Assisted Living Survey Boot Camp
Post-Survey Process & Appeals
9.10.2019

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Liability Landscape

Liability exposure and trends for communities and staff
Overview

Liability Landscape

After the Surveyors are gone:

<table>
<thead>
<tr>
<th>Plan of Correction</th>
<th>Other DSHS Enforcement Actions</th>
<th>Informal Dispute Resolution</th>
<th>Administrative Hearings &amp; Appeals</th>
</tr>
</thead>
</table>
CNA Aging Services Claims Report 2018
Using Evidence to Achieve Excellence:
Engage, Lead, Succeed

- Insurer claims data report: CNA Financial Corporation
- Claims by CNA’s insureds that closed between 2016 through 2017
- 1,426 aging services professional liability claims
  - The average total amount paid per claim was greater for assisted living than for SNF and IL
  - Most fall related claims occurred in SNF setting, the AL fall related claims were higher amounts paid.
  - Excludes:
    - Indemnity payment less than $10,000
    - Home healthcare and adult day care claims
Assisted Living Closed Claims

Highest Frequency Allegations

- Resident abuse: 49.4%
- Improper care: 18.4%
- Elopement: 10.5%
- Resident fall: 10.1%
- Pressure ulcer: 6.0%
- All other: 5.6%
Ongoing Challenges and Emerging Risks for AL Falls

Failure to monitor is the most frequent and most expensive category of falls in assisted living claims.

The average paid for a resident fall claim in AL was $224,300.

AL fall related claims are more costly on average that fall related claims in other settings.

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Ongoing Challenges and Emerging Risks for AL

Resident Abuse

Resident abuse was the 2nd most frequent allegation for assisted living communities accounting for 10.5% of claims

Frequently, abuse claims involved resident-on-resident abuse

- Typically associated with memory care residents wandering into other residents’ rooms

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Ongoing Challenges and Emerging Risks for AL Pressure Ulcers

Pressure ulcers are a leading source of injury with potentially life-altering results for residents.

Defending pressure ulcer claims may be complicated by evocative photographs if presented to a jury.

The frequency of pressure ulcer claims in assisted living was low, however, the severity was higher than skilled nursing.

Pressure ulcer claims in assisted living communities were associated with higher acuity, non-ambulatory residents.
Ongoing Challenges and Emerging Risks for AL Social Models

Homelike environment

Aging in Place

Competing priorities
• Resident rights and freedom of movement, versus resident safety

Expectation management
• Admission screening

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Other Liability Issues

Facility:

- Reputational harms
- Medicaid
  - HCA cancellation of Medicaid contract
  - Medicaid overpayment
  - AGO MFCU investigation
- Consumer Protection Act investigation
- Criminal investigation
- APS investigation
Other Liability Issues

Individual Employees:

- Professional harms
  - Reputation
- AL Administrator certification
- Nurse/Professional Staff license
- CNA certification
- Adult Protective Services investigation
- Criminal investigation
Other Liability Issues

Common allegations against professional licenses:

• Failure to adhere to standards
• Failing to assess, evaluate or institute action
• Repeated failure to report, document, or make entries
• “Willfully” causing or contributing to physical or emotional abuse
• Failure to protect from unsafe practices or conditions, abusive acts, and neglect
• Failure to supervise delegated persons
Plan of Correction

Developing And Drafting Your Action Plan To Address The Statement Of Deficiencies
What is a Plan of Correction?

Type of corrective action imposed by DSHS

Establishes how the facility will address all alleged deficiencies

Immediate actions

Ensuring the deficiency does not return

Provides road map and assigns responsibility

Documents actions taken

Audience? Staff, surveyors, residents, families...

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Post-Survey Timeline

10 calendar days from **SOD:** POC
- Submit attestation of compliance date
- POC completed, but not submitted to DSHS
- SOD/POC “readily accessible” to residents

10 business days from **SOD:** IDR?

28 calendar days from **notice:** Appeal?

45 calendar days from **survey:** Compliance
- Longer period may be allowed if reasonable

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5 Elements of a Plan of Correction

1. What corrective actions are being taken for the affected individuals noted in the SOD?
2. How will other potentially affected residents be identified and addressed?
3. What measures will be put in place, or systemic changes made, so the deficiency does not recur?
4. How will the corrective action be monitored to ensure it is effective?
5. When will the corrective action will be in place?

