Legal Update - Annoying Deficiency Citations: The Leaky Roof and Other Stories

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As noted in a previous Legal Update, many deficiency citations issued to RCFEs are either factually or legally incorrect. This Update discusses three recent citations received by providers. In each case there is no dispute as to the facts but the legal basis for the citation is highly questionable.

Question: During a recent rainstorm, our roof leaked. We placed a bucket in the hallway to catch the dripping water and placed warning signs around the bucket. There was sufficient room in the corridor for residents (including those using wheelchairs and walkers) to get around the bucket. We immediately called our roofer who fixed the problem as soon as possible. We have an upscale building that is less than two years old. We maintained the roof in full accordance with the manufacturer's specifications. We received two deficiencies from DSS: one for having a leaky roof and one for obstructing the hallway with the bucket. Are these deficiencies appropriate?

Answer: No. This is an area of ongoing controversy between DSS and RCFE providers. The problem stems from the fact that regulation Section 87691(a) states, "The facility shall be clean, safe, sanitary and in good repair **at all times.**" Many LPAs, as well as some supervisors (now called Local Unit Managers), have incorrectly applied this section literally and enforced what amounts to a strict liability standard on providers. Under their reasoning, because the regulation contains the words "at all times," a provider is guilty of a deficiency if any portion of its building is ever unclean, unsafe, unsanitary or not in good repair no matter what the reason and no matter how briefly. This does not appear to be a reasonable interpretation of the regulation.

A number of years ago, I had the opportunity to speak at the Annual Training Program for CCLD supervisors. In an attempt to illustrate the inappropriateness of this "strict liability" approach to the regulation, I noted sarcastically that there were LPAs who would stand in the hallway of an RCFE waiting for a light bulb to burn out, and as soon as it did, cite the facility for having a burned out light bulb. My example was greeted with a good deal of laughter, albeit some of it of the nervous variety. Sure enough, two years later, I had a client cited when during a survey an LPA found a lamp with a burned out bulb in the room of a mentally competent resident.

Perhaps the following hypothetical provides a better illustration. Suppose an LPA were in an RCFE during a hailstorm, and a large hailstone struck and shattered a window in the building. Does the broken window constitute a violation of regulation Section 87691? Obviously, the answer should be "no," provided that the broken glass is cleaned up and cardboard placed over the window immediately and the window is expeditiously repaired. It is unlikely that DSS would argue with this example. Yet, in substance, it is no different than the leaky roof situation described above.

The correct analysis in the case of any physical plant violation should be not whether a physical plant problem arose, but whether a provider acted in a reasonable manner to prevent the problem from occurring and when the problem did arise despite the provider's reasonable efforts at prevention, whether the provider acted reasonably to correct the problem. In our leaky roof situation, the provider had a new building and had maintained the roof appropriately. Therefore, the provider had no reason to suspect that the roof would leak. Once the roof did leak, it acted expeditiously to have repairs made. In the interim, it took appropriate steps to mitigate the problem by placing a bucket and warning signs in the corridor. In these circumstances, it is unreasonable to cite the provider. Conversely, if the roof had leaked because of negligence on the part of the provider (for example, if it had fixed a previous leak with chewing gum), or if the provider had waited six weeks before calling a roofer following the leak, a deficiency citation would be warranted. With respect to the bucket, what did DSS expect the provider to do? It would appear that the provider would have violated Section 87691(a) if it had not placed a bucket in the corridor.

Question: We lock our doors at 8:00 p.m. each evening. If a resident returns to the community after 8:00 p.m., they need to ring the bell and wait to be let in by a staff person. A resident complained to DSS and we were cited for a violation of regulation Section 87572(a)(2) related to personal rights. Should we have been cited?

Answer: No. Regulation Section 87572(a)(2) states that every resident has a right to be "accorded safe, healthful and comfortable accommodations, furnishing and equipment." It is difficult to see how locking the door at night could be deemed to deny a resident the right to safe, healthful and comfortable accommodations when, presumably, the reason for locking the doors is to allow you to maintain safe, healthful and comfortable accommodations. Moreover, there is another subsection of the personal rights regulation that is directly on point. Section 87572(a)(6) states that a resident has a right:

"To leave or depart the facility at any time and to not be locked into any room, building, or on facility premises by day or night. This does not prohibit the establishment of house rules, such as the locking of doors at night, for the protection of the residents. . . ."

Assuming that residents who ring the doorbell after 8:00 p.m. are let into the building in a timely fashion, DSS has no basis for citing a provider under these circumstances. If, however, residents are required to wait for an extended period before being allowed

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into the building, a deficiency could be warranted, as this may create not only an inconvenience to the resident but a safety concern as well. If the community does not have staff available to respond quickly to the doorbell, it should find some other means to allow residents who routinely enter the building at night to do so, such as providing them with a key.

Question: Are the nighttime supervision requirements triggered by the number of residents living in the building or the facility's licensed capacity? We have 85 residents but are licensed for over 100. We were cited for not meeting the nighttime requirements for facilities with over 100 residents.

Answer: You were incorrectly cited. Regulation Section 87581 pertains to night supervision. Subsection (a)(2) states, "In facilities caring for sixteen (16) to one hundred (100) residents at least one employee shall be on duty on the premises and awake. Another employee shall be on-call and capable of responding within ten (10) minutes." The staffing requirements under this regulation clearly apply to the number of residents actually in the provider's care and not to the licensed capacity of the building. When regulations are intended to relate to licensed capacity, they explicitly so state. For example, Section 87580 (the regulation immediately preceding the night supervision regulation) states, "If a facility is licensed for sixteen (16) persons or more, there shall be a dated weekly employee time schedule displayed conveniently for employee reference." Similarly, Section 87579 (planned activities), Section 87576 (food service) and Section 87564 (administrator qualifications), all refer to licensed capacity as the trigger for staffing requirements. The fact that Section 87581 specifically refers to the number of residents and not to licensed capacity is conclusive evidence that you were incorrectly cited.

As the deficiencies discussed above amply demonstrate, it is important for providers to review deficiencies carefully to determine whether there is a factual or legal basis for challenge. DSS sometimes interprets regulations in a manner that is unreasonable or simply incorrect. In these circumstances, providers should be certain to exercise their appeal rights. ■

Grants for Health Insurance

HHS Secretary Tommy G. Thompson has announced the availability of $80 million in grants for states that provide health insurance to residents who cannot get conventional health coverage because they are too sick. The grants would be used by states to offset losses they may incur operating high-risk pools, which are typically state-created non-profit associations that offer health coverage to individuals with serious medical conditions. Enrollment in these pools is growing, with more than 153,000 individuals enrolled in state pools. ■