

## VII. State Oversight Performance Standards

### Introduction:

This category of the guide covers the requirements which state survey agencies must meet in respect to their responsibility for ensuring that nursing homes provide care in compliance with federal standards.

### What you'll learn:

- The definition of inadequate survey performance
- Performance standards required in the §1864 Agreement (contract between CMS and state governments for a state agency to carry out quality assurance and oversight)
- CMS's evaluation process

### State Performance Standards [SOM §8000]

The Social Security Act, the Code of Federal Regulations, and the State Operations Manual contain the regulatory authority for the state performance standards and protocols.

#### ***Definition of Inadequate State Survey Performance [SOM §8000C]***

CMS monitors state surveying procedures and functioning through the Federal Monitoring Program.<sup>3</sup> CMS considers survey performance to be inadequate if the state demonstrates a pattern of failure to:

- Identify deficiencies;
- Cite only valid deficiencies (i.e., the state cites unfounded deficiencies);
- Conduct surveys in accordance with the requirements;
- Use federal standards, protocols, and the forms, methods, procedures, policies and systems specified by CMS in instructions;
- Utilize enforcement actions to assure continued compliance;
- Input online data timely and accurately;
- Conduct surveys in accordance with required timeframes;
- Respond to complaints in accordance with requirements;
- Lead in the implementation by providers of federally required patient assessment instructions or data sets; and/or
- Operate federally required systems for the collection of patient assessment data.
- Fails to identify an immediate jeopardy situation.

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<sup>3</sup> <https://nursinghome411.org/wp-content/uploads/2017/03/LTCCC-Report-CMS-Oversight-2010.pdf>.

***Performance Standards [SOM §8000D]***

- Organization and staffing of the agency to fulfill functions required under the [§1864 Agreement](#);
- Surveys are planned, scheduled, conducted, and processed timely;
  - 42 CFR [488.307](#); [488.308](#); [488.7](#)
  - [SOM §7207.B.2](#)
  - [§1819\(g\)\(2\)\(A\)\(iii\)](#) and [§1919\(g\)\(2\)\(A\)\(iii\)](#) of the Act
  - [§1891\(c\)\(2\)\(A\)](#) of the Act
  - [§1864\(c\)](#) and [§1865](#) of the Act
- Survey findings are supportable;
  - [42 CFR 488.318](#)
  - [Principals of Documentation of the SOM, Exhibit 7A](#)
- Certifications are fully documented, and consistent with applicable law, regulations, and general instructions;
  - [§1819\(g\)\(3\)\(A\)](#) and [§1919\(g\)\(3\)\(A\)](#) of the Act
- Current written internal operating procedures and policies are consistent with program requirements;
- A plan of correction is requested from a provider/supplier;
- When certifying noncompliance, adverse action procedures set forth in regulations and general instructions are adhered to;
  - [§1819\(h\)\(2\)\(A\)\(1\) of the Act](#)
  - [§§1919\(h\)\(1\)\(A\) and 1919\(h\)\(3\)\(B\)\(1\) of the Act](#)
  - [§1866\(b\) of the Act](#)
  - 42 CFR [488.410](#); [489.53](#)
- Supervisory reviews and evaluations of surveyor performance are made routinely;
- Required financial and budget reports are submitted on time and completed in accordance with general instructions;
  - [§1864](#) and [§1902](#) of the Act
- All expenditures and changes to the program are substantiated to the Secretary's satisfaction;
  - [§1864](#) and [§1902](#) of the Act
- Actual survey and certification activities are consistent with the annual activity plan and workload estimate approved by CMS;
- The performance of agencies utilized to perform specific functions under this agreement are monitored;
- Ongoing surveyor training programs develop and maintain surveyor proficiency;
- Results of complaint investigations against providers and supplier are considered in making certification decisions;

- Scope and severity decisions for nursing home deficiencies are accurate and supportable;
- Updates, training, and technical assistance about patient assessment instruments/data sets are supplied to providers as appropriate;
- The conduct and reporting of complaint investigations is timely and accurate;
  - [SOM Chapter 5](#)
  - [§1819\(g\)\(4\) of the Act](#)
  - [§1919\(g\)\(4\) of the Act](#)
  - [42 CFR 488.332](#)
  - [Article II \(A\)\(2\) and Article II\(J\) of the §1864 Agreement](#)
- Survey teams include surveyors with required qualifications and/or certifications;
- Accurate and timely data is entered into online survey and certification systems; and
  - [Article II\(J\) of the §1864 Agreement](#)
- Information on certification findings is provided to the public as required in instructions.

#### ***Performance Criteria [SOM §8000F]***

All standards for adequate state performance will be measured against “threshold” criteria that may be expressed in quantifiable terms, or in some cases, narrative descriptors. Threshold criteria describe the point at which CMS will impose a sanction or remedy/alternative sanction on the state.

- **Example:** The threshold for failure to identify deficiencies could be expressed (quantified) as a 20 percent disparity rate between federal and state deficiency citations on any given federal survey, or the failure of a state to identify any single (one) instance of “Immediate Jeopardy” would be another quantifiable threshold.
- **Example:** An example of threshold criteria explained in narrative terms would be applied to the standard: “The state uses the results of complaint investigations in making certification decisions.” An appropriate descriptor in this instance could be: “State provider files do not reflect the appropriate documentation of complaints.”

