

## Long-Term Care Survey Alert

### Reader Question: Beware Survey, Other Pitfalls of Not Following Your Own Policies

**Question:** Is it true that surveyors can cite a facility for not following its own policy when that policy is more stringent than the regulations require? If the facility were meeting the regulatory requirements and got cited in such an instance (for not following its own policy), could the facility prevail upon appeal?

Denver Subscriber

**Answer:** Surveyors cannot cite a facility for failing to meet its own policy if the policy exceeds the regulations. The issue of whether a facility's failure to follow its own policy is sufficient evidence to support a deficiency was addressed by the **Centers for Medicare & Medicaid Services'** Departmental Appeals Board in Haverhill Care Center, CR522 at page 4 (1998). In that case, the administrative law judge said:

Not every failure to perform a facility policy or procedure will constitute a deficiency. A facility may develop policies and procedures exceeding the requirements of the regulations and exceeding professionally recognized standards of care. Thus, the law and the evidence must be carefully examined to determine whether the facility's failure to perform constitutes a deficiency.

In Haverhill, the issue was whether the facility's failure to conduct all the vital signs and neurological checks required by the facility's policy after a resident fell was sufficient cause to cite a deficiency. The court found that the resident's vital signs and neurochecks were appropriately monitored even though the facility did not comply with its policy.

Even so, just because a failure to follow a facility policy may not be a regulatory violation, it still can give rise to civil liability (from consumers or the government) or criminal liability if the deviation from the policy is extreme. For example, the civil liability can arise from a state consumer protection statute wherein the consumer or the state attorney general claims the policy constitutes a "representation" about the quality or type of care to be provided. The policy can also constitute a self-imposed "duty" which the facility assumes, and breach of that duty can give rise to a negligence action if the result is harm to the resident.

Criminal liability may be enhanced because the policy can supply the element of intent necessary to prove that [the facility engaged in] knowing and willful violation of a statute on resident abuse or neglect.

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