EXAMPLE CITATION for discussion:
Failure to provide ADL assistance with transferring consistent with the resident’s assessed needs. Resident #1’s care plan called for use of a gait belt during one-person physical assistance with transfers. Surveyor observed staff member transfer the resident from a wheelchair to the bed without using the gait belt.
Common Mistakes

• Insufficient response to 5 elements
• Leaving out language to support/defend the facility’s approach and systems
• Implying that the Department’s allegations are completely accurate; use lawyerly words

  – “alleged”
  – “assumed”
  – “purported”
  – “supposed”
  – “unspecified”
  – “unidentified”
Planning Your Correction

Investigate

• This also informs your IDR/appeal decision

Analyze Root Cause(s)

Develop Solutions

Draft/Document:

• Corrections being put in place
• Process you went through to get there
Investigating the Allegations

What questions should we explore in developing a plan of correction?

How do we determine the root cause, or eliminate potential root causes of the survey deficiency?

EXAMPLE CITATION for discussion:
Failure to provide ADL assistance with transferring consistent with the resident’s assessed needs. Resident #1’s care plan called for use of a gait belt during one-person physical assistance with transfers. Surveyor observed staff member transfer the resident from a wheelchair to the bed without using the gait belt.
Include a Disclaimer

First thing on the first page of POC

POC is legally required even if you do not agree with the allegations

- Families, plaintiff attorneys, and courts may not always know that you don’t agree and/or you are required to submit a POC if you don’t tell them

Preparation and implementation of this Plan of Correction does not constitute admission or agreement by Community with the facts, findings, or other statements as alleged in the survey findings dated May 2, 2019. Submission of the Plan of Correction is required by law and does not evidence the truth of any of the findings. Community specifically reserves the right to move to strike or exclude this document as evidence in any civil, criminal or administrative action.
It is Community’s policy to fully assess resident needs and to provide adequate supervision, assistance, and assistive devices to minimize accidents. Some of the many ways this has been achieved for Resident #1 is by providing a low bed with a fall mat to ease the impact if a self-transfer is attempted, monitoring and reviewing medications with potential adverse effects associated with falls, and arranging for physical therapy appointments including range of motion exercises for strength and maintenance.
1: Identified Individuals

Explain how the immediate problem is being addressed

Is this an individual-centered deficiency?

• If so, state what you have done for each individual
• If not, state what you have done about the identified issues

After the surveyor reported the transfer, the caregiver was reminded to use a gait belt while transferring Resident #1. The caregiver’s supervisor reports that she did so appropriately. The resident’s care plan was reviewed and updated to include reminding the resident if necessary that using the gait belt during transfers is for the safety of both the resident and caregivers.
All residents receiving physical assistance with transfers are potentially affected by the alleged deficiency. On May 5, the Resident Care Director reviewed staff assignment sheets for all residents receiving transferring assistance to identify relevant staff. Those staff were reminded to use proper transfer methods including gait belts if called for in the resident’s care plan. The RCD and supervisors observed that all assisted transfers were conducted using proper technique including the use of a gait belt where appropriate. Also on May 5, the placement and availability of gait belts throughout the facility was reviewed to ensure belts are readily available to staff when needed. There is no indication that other residents were affected.
3: Changes to Prevent Recurrence

Consider whether you need to develop or modify a system or practice

Describe the changes in adequate detail to show that your plan is thoughtful and effective

To enhance currently compliant operations and under the direction of the Resident Care Director, on May 20 all direct care staff will receive in-service training regarding state requirements and facility policies for minimizing accidents. The training will emphasize the importance of using gait belts as indicated on the resident’s care plan and assignment sheet. Training will include a demonstration of proper gait belt transfer procedure.
4: Monitoring the Corrective Actions

Should a monitoring system be developed or modified?

When and how often will monitoring occur?
- Monitoring is ongoing; no “completion date”

Who will conduct the monitoring?

Effective May 10, a quality assurance program was implemented under the supervision of the Resident Care Director to monitor staff assistance with resident transfers. The RCD will conduct random checks on a weekly basis to ensure that residents requiring assistance with transfers are being transferred using the proper technique as identified in the resident care plan. Any deficiencies will be corrected on the spot. The RCD will document the results of the random checks and report results quarterly to the Quality Assurance Committee for further review or action.
5: Reasonable Date of Completion

Use the date the last element of the plan will be in place

- Not including ongoing monitoring

Consider the significance and seriousness of each deficiency

The amount of time for correction will vary based on the nature of the deficiency and how much work is required to remedy

Deficiencies involving threats to health or safety should be corrected quickly

Corrective action will be completed by May 20, 2019.
Plan/Attestation Statement

I hereby certify that I have reviewed this report and have taken or will take active measures to correct this deficiency. By taking this action, is or will be in compliance with this law and/or regulation on (Date)________________. In addition, I will implement a system to monitor and ensure continued compliance with this requirement.

