

## Long-Term Care Survey Alert

### Survey News

The HHS secretary could end up being the final arbiter in departmental survey appeals. **The Department of Health and Human Services** published a proposed rule (Federal Register, Dec. 28, page 73708) that would ensure that administrative decisions reflect the "considered opinion" of the HHS secretary. In the case of a survey appeal, the proposed rule would give the secretary authority to reverse an administrative law judge's (ALJ) or Departmental Appeals Board (DAB) decision that went in either direction, e.g., for or against a nursing facility. The rule notes that "because DAB review is not a mandatory part of the appeals process" if the Board denies or dismisses review of an ALJ decision, the secretary may review the ALJ decision and affirm, reverse or remand.

What might be the impetus for the proposed rule? Attorney **Joseph Bianculli** in Arlington, VA, who handles nursing facility survey appeals, thinks it's possible that the secretary is dissatisfied with ALJs' and the Board's inconsistency on both "the merits of what constitutes a deficiency, as well as appropriate civil monetary penalties." The secretary may thus want to enforce more consistency, he says. Or he may simply reverse every pro-facility decision, Bianculli adds, although there are virtually none these days. Bianculli's data reveal that four out of 48 ALJ decisions and zero out of 17 Board decisions favored nursing facilities in 2007. Yet as recently as two years ago, ALJ decisions were two to one against facilities, Bianculli notes.

On the other hand, Bianculli speculates, the proposed rule may reflect a realization on HHS' part that the DAB had been excluded from "otherwise applicable review authority that the secretary wants to impose" without having a particular goal in mind. And that would "open the door to all sorts of mischief if a later secretary does want" to intervene.