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DATE: February 15, 2001

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

SUBJECT: Clarification of Appeal of Nurse Aide Training & Competency Evaluation Programs

TO: Associate Regional Administrators, DMSO
State Survey Agency Directors

It has come to our attention that Medicare-certified, or dually-certified nursing homes may not be receiving hearings to challenge their loss of authority to conduct a nurse aide training and competency evaluation program (NATCEP) even when they have sought such hearings. We wish to clarify the requirements of the regulations that provide for such hearings to make sure that we are implementing them in a proper and consistent fashion.

Loss of NATCEP Due to an Extended Survey - Under 42 C.F.R. §483.151(b)(2)(iii), a facility that is subject to an extended survey may not operate a NATCEP by or in the facility for two years. An extended survey is conducted when there has been a determination that the facility has provided substandard quality of care (SQC). 42 C.F.R. §488.310. Under 42 C.F.R. §498.3(b)(16), a facility may challenge the loss of NATCEP that arises out of a determination that it has provided substandard quality of care.

Appeal Rights When Loss of NATCEP occurs without other remedies imposed. - There are instances where a Medicare-certified or dually-certified nursing home has been found to have provided substandard quality of care, but has not experienced any other adverse consequence other than the loss of its ability to conduct NATCEP. In these cases where no remedies have been imposed, some facilities may have sought review of the SQC determination before an Administrative Law Judge of the Departmental Appeals Board, but have been denied that review because there has been no action taken by HCFA against the facility. These situations do give rise to a hearing under Part 498 even though it is the State that is the responsible party for removing the approval of the facility to conduct NATCEP at the facility. When HCFA makes a determination of SQC that leads to the loss of NATCEP, this determination does give rise to a hearing under Part 498.

Under the regulations, it is the State, not HCFA, that acts to deny (or withdraw) approval of a nursing home's NATCEP program. While the hearings authorized under Part 498 are directed at actions initiated by HCFA, they are expressly designed to confer hearing rights on Medicare-certified or dually-certified nursing homes that lose their NATCEP authority even where no other Federal remedies have been imposed. If we were to read the appeals regulations at Part 498 to permit challenges to a loss of NATCEP only when such losses are a result of actions taken by HCFA, these hearing rights would never be triggered since it is not HCFA that takes these actions. This is a not a result that was intended by the NATCEP appeals regulation that was published on July 23, 1999 (64 Federal Register 39934).

In summary, Medicare-certified, or dually-certified nursing homes that lose their NATCEP programs as a result of a decision by a State to deny or withdraw approval of them stemming from a finding of SQC, have an opportunity to have this determination reviewed under Part 498 even where no other remedies are imposed. For nursing homes that are Medicaid only, the regulations leave the determination to the State as to whether to provide a hearing to challenge SQC determinations that have resulted in the loss of NATCEP. Accordingly, notices from States advising SNFs or dually participating facilities of their loss of authority to conduct NATCEPs must provide notice of the appeal rights available under Part 498.

Effective Date: This policy clarification is effective immediately.

Training: This policy should be shared with all survey and certification staff, their managers, legal counsel and the State/Regional office training coordinator. We are making changes to Chapter 7 of the State Operations Manual to reflect this policy.

/s/
Steven A. Pelovitz