I understand that to maintain an assisted living facility license, the facility must be in compliance with the licensing laws and regulations at all times.

Administrator (or Representative) ___________________________ Date ______________________
DSHS Enforcement Actions

- Fines
- Stop Placement
- License Conditions
- License Revocation
When Does DSHS Impose Remedies?

DSHS has substantial discretion as to when it will impose an enforcement remedy rather than merely requiring a Plan of Correction.

DSHS must consider “the gravity and frequency of the noncompliance” in deciding what penalties to impose.

Progression of possible sanctions described in WAC 388-78A-3200.
## Progression of Enforcement Actions

<table>
<thead>
<tr>
<th>Scope of Problem</th>
<th>Degree of Harm</th>
<th>Possible Sanctions</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Initial, non-recurring problem</td>
<td>• Minimal or moderate harm</td>
<td>• Plan of correction</td>
</tr>
<tr>
<td>• Non-serious</td>
<td>• Limited in scope</td>
<td>• Conditions on license</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Civil penalty</td>
</tr>
<tr>
<td>• More than an isolated event</td>
<td>• Reasonable probability of moderate harm</td>
<td><strong>Any of the above, plus:</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Stop placement order</td>
</tr>
<tr>
<td>• Past history of noncompliance, plus current problems</td>
<td>• Imminent threat of serious harm</td>
<td><strong>Any of the above, plus:</strong></td>
</tr>
<tr>
<td>• Failure to cooperate with surveyors</td>
<td></td>
<td>• License Revocation</td>
</tr>
<tr>
<td>• Other serious issues (fraud, bankruptcy)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• More than an isolated event</td>
<td></td>
<td><strong>Any of the above, plus:</strong></td>
</tr>
<tr>
<td></td>
<td>• Imminent threat of serious harm</td>
<td>• Summary suspension</td>
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</table>
License Conditions

DSHS has wide discretion to impose temporary conditions upon the AL license to help bring the community into compliance.

Conditions are often in place for several months or even over a year.

If progress is not made, license may eventually be revoked.
Possible Enforcement Remedies

DSHS may:

- Impose reasonable conditions on a license, such as correction within a specified time, training, and limits on the type of residents the provider may admit or serve.
- Suspend admissions by imposing a full or limited Stop Placement order.
- Suspend, revoke, or refuse to renew a license, or refuse to issue a new license for associated entities.

RCW 18.20.190
License Conditions – Examples

- Administrator training course
- Specific staff in-service training
- Replacement of certain staff
- Contracting with RN consultant to review medication management system
- Contracting with administrator consultant to review recent SODs and evaluate how community can be improved
- Physical plant changes
- Appointment of monitor (at community expense)
- Appointment of temporary manager (at community expense)
- Probationary period
Possible Enforcement Remedies

DSHS may:

• Impose civil penalties of at least $100 per day, per violation

• Impose reasonable conditions on a license, such as correction within a specified time, training, and limits on the type of residents the provider may admit or serve

• Suspend admissions by imposing a full or limited Stop Placement order, or for category of residents

• Suspend, revoke, or refuse to renew a license, or refuse to issue a new license for associated entities

RCW 18.20.190
Possible Enforcement Remedies:
Civil Fines

DSHS may:

Impose civil penalties of at least $100 per day, per violation.

“Until July 1, 2019, the civil penalties may not exceed” $1,000 per day per violation;

“Beginning July 1, 2019, through June 30, 2020, the civil penalties may not exceed” $2,000 per day per violation;

“Beginning July 1, 2020, the civil penalties may not exceed” $3,000 per day per violation.

RCW 18.20.190
Civil Fines

Fines are normally due within 28 calendar days of the SOD.

- Late fines accrue 12% interest.
- If a formal administrative appeal is filed, the fines do not need to be paid until the appeal is resolved.
- IDR does not change the due date.
Stop Placement

A "Stop Placement" order prevents the community from admitting any new residents until the order is lifted.

- Reentry of resident after overnight hospitalization requires RCS field manager permission.

