage programs/projects to be jointly developed with academic organizations, consumers (or their representatives) and established experts.

IV. Additional Recommendations Made by Stakeholder Summit in NY¹³

- Allocate sufficient funds for projects/activities/programs so that they can make a substantial, lasting impact and potentially a widespread impact.
- Allocate funds for programs/projects that are practical and can be sustained and/or replicated by others after the funding has ended.
- Authorize funds for innovative projects that go beyond regulatory requirements and ordinary budget items to improve residents' quality of care and quality of life, encourage person directed care, promote consumer advocacy and involvement and stimulate and support the spread of "culture change."
- Target consumer focused projects such as work with family councils, resident councils, consumer advocacy organizations, and ombudsman projects.
- There should be evidence that any project has the support of the stakeholders. If it is a project within a nursing home, the residents and families should indicate support

¹³ *Id.*

and be involved in the development and implementation of the project. If it is a more global project with groups from outside the home, documentation, such as research, must be presented demonstrating that the goals of the project are ones that residents and/or family members desire.

- Establish an evaluation process for all projects, using outside evaluation experts if possible.
- Encourage programs/projects to be jointly developed with academic organizations, consumers (or their representatives) and established experts.
- To encourage non-provider projects, the state should:
 - Have staff, easily accessible, to help such groups as they develop proposals.
 - Facilitate these groups partnering with the needed experts.
 - Make the process simple enough not to burden such groups that do not have the staff to spend enormous amounts of time.
 - Give examples of projects that it would consider funding to help such groups.
- Use some of the funds for projects that can be done quickly to make sure they benefit current residents as well as projects that might take a year or two to accomplish.

Examples of Areas That the State Should Consider Funding:

- Care of people with dementia
- Staff shortages
- Feeding issues
- Mental Health
- Food
- Quality of Life
- Transition/closure/discharge issues including housing issues and transfer trauma
- Younger population
- Activities
- Culture Change
- Enhanced relationships/communication among stakeholders: residents, families, staff, etc.

V. Final Work Plans of the State Participants¹⁴

Georgia

Goals:

1. To secure \$500,000 of CMP funds for local ombudsmen programs
2. To develop a process for soliciting proposals, reviewing proposals and awarding funds to make the system more accountable and transparent.
3. To use some of the CMP funds for culture change activities.

Activities Associated With Each Goal:

Conference calls with LTCCC

Goal 1: State Ombudsman will continue discussion with Governor's staff (at their request) on using \$500,000 of CMP funds for local ombudsmen program.

Goal 1: Council on Aging will meet Governor's staff to urge use of CMPs for local ombudsmen program.

Goal 1: Possible mobilization of CO-AGE (Coalition of Advocates for Georgia's Elderly) at January meeting to send letters, etc.

Goal 2: Get needed information on: (1) current state process for awarding competitive bids; (2) whether this process applies to CMP funds.

1. Contact state staff to get information.
2. Look at state policy manuals.
3. Find out if state staff, responsible for competitive bids, can give an educational session.

Goal 2: Evaluate whether the state process should apply to CMP funds and/or how to make it or a new process more: user friendly, accountable, transparent and encouraging to non-nursing home application and to innovative ideas.

¹⁴ These are the final work plans developed by each state after a number of conference calls with LTCCC. As indicated, a number of the original goals were modified over the course of the project year and not all goals were achieved within the year.

1. Go over the process in detail.
2. Bring in other stakeholders to discuss.

New Goal 2: Work to make sure the state procurement process is used to distribute funds from CMP account.

Add information on the need to use the procurement process to any testimony given before state hearings and in any meetings with state officials.

Goal 2: Develop the new or modified process. Share with state.

Goal 3: Develop a process to use any funds restored to the ombudsman program for fiscal year 2010 (that cannot be allocated to local ombudsman programs) for other ombudsman-related purposes, including promoting culture change.

Fund projects.

Massachusetts

Goals:

1. To make the process more transparent. Information should be made available to the public on: how much money is available; what criteria are being used for the distribution of funds; who the funds are going to; how the funds are being used; and an evaluation of project outcomes. (A long range goal: information on the number of facilities receiving CMPS and information on the violations these facilities received should be made public).
2. To modify the state's proposal to use the CMP funds to be more inclusive of families, other applicants in addition to nursing homes, and MA Culture Change Coalition (MACCC) initiatives. And to ensure that consistent assignments are a major focus of the CMP funded Quality of Life Program.

