



COMMISSIONER
Jon Weizenbaum

August 22, 2013

To: Nursing Facilities (NFs), Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions (ICFs/IID) and Assisted Living Facilities (ALFs)

Subject: **Provider Letter 13-18** – Amelioration of Administrative Penalties
(Replaces Provider Letters 06-38, 02-36 and 03-32)

The purpose of this letter is to provide guidelines for the amelioration of administrative penalties.

What is amelioration?

Amelioration allows a licensee to use funds for the benefit of a facility, instead of paying administrative penalties for licensure violations. Amelioration is an alternate form of payment and not an appeal. Amelioration does not remove violations or assessed penalties from a licensee's history.

What is the legal authority for allowing amelioration?

Amelioration is provided for in §242.071, §252.071 and §247.0457 of the Texas Health and Safety Code and in:

- Texas Administrative Code, Title 40, Part 1 (40 TAC) §19.2115 for NFs;
- 40 TAC §90.241 for ICFs/IID; and
- 40 TAC §92.551(j) for ALFs.

In lieu of demanding payment of an administrative penalty, the commissioner may allow a licensee to use, under supervision of the Texas Department of Aging and Disability Services (DADS), any portion of the penalty to ameliorate the violation or improve services (other than administrative services) in the facility affected by the violation.

Does an amelioration plan have to address the violations for which the administrative penalty was imposed?

No, an amelioration plan may address any area that a facility wishes to improve. However, DADS will not approve an amelioration plan that is essentially a plan of correction for the violations cited. An amelioration plan must propose changes that would result in conditions that exceed licensure requirements.

What does DADS look for in an amelioration plan?

DADS expects an amelioration plan to target the improvement of the quality of care and quality of life of residents. Improvements are expected to exceed minimum levels of regulatory compliance, with results based on measurable outcomes. At a minimum:

1. The plan must propose changes to the management or operation of the facility that will improve services to residents (or the quality of care) and identify the specific licensure requirements that the plan exceeds.
2. The plan must establish a timeline, such as a Gantt chart, for implementing the proposed changes that includes the date the plan will be completed. The timeline must be realistic. A licensee should take into account activities that involve coordination with outside entities such as contractors or service providers. Such activities may take longer than anticipated.
3. The plan must establish clear goals to be achieved through the proposed changes and identify how the goals exceed licensure requirements. A plan must identify how it will exceed a specific licensure requirement.
4. The plan must identify specific actions necessary to implement the proposed changes. If, for example, a plan includes the purchase of equipment, specific product information must be provided. DADS requires documentation that an item planned for purchase exists and is available at the cost stated in the amelioration plan. The plan must provide a budget for implementing the proposal with proof of equipment or labor costs. (Please be realistic. Plans that have a cost for goods or services that is significantly higher than market cost give the appearance of improper padding. Plans that have a cost for goods or services that is significantly below market cost appear doomed to fail.) An amelioration plan must include a realistic budget for implementing the changes.
5. The plan must identify, through measurable outcomes, how and to what extent the proposed changes will improve the services or quality of care for residents.

Can a licensee start its plan before violations are cited?

No, DADS does not approve an amelioration plan that includes changes that a licensee has made to its management or operations before the violations were cited.

How much of the administrative penalty may a licensee request to have ameliorated?

A licensee may request to have a portion or the full amount of a penalty ameliorated. The amelioration plan must have an identifiable monetary value. If the value of a plan, or the approved portion of a plan (if only a portion is approved), meets or exceeds the amount of the administrative penalty, the entire administrative penalty will be considered paid when the plan is complete. DADS does not consider the amounts over the amount of the administrative penalty to be "credit" toward future administrative penalties. If the value of an amelioration plan is less than the amount of the administrative penalty, the value of the completed amelioration plan will be credited against the administrative penalty and DADS collects only the remaining balance.

How does DADS monitor amelioration plans?

DADS staff monitor an amelioration plan against the objectives set forth in the plan. Monitoring activities may include periodic written progress reports from the licensee, telephone contacts and on-site visits by DADS staff.

What happens if an amelioration plan is started but not finished?

If DADS determines that an amelioration plan has not been completed within the approved timeframe, DADS subtracts the value of the portion of the plan that was completed from the amount of the administrative penalty. DADS collects the remaining balance of the penalty.

Is amelioration offered for all violations?

DADS does not offer amelioration for violations that constitute “immediate jeopardy” as described in 40 TAC §19.2115(b), §90.241(b) or § 92.551(j)(2). Furthermore, DADS will not offer amelioration for a violation when the facility has a “right to correct” or “opportunity to correct” the violation in a NF (as provided in 40 TAC §19.2115(c)(1)) or an ICF/IID (as provided in 40 TAC §90.241(c)(1)).

How often does DADS offer amelioration to a facility?

For the same or a similar violation, DADS does not offer amelioration more than three times in a two-year period or more than one time in a two-year period.

Can violations be combined in one amelioration plan?

A licensee may request amelioration for more than one violation. For each of those violations, the licensee must submit an amelioration plan. However, DADS may allow violations to be combined in one amelioration plan to increase the dollar amount ameliorated.

Are there allowable and non-allowable spending guidelines for amelioration plans?

Yes. DADS may approve the following:

- the offer or improvement of dental services;
- the implementation of best practices (in areas of infection control, resident behavior, psychotropic drug use, bowel and bladder control, dietary improvements, and other resident quality of life areas); and
- the improvement of staff recruitment and retention.

DADS considers the following items to be non-allowable costs for amelioration plans:

- capital improvements not directly related to quality of life;
- kitchen materials (such as pots and pans);
- administrative equipment, functions or costs;
- existing improvements or services; and
- services billed to Medicaid or Medicare. (Regulatory Services notifies Provider Billing when an amelioration plan is approved to prevent a licensee from receiving payment for purchases made under an amelioration plan.)

When is a licensee notified of amelioration rights?

DADS notifies a licensee of its amelioration rights when the licensee is advised that an administrative penalty has been imposed.

How does a licensee request amelioration?

If a licensee wants to file an amelioration plan, the licensee must file the plan with DADS within 45 days after receipt of a notice of administrative penalty. The DADS Amelioration Request form is DADS Form 3708. A licensee must submit an amelioration plan to the address on the form.

What happens if a licensee previously requested an administrative hearing?

If a licensee's plan is approved, the licensee must agree to waive its right to an administrative hearing under §242.068, §252.067 or §247.0454 of the Health and Safety Code. Upon approval of a plan, DADS requests that a pending request for a hearing submitted under §242.067(d), §252.066(b), or §247.0454(a) of the Health and Safety Code be dismissed. If DADS determines that an approved amelioration plan was not completed as specified in the plan, the full amount of the imposed penalty becomes due.

Who may be contacted with additional questions?

Please direct questions regarding amelioration proposals to the Regulatory Services Provider Licensing Enforcement unit at (512) 438-4860.

Sincerely,

[signature on file]

Susan E. Davis
Interim Assistant Commissioner
Regulatory Services

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