A "limited Stop Placement" order may:

- Restrict the community from admitting new residents with certain care needs.
- Restrict the community from admitting new residents to a certain part of the community.
Lifting the Stop Placement Order

Survey revisit:

- DSHS will conduct on-site revisit within 15 days of community request
- For serious violations, DSHS must make an on-site revisit as soon as appropriate to ensure correction of the violation
- Even if original problems are corrected, if the revisit discovers other serious issues the Stop Placement may continue

DSHS must lift the Stop Placement order when:

- The violations necessitating the stop placement have been corrected; and
- The community shows it is capable of maintaining the correction.
Summary Suspension and Revocation

DSHS has the authority to shut down communities with serious and/or recurring compliance issues.

Summary Suspension means that the community is shut down temporarily but immediately, before an opportunity for appeal.

Revocation means the license is permanently removed.

For practical reasons, these remedies are rare but subject to considerable DSHS discretion.
Grounds for License Revocation

- Imminent threat of serious harm that is more than an isolated event
- Serious history of compliance issues or previous enforcement remedies, plus current non-compliance
- Failure to cooperate with survey or investigation
- Providing false or misleading information to DSHS or other regulators
- Serious non-compliance issues such as fraud or impending bankruptcy
- All residents have moved out

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Grounds for License Revocation

• DSHS must suspend/revoke an AL license when the community’s owner, manager, or director commits certain crimes or infractions
  o Sex offender
  o APS finding or permanent restraining order re: abuse/neglect/exploitation

• Community license will probably be restored by discharging the offender

WAC 388-78A-3190
### Other Enforcement Issues

#### Community:
- Health Care Authority cancellation of Medicaid contract
- Medicaid overpayment claim
- Criminal investigation

#### Individual Employees:
- Administrator license
- Nurse/Professional Staff license
- Adult Protective Services investigation
- Criminal investigation
Communication Tips

Give staff a heads up that a negative survey may result in an automatic DOH license investigation into involved staff.

Reassure staff: We have your back.

Avoid pointing fingers at each other while internal investigation/response is ongoing.

Consider whether staff facing a license investigation should be represented by counsel.
Survey Appeal Rights

You have two appeal rights: Informal Dispute Resolution (IDR) and an Administrative Hearing. Each has a different request timeline.

**Informal Dispute Resolution [RCW 18.20.195]**

You have an opportunity to challenge the deficiencies and/or enforcement actions through the state's IDR process. **All IDR requests must be in writing and include:**

- The deficiencies you are disputing; and
- The method of review you prefer (face-to-face, telephone conference or documentation review).

**The written request must be received by the 10th working day from receipt of this letter.**

During the IDR process you will have the opportunity to present written and/or oral evidence to dispute the deficiencies.

Send your written request to:

Informal Dispute Resolution Program Manager  
Residential Care Services  
PO Box 45600  
Olympia, Washington  98504-5600  
Fax (360)725-3225
Survey Appeal Rights

Formal Administrative Hearing

You may contest the civil fine by requesting a formal administrative hearing to challenge the deficiencies which resulted in the civil fine. All hearing requests must be in writing and include:

- A copy of this letter; and
- A copy of the Statement of Deficiencies.

The written request must be received within twenty-eight (28) calendar days of receipt of this letter.

Send your written request to:

Office of Administrative Hearings
PO Box 42489
Olympia, Washington 98504-2489
Informal Dispute Resolution

Resolving Minor Disagreements With Your Surveyor
What is Informal Dispute Resolution?

• Opportunity to resolve disagreements about your survey without litigation
  o Dispute any violations found or remedy imposed
• Opportunity to provide information that may lead to the modification, deletion, or removal of a violation or enforcement remedy
• Review conducted by DSHS employee who did not participate in or oversee the determination
• DSHS still has the final word

RCW 18.20.195
IDR is **Not** a Formal Appeal

- **Does not** change deadline for submitting and enacting a POC
- **Does not** change deadline for requesting a formal appeal
- **Does not** delay enforcement remedies
IDR versus Formal Appeal

If enforcement remedy is imposed:
- IDR can be requested instead of, or in addition to, a formal appeal
- IDR may allow you to avoid the need for a formal hearing and the expense of litigation

If enforcement remedy is not imposed:
- No formal appeal is available
- IDR is normally your only opportunity to correct the public record

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Informal Dispute Resolution: Purpose

Provide the State with:

- Additional Information
- Clarification
- Documentation

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Informal Dispute Resolution: Process Overview

- Request IDR within 10 working days
- Gather materials and/or witnesses
- Submit explanation of your position and supporting materials
- IDR held in person, by phone, or on paper review
When Should You Request an IDR?