Activities Associated With Each Goal:

Conference calls with LTCCC

Goal 1: Present this goal to the CMP advisory committee for their buy-in.

Goal 1: Present to statewide organization for their buy-in

Goal 1: Based upon response of CMP advisory group and the state, evaluate need to bring pressure by engaging other groups.

Goal 1: Bring together other organizations (if needed) for support

Goal 1: Mobilize groups (If needed)

Goal 1: If state agrees, decide whether to urge state to release or whether Massachusetts group will release.

Goal 1: Publicize information

Goal 1: Since state has responded that they cannot make the process more transparent:

- Ask state staff to state which regulations they believe prohibit this;
- LTCCC will review and research this issue.

This goal will be on hold until RFP is completed.

Goal 2: Present proposal idea to use the CMP funds for a project similar to Illinois to Culture Change Coalition

- Do they want to do it?
- Will they be willing to modify it the way we want (to include the participation of consumers)?

Goal 2: Present to Entire Board of MANHR (Massachusetts Advocates for Nursing Home Reform)

Goal 2: Present to state CMP Advisory Group

Goal 2: Based upon responses, evaluate need to bring pressure on state by engaging other groups.

Goal 2: Since CMP Advisory Group did not agree to use the CMP funds for a project similar to Illinois and the state presented a detailed proposal for use of the funds:

- Recommend that the use of the funds also include both improvement in quality of care and life, and culture change, primarily through consistent assignments;
- Work to get the modifications to the proposal accepted by the CMP Advisory Board and the State;
- Work to add to the qualifications needed for the coordinator position – experience in culture change.

Goal 2: The CMP Advisory Group may be enlarged in the future.

- Get more advocacy groups and family members to be on the state CMP advisory committee. LTCCC sent a specific work plan on this task.

Goal 2: Work to expand proposal language to allow for future funding of various culture change initiatives.

Goal 2: Work to increase family involvement in the QLP plan.

Pennsylvania

Goals:

1. To make the information regarding CMPs transparent
2. To make recommendations regarding a process for awarding CMP funds

Activities Associated With Each Goal:

Conference calls with LTCCC

Using the Right to Know Act, request information from the state:

- Amount of CMP money the state collected each year for the last 10 years (Medicaid portion).
- Balance in the CMP account.
- Amount distributed over the last 10 years.
- Information on State rules and process on how funds are to be used.
- Details on how funds, if any, have been distributed including any projects funded and the recipients.

Using the Freedom of Information Law, request information from CMS:

- All due and payable letters sent to facilities in the state.
- Data from Comparative surveys from 2007 to the present.

Assess all information received in order to develop a plan to make sure the information is made public.

Implement the dissemination plan.

Research funding opportunities and submit request for funding.

Gather input from other consumer groups in the state on the kind of process they would recommend for distributing the CMP funds and what types of projects they would like to see these funds be used for:

- Educate organizations about CMPs.
- Elicit ideas for defining the state process.
- Elicit ideas on how funds should be awarded.

Write up recommendations for a process for awarding CMP funds to present to gubernatorial campaigns/new administration.

Strategize efforts over the next six months.

California

Goals:

1. Get “Due & Payables” from the State
2. Get state legislature to order accounting and audit of the two Special Deposit Fund Accounts to determine whether the funds are:
 - a. Being properly managed by the CA Department of Public Health and
 - b. How much money is in the accounts.
3. Get information out to organizations that joined in campaign to use CMPs for California Long Term Care Ombudsman Program (LTCOP) and in campaign for audit of Special Deposit Fund Accounts to:
 - a. Educate the groups about CMPs and how they can be used;
 - b. Pressure state and CMS to levy and collect fines to increase pool of money for LTCOP funding (in short term, due to the state’s defunding of program);
 - c. Inform state legislature and news media (to increase transparency and accountability re. levying, collecting and use of CMPs).
4. Publicize Federal Enforcements and CMPs in CANHR report card.

Activities Associated With Each Goal:

Conference calls with LTCCC

Goal 1: Get Model Due & Payable letters from LTCCC

Goal 1: Adapt and send Due & Payable requests

Goal 1: Follow-up if no response

Goal 2: Get legislature to order accounting & audit

Goal 3: Get consumer friendly materials from LTCCC on CMPs

Goal 3: Conduct outreach and disseminate info to groups that joined campaigns to increase awareness and understanding of CMPs and their appropriate uses and value to the public

Goal 3: Work with groups to campaign for state to levy and collect state fines and recommend federal CMPs

Goal 3: Inform state legislature and news media on status of levying, collection and use of state fines and CMPs

Goal 3: Advocate for improved collection of fines and CMPs and for use responsive to priorities identified by group (i.e., bolster ombudsman program funding in short term).