#### ***Available Sanctions/Remedies [SOM §8000G]***

CMS will take one or more of the following actions when there is inadequate state survey performance:

- Remedies/Alternative Sanctions:
  - Provide for training of survey teams;
  - Directed Quality Improvement Plan;
  - Provide technical assistance on scheduling and procedural policies;
  - Require the state to undertake improvements specified in a plan of correction; and
  - Provide CMS directed scheduling.
- Sanctions:

- Place state on compliance for failure to follow the Medicaid State Plan;
- Meet with the Governor and other responsible state officials;
- Reduce federal financial participation for survey and certification of nursing facilities (See §§ [8000G](#), [I](#) below); and
- Initiate action to terminate the agreement between the Secretary and the state under § 1864 of the Act, either in whole or in part.

#### ***Sanctions Other Than Federal Financial Participation Reduction [SOM §8000H]***

The RO may use the results of oversight and monitoring survey activities to identify inadequate state performance. Generally, the RO will consider that there is inadequate state survey performance when enough survey data have been analyzed to indicate that there is a systemic problem in some aspect of state performance.

**However, even a single failure to identify an IJ situation will be considered inadequate state survey performance.** The RO will select one or more sanctions appropriate to the inadequacy, but may not select federal financial participation reduction to respond to any inadequacy other than a pattern of failure to identify deficiencies in nursing facilities. The RO will notify the state in writing of the sanctions it plans to impose and the reasons for their imposition.

#### ***Reducing Federal Financial Participation for Pattern of Failure to Identify Deficiencies [SOM §8000I]***

Federal financial participation will *only be reduced* when the state demonstrates a pattern of failure to identify or accurately classify deficiencies in nursing facilities. The Act does not allow for imposition of this sanction when the failure to identify or accurately classify deficiencies occurs in Medicare-only facilities when the nature of the inadequacy is anything other than a failure to identify deficiencies. The RO should use the following process to determine whether a pattern of failure to identify deficiencies in nursing facilities exists:

- After each federal survey/review of a facility, the RO should calculate the percentage of the discrete tags that were identified by the RO but that did not appear on Form CMS-2567. The RO should average all percentages calculated in the state at the end of each quarter of the fiscal year.
- If the quarterly disparity rate is less than 20 percent, the RO may impose those remedies and/or sanctions that do not result in a reduction of federal financial participation.
- If the quarterly disparity rate is greater than 20 percent in at least three of the last four quarters for which disparity rates were calculated, the RO should confer with the state to seek the root causes of the disparities. The state will have the remainder of the quarter in which the root causes were identified as well as the succeeding quarter to correct the root causes. Federal surveys performed in the quarter following the correction period will ascertain whether the state has been successful.

**If the federal survey/review(s) yield a disparity rate of less than 20 percent, the RO should not conclude that the state demonstrated a pattern of failure to identify deficiencies in nursing facilities and should not reduce federal financial participation.**

**If the disparity rate is again greater than 20 percent, the RO should advise the state that unless it can rebut the findings used to calculate the disparity rate, or can offer compelling reasons for the regional office to excuse the rate, the RO intends to consider there to be a pattern of failure to identify deficiencies in nursing facilities, and to reduce the federal financial participation made to the state during this quarter of the fiscal year as it is the quarter in which the determination of inadequate state survey performance is actually made.** The RO will calculate the amount of the federal financial participation reduction in accordance with subsection G, and will forward this information to the CMS Operations, Central Office, for processing.

#### ***Federal Financial Participation Reduction Formula [SOM §8000J]***

To calculate the reduction in the federal financial participation made to the state under [§1903\(a\)\(2\)\(D\) of the Act](#) for the survey and certification of nursing facilities, the regional office uses the formula specified in [§1919\(g\)\(3\)\(C\) of the Act](#), which is 33 percent multiplied by a fraction:

- The numerator of which is equal to the total number of Medicaid residents in those nursing facilities that CMS found to be noncompliant during validation surveys in the quarter, but that the state found to be in substantial compliance; and
- The denominator of which is equal to the total number of Medicaid residents in all of the nursing facilities (in the state) in which CMS conducted validation surveys during the quarter.

#### ***Termination of the §1864 Agreement [SOM §8000K]***

The §1864 Agreement may be terminated at any time by mutual written consent of the parties to the Agreement. States may terminate the Agreement at any time upon 180 days written notice to CMS. If CMS determines that the state is not able or willing to carry out part or all of the functions under this Agreement (including a determination that the state has fails to meet the performance standard(s) detailed in Section D), CMS may unilaterally terminate the Agreement in whole or in part or otherwise limit or decrease its scope.

#### ***Informal Dispute Resolution [SOM §8000L]***

In the RO's notice to the state of its determination of inadequate state survey performance and its intent to impose sanctions, the RO will offer the state an opportunity to dispute the determination. The state must submit its request in writing along with information that refutes the apparent inadequacy. The informal dispute resolution process will be conducted by one level above the decision-maker. When sanctions are imposed as described in G.2 of this section, a state is entitled to Consortium Administrator review.

***Appeal of Federal Financial Participation Reduction [SOM \$8000M]***

When a state is dissatisfied with CMS' determination to reduce federal financial participation, the state may appeal the determination to the Departmental Appeals Board, using the procedures specified in [45 CFR Part 16](#).