- Are the findings accurate?
- Are the findings complete?
  - Is SOD supported through observation, interview, and document review?
- Did the surveyor correctly interpret the statute or regulation?
- Is correcting the surveyor’s mistake worth your time?
Requesting an IDR

Within 10 working days of SOD:
- Send letter to RCS IDR Program Manager stating you are requesting an IDR
  - SOD provides the address for mailing
- Cite the deficiencies you are contesting
- By phone, or in person?
- Tell them when you are available
- Tell them who will attend
- Tell them you will provide additional information prior to the IDR
## Preparing for IDR

### Organize Documents

- What documents did the surveyor look at or rely on?
- What documents did the surveyor overlook or misconstrue?
- Letters or declarations from persons with knowledge?
Preparing for IDR

Decide who should attend

- Who will best present the information?
- Who knows enough about the situation to answer any questions?
- Can the knowledgeable person provide information through a letter or formal declaration?
Attending the IDR

RCS rules require IDR to convene within 10 days if possible (*but usually occurs within longer time frame*)
• Agree to a convenient date

Leave the lawyer at home?

Build trust and professional reputation with your regulators
• IDR starts when you walk in
Successful IDR

Original deficiency citation revised or deleted
• Changes signed and dated by the supervisor

Enforcement action reduced or rescinded

Entitled to “clean” SOD
• Monitor RCS website
Appeals

Administrative Hearings
Final Agency Orders
Judicial Review
Administrative Law: The Basics

• DSHS is an agency within the Executive Branch of state government
  o Secretary of DSHS appointed by Governor
  o Permanent bureaucracy of agency employees

• Administrative agencies are creatures of statute, and have only the powers granted to them by the Legislature

• Agency decisions, as actions taken by the Executive Branch, are reviewable by the Judicial Branch
  o Washington Administrative Procedure Act
Appeal of Enforcement Action

Administrative Hearing
- An independent agency within the Executive Branch reviews documents and hears testimony to render an Initial Order
  - Office of Administrative Hearings

DSHS Review
- DSHS itself has the final word within the Executive Branch: DSHS Review Judge reviews ALJ’s decision and issues Final Order
  - DSHS Board of Appeals

Judicial Review
- Courts can review the DSHS Final Order, but will defer to the agency’s reasonable interpretation of facts and WAC
  - Superior Court
  - Court of Appeals
  - State Supreme Court

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Administrative Hearings

When a state agency imposes enforcement actions, the action normally will not be effective until there is an opportunity for appeal.

- Exception for instances where there is reasonable basis to believe that harm is imminent
  - Stop placement
  - Summary suspension of license

The appeal is heard within the Executive Branch itself, by an Administrative Law Judge.
Benefits of Administrative Hearings

- For the initial hearing, Administrative Law Judges are fully independent of DSHS
- DSHS Review Judges ultimately answer to the Secretary of DSHS, but generally exercise independent judgment in individual cases
- Further review available in the courts

RCS is not the final decision-maker

“Discovery” process

Opportunity for settlement

- Access to DSHS-RCS documents and staff testimony

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Drawbacks of Administrative Hearings

Time
- Initial hearings often set out for 6+ months
- In cases with extensive discovery process, may be even longer
- ~18 month process from hearing request to decision from Superior Court

Expense
When To Request A Hearing?

**Serious allegations**
- Are the allegations untrue or overstated?
- Is a resident lawsuit likely? (e.g. personal injury, abuse/neglect, wrongful death)
- Will the allegations harm future marketing efforts?

**Heavy enforcement remedies**
- Does the penalty suit the violation?
- Is the penalty so heavy that you have little choice (revocation)?

**Industry-wide implications**
- Does DSHS’s questionable interpretation of its regulation set a new, costly, and/or dangerous standard for AL facilities?

**Keeping options open**
- You requested IDR—but what if RCS refuses to change its mind?
Post-Survey Process: Questions?
Thank you for participating

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Carin Marney, Co-Chair of Lane Powell’s Senior Living and Long Term Care team, represents health care and long term care providers in regulatory and litigation matters. She has deep experience advising clients in this highly-regulated industry on compliance and helping them avoid and also resolve disputes, both in and outside of court.