Goal 4: Publicize federal enforcements & CMPs.

VI. Materials From CMS

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-12-25
Baltimore, Maryland 21244-1850



Center for Medicaid and State Operations/Survey and Certification Group

Ref: S&C-09-44

DATE: June 19, 2009

TO: State Survey Agency Directors

FROM: Director, Survey and Certification Group

SUBJECT: Use of Civil Money Penalty (CMP) Funds by States and Reporting of CMP Funds Returned to the State

Memorandum Summary

The purpose of this memorandum is to:

- Clarify that States may direct collected CMP **funds to entities other** than nursing homes as long as funds are used in accordance with statutory intent.
- Share innovative practices that States may want to consider when making decisions about how CMP funds can be directed and used to improve the quality of care and life for nursing home residents.

This memorandum is being issued in response to requests that CMS clarify how CMPs may be directed and used by States, and share suggestions of innovative projects and activities that have already been undertaken with CMP funds in some States. It has also been suggested that CMS publicly report the CMP amounts that have been collected and returned to States.

The information provided in this memorandum clarifies earlier guidance that some States may find helpful when considering their options in directing CMP funds toward efforts that will benefit nursing home residents. It also reiterates the fact that CMS does not have the statutory authority to endorse, approve, disapprove, or otherwise make determinations about suggested uses for CMPs. Instead, States have the authority to determine which activities constitute acceptable and beneficial uses of the funds, and which do not. Guidance provided by this memorandum supplements “S&C-02-42 Use of Civil Money Penalty (CMP) Funds by States,” dated August 8, 2002, which remains in effect.

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Entities Other than Nursing Homes May Receive Collected CMP Funds from the State

When CMPs are collected and returned to the State, the statutory expectation is that these funds are to be used for purposes that will benefit nursing home residents. Aside from this usage condition and any restrictive State-specific laws, States may target these resources for projects or programs available through various interested nursing home stakeholders, e.g., facilities, consumer groups, professional nursing home associations, ombudsmen, quality improvement organizations, etc. While this is not a new interpretation of how CMP funds can be used by States, some States may not realize that they can look beyond facilities to other sources of valuable projects that could promote the quality of life and quality of care of nursing home residents. Knowledge that they can manage their CMP funds within a broader universe may also motivate and assist some States that have been reluctant or uncertain about how to use these funds in the past, to identify worthwhile projects that can positively impact the lives of facility residents.

The statute provides specific examples for potential use of collected CMPs:

1. For the protection of the health or property of residents, including payment for the cost of relocating residents to other facilities;
2. Maintenance of operation of a facility pending correction or closure; and
3. Reimbursement of residents for personal funds lost.

We understand that there are creative and innovative projects and activities that States have funded to stimulate quality using their CMP funds. Examples of such projects are provided for your information in the attachment to this memorandum.

Questionable Uses of CMP Funds

Given the three examples in the statute about how CMPs could be applied, statutory intent is clear that they should be used for activities that will benefit facility residents. Within that broad criterion, States have a great deal of flexibility in determining what would and would not satisfy statutory intent. However, discussions with regional offices, States, and others over time have resulted in general agreement about the types of expenditures that should be considered inappropriate for CMP funds, e.g., to make capital improvements to a facility; to pay for items, services, etc., that the facility is responsible for and responsible for paying for; to fund projects, items, services, etc., that are not related to improving the quality of life and care of nursing home residents.

Reporting on CMP Funds Returned to the State

It has been suggested that CMS publicly report the amount of CMP funds collected and returned to the States and that proposal is under consideration. We are currently in the process of determining how and when this could be accomplished.

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Effective Date: This clarification is effective immediately. Please ensure that all appropriate staff are fully informed within 30 days of the date of this memorandum.

Training: This information should be shared with all appropriate survey and certification managers and staff.

/s/

Thomas E. Hamilton

cc: Survey and Certification Regional Office Management

Attachment:

Promising Practices-Examples of Civil Money Penalty Use

Attachment

Promising Practices

Examples of Civil Money Penalty Use

- Development of the **Wisconsin** Clinical Resource Center access to the American Medical Directors Association Clinical Practice Guidelines (the only place that these have been provided electronically and without charge) for all nurses in Wisconsin nursing homes.
- Start-up of **Ohio's** consumer guide Web site -- <http://www.ltcoho.org/consumer/index.asp>.

- Family and Family Council Support and Development
 - **Maryland** – multi-year grant to National Citizens' Coalition for Nursing Home Reform (NCCNHR) to support the development of family councils in the State, including resources and information such as a DVD on family councils and an informational booklet.
 - **Minnesota** – using CMP funds to host a conference for family members that will highlight quality improvement success stories in MN nursing homes for consumers.

- Support or Relocation of Residents During Facility Closure
 - **Michigan** - funded a CMP project to pull together a workgroup (1½ years) to figure out the underlying factors of facility closure and come up with creative ideas to address closure issues and their impact on residents.

- Improving Resident Care & Quality of Life

New York

- Funded a user-friendly electronic care documentation system for use by nurse aides that simplifies documentation and helps caregivers follow resident conditions and progress of treatment.
- Funded hiring of independent consultants to train nursing home staff on four “life enrichment modules:” Therapeutic Small Group Activities, Soft Sensory Programming (to relate to dementia residents through aromatherapy, music and gentle touch), Roving Cart Activities (provide individualized activities to residents) and a Dignity and Sensitivity Boot Camp (exposes staff to life as their residents experience it).
- Funded a project to improve resident balance and mobility and decrease falls using innovative exercise and balance programs that include Tai Chi and Yoga.
- Funded several projects to enable facilities to substantially improve their residents’ dining experiences. One project funded a fine dining project. The facility committed its own funds for renovations, while the project funds paid for training of all staff in fine dining procedures, steam tables, music systems for the dining rooms, elegant linens, etc. The project incorporated staff, resident, and family satisfaction.

Culture Change

- **Louisiana**
 - CMPs funded a workforce and culture change project focusing on achieving staffing stability in nursing homes.
 - Funded a culture change conference in the State.
- **Illinois** – to the Long-Term Care Ombudsman Program (LTCOP) to promote the Pioneer Movement.
- **Arkansas** – CMPs used as seed money to build Green Houses.
- **New York** – funded projects that facilitated nursing homes’ implementation of culture change. One such project funded “wait-staff” style dining with enhanced resident

- choice, dismantling of the central nurse station and its replacement with a living room, the building of kitchenettes adjacent to resident rooms, etc.
- Support the Enhanced Work of the LTCOP.
 - **Connecticut** is requesting CMP funds to support their VOICES program which brings together presidents of resident councils to bring the problems and concerns residents face to the attention of elected officials and public officials who can influence decisions. It also helps set the agenda for legislative issues of concern.
 - **Michigan** has used CMPs to develop, write, implement, and monitor an ombudsman program process for designating and monitoring local ombudsman programs.
 - **Minnesota** has used CMPs to update and reprint the ombudsman program's consumer education materials, i.e., resident rights; LTCOP; and to develop a new brochure on the NHQI.

DEPARTMENT OF HEALTH & HUMAN SERVICES Centers for Medicare & Medicaid Services 7500 Security
Boulevard Baltimore, MD 21244-1850
Ref:S&C-02-42

Date: August 8, 2002

From: Director Survey and Certification Group Center for Medicaid and State Operations

Subject: Use of Civil Money Penalty (CMP) Funds by States

To: Associate Regional Administrator Divisions of Medicaid & State Operations Regions I – X
State Survey Agency Directors

The purpose of this memorandum is to provide information regarding how states may use CMP funds collected from nursing homes that have been out of compliance with Federal requirements. It has come to our attention that guidance is needed to ensure that states use CMP funds in accordance with the law and in a consistent manner, while maintaining some flexibility in the use of those funds.

Background – States collect CMP funds from Medicaid nursing facilities and from the Medicaid part of dually-participating skilled nursing facilities (SNFs) that have failed to maintain compliance with Federal conditions of participation. These CMP funds are state, not Federal funds. CMP funds collected from Medicare-participating SNFs and the Medicare part of dually-participating SNFs are Federal funds and are returned to the Medicare Trust Fund.

Section 1919(h)(2)(A)(ii) of the Social Security Act (the Act) provides that CMP funds collected by a state as a result of certain actions by nursing facilities or individuals must be applied to the protection of the health or property of residents of nursing facilities that the state or the Secretary finds deficient. These actions include CMPs assessed against:

- (1) A nursing facility that is not in compliance with Federal requirements in sections 1919(b), (c), (d) of the Act; (2) An individual who willfully and knowingly certifies a material and false statement in a resident assessment (section 1919(b)(3)(B)(ii)(I) of the Act);
- (3) An individual who willfully and knowingly causes another individual to certify a material and false statement in a resident assessment (section 1919(b)(3)(B)(ii)(II) of the Act); and
- (4) An individual who notifies (or causes to be notified) a nursing facility of the time or date on which a standard survey is scheduled to be conducted (section 1919(g)(2)(A)(i) of the Act).

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The Act cites three examples of uses for CMPs:

- (1) Payment for the costs of relocation of residents to other facilities;
- (2) Maintenance of operation of a facility pending correction of deficiencies or closure;
- and (3) Reimbursement of residents for personal funds lost.

The regulations, at 42 CFR 488.442(g), contain similar language, with some very minor wording changes that make it clear that the costs of relocation of residents to other facilities are for state costs. The regulations also indicate that the personal funds lost at a facility are the result of actions by the facility or by individuals used by the facility to provide services to residents. Section 7534B of the State Operations Manual (SOM) contains similar language, but specifies that the funds must be used to protect the health or property of residents of deficient facilities.

In the preamble to the final enforcement regulations published on November 10, 1994, we indicated that the law suggests that CMP revenues be applied to administrative expenses rather than direct care costs, although it is clear that states have broad latitude to determine which of these types of expenses best meet the needs of their residents (page 56210 of the Federal Register, Volume 59, No. 217). Further, the preamble is very clear that the Act permits each state to implement its own procedures with respect to the use of CMPs. Our previous direction to CMS regional offices has been that the specified uses of CMP funds in the Act and section 488.442(g) are not exhaustive, that states need flexibility in determining the appropriate use of funds, and that regional offices have some oversight responsibility. Beyond this, we have not provided general guidance to all states and regional offices on what is considered appropriate use of these funds within the scope of the law and regulations. Due to the lack of guidance, a number of states have been reluctant to use a majority of the money. As a result, some states have a significant amount of money on deposit and this amount is continuously growing.

Flexibility in Use of CMP Funds -- While the Act provides states with much flexibility to be creative in the use of CMP funds, this flexibility is limited by the requirement that CMP funds are to be focused on facilities that have been found to be deficient. However, the law does not specify when a facility must have been determined to be deficient to qualify for benefits under a state project funded by CMPs. Most nursing facilities have had one or more deficiencies either recently or in the past. Rather than setting forth rigid criteria on when it is that a facility must have been deficient to be an eligible target for the application of CMP revenues, we

believe that the best course is to offer states maximum flexibility to make this determination. Apart from this, we believe that projects funded by CMP collections should be limited to funding on hand and should be relatively short-term projects.

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Each state is responsible for ensuring that CMP funds are applied in accordance with the law. Regional oversight should be general in nature, responding to questions from states or commenting on the occasional project proposal submitted for regional office input, but there is no requirement that a regional office review and approve each state project before it is implemented.

Appropriate CMP Fund Use --As we stated in the preamble to the 1994 final enforcement regulations, CMP revenues should be spent on administrative expenses, rather than direct care costs, as applied to deficient facilities. If the purpose of the state project is related to deficient practice, the CMP funds could be used to prevent continued noncompliance by nursing facilities through educational or other means. For example, to address particular areas of noncompliance, a state could develop videos, pamphlets, or other publications providing best practices, with these educational materials being distributed to all deficient nursing facilities. Other uses could include, for example, the development of public service announcements on issues directly related to the identified deficient area, and employment of consultants to provide expert training to deficient facilities. North Carolina and other states have issued grants to several nursing facilities to fund Eden Alternative Projects, which provide training and other services necessary to support the use of animals in nursing facilities for therapeutic purposes. Because CMP funds collected by a state are state funds, the state may use the money for any project that directly benefits facility residents, in accordance with section 1919(h)(2)(A)(ii) of the Act, including funding an increase in ombudsman services.

Inappropriate CMP Fund Use – We believe that it is not appropriate for states to use CMP funds for a loan to a deficient facility that is having financial difficulty meeting payroll or paying vendors. As pointed out in the preamble, if the CMP is used by the facility to correct the noncompliance that led to its imposition, it is, in effect, not a remedy.

If you believe that a state is not spending collected CMPs in accordance with the law or regulations, or not at all, you should refer this matter to your regional office account representative so that he or she may discuss this matter with the state.

Effective Date: This guidance is effective on the date of issuance.

Training: This policy should be shared with all survey and certification staff, surveyors, their managers and the state/regional training coordinator.

/s/Steven A. Pelovitz

VII. State Participants in This Project

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