Writing Legally Defensible Deficiencies

Anne Hall
Chief Counsel, Region IX
United States Department of Health & Human Services
Office of the General Counsel

This presentation represents the views of the speaker. It does not constitute official policy or interpretation by or on behalf of DHHS, CMS, or OGC.

Purpose of the Statement of Deficiencies

Why Write a Statement of Deficiencies?

- To serve as evidence of noncompliance with federal requirements
- To provide legal notice of the basis for CMS's remedies
- To identify and encourage prompt correction of deficiencies
- To support the amount of a CMP
Other Uses of the 2567

- Residents’ and patients’ rights
- Consumer information (NH and Hospital Compare and 5-Star)
- Congressional oversight
- Law enforcement
- Private lawsuits
- Research

What Do Judges Think?

- "The Statement of Deficiencies cites the regulatory requirements that were not met, and then explains why those requirements were not met."

What If I Forget to Include Something?

- According to the DAB, “the 2567 is a notice document, and is not designed to lay out every single detail in support of a finding that a violation has been committed. If the opposite were the case, there would not be much of a need for an exchange of documents or, for that matter, a hearing.”
More from the DAB...

• “[T]he SOD's purpose is not to provide a comprehensive recitation of the evidence supporting the survey agency's findings. Its purpose is to notify the facility of the nature, scope, and severity of the deficiencies found and the factual basis for the survey agency's conclusion that regulatory standards had been violated.”

Pacific Regency Arvin, DAB No. 1823 (2002)

Here’s Another Way of Looking at This...

• “While fairness requires that facilities know, prior to hearing, what they must answer to, the Statement of Deficiencies is not the sole source of notice, which may be provided during the pre-hearing development of the case.”

Alden Town Manor Rehab & HCC, DAB No. 2054 (2006)

What is the Judge Actually Reviewing?

• The 2567 and evidence obtained during the survey

• Both together provide adequate notice for remedies and corrective action
Question Time!

Question #1:
How should the regulation be referenced in the deficient practice statement?

Question #1 Continued

• Example A: F166. “Based on the resident group interview, interviews with the staff, and record review, the facility did not resolve residents’ grievances with respect to missing personal property. The Resident Council minutes for June, July, and August 2008 identified resident concerns with missing personal items and no facility response. This resulted in no actual harm with the potential for more than minimal harm.”

Question #1 Continued

• Example B: F309. “Based on record review and staff interviews the facility did not ensure that 1 of 2 sampled residents received necessary care and services to maintain or attain the highest practicable physical, mental and psychosocial well-being in accordance with the assessment and care plan. The resident was not assessed for skin integrity on her right leg. She developed gangrene and was admitted to the hospital. This is actual harm.”
LETS VOTE!

How should the regulation be referenced in the deficient practice statement?

For “Example A” select the Green Check. For “Example B” select the Red X.

Tips for Organizing, Writing, and Streamlining Survey Documentation

THE “ORGANIZATIONAL PROCESS”
Ten Things to Keep in Mind

1 – Know the regulations

2 – Know the differences among regulations and related regulations

3 – Evaluate negative outcome as a result of the provider’s practices or failures

Ten Things Continued...

4 – Avoid assumptions

5 – Corroborate

6 – Confirm

7 – Copy

Ten Things Continued....

8 – Verify

9 – Explain the standard of care

10 – Provide adequate notice
The Five “Rights”

- Right Regulation
- Right Standard
- Right Action
- Right Cause
- Right Notice

And a Couple of Thoughts

- Use measurable, objective language and avoid opinion
- Negative impact is not the deficiency
HOW TO IDENTIFY A DEFICIENCY: A THREE-STEP PROCESS

Step One: What does the regulation require?

Step Two: What did the provider do or fail to do?

Step Three: What is the actual or potential adverse outcome?

AN EXAMPLE

F371. Based on kitchen observations and interviews with dietary staff, the facility failed to ensure that frozen foods were properly stored and protected from potential cross-contamination and food-borne illness. Plastic bags of cut pieces of meat and plastic bags of chopped vegetables were open, torn and undated in two chest freezers. The open bags potentially compromised food quality and safety.
A CONCLUSORY TALE
OR
HOW THE LIFE SAFETY SURVEYOR
GOT INTO TROUBLE

Life Safety Code. The surveyor cited the facility for not programming its room door detectors to close corridor doors claiming this failure was a violation of the LSC.

The surveyor conceded that the room detectors accomplished the control functions they were programmed to accomplish.

THE TALE CONTINUED...

The ALJ rejected the surveyor’s opinion that the facility’s system violated the LSC as conclusory.

While she had relevant training in the LSC, the surveyor could not explain the basis for her application of the LSC to the facility’s system.
THE TALE CONTINUED...

• “Absent such legal authority or expert testimony, there is no basis for the deficiency citation because there is no dispute that [the facility’s] room detectors were arranged to automatically accomplish and did automatically accomplish, without delay, the control functions to be performed by those detectors.”


A TALE OF SPECULATION

• CMS must show that the resident was put at risk of injury. That risk cannot be speculative or imagined.

• The surveyor asserted that a delay in treating R3’s UTI put her at risk of developing an electrolyte imbalance that could cause the heart to go into “a strange rhythm” or go faster or slower, or “skip a beat or something like that.”
ANOTHER TALE CONTINUED...

- The ALJ found that CMS offered no persuasive explanation for the surveyor's "prognostic theory on possible complications from untreated UTI, nor does that theory find support in the medical literature."

- "That explanation is certainly not very scientific. Moreover, I find such an opinion to be conclusory, and contrary to medical literature that is the resulting distillate of a plural intelligence."

STREAMLINING

Five More Things To Consider

- Focus on the regulations

- Use the best tags and the best examples

- Avoid unnecessary facts
Five More Things
Continued…

• Identify the sources of information: Who, What, When, Where, How

• Check for mistakes

Can I Use Shortcuts?

ABSOLUTELY!

Some Shortcuts to Use

• Only use essential facts. Do we really need to know the patient’s age, height, weight, medical history?

• Don’t repeat facts. Consider cross-referencing. BUT BE CAREFUL: The facts must fit the regulation.
Some Shortcuts Continued...

• Don’t cite every Standard under a Condition.

• Don’t cite to the provider’s plan of correction as the basis for the deficiency.

Some Shortcuts Continued...

• Don’t cite to the provider’s policies and procedures as the basis for the deficiency.

• BUT, it is OK to cite to the provider’s policies and procedures if that finding supports the deficiency.

Some Shortcuts Continued...

• Minimize write-ups of A,B,C level deficiencies and Standards not related to Conditions.

• Minimize discussions of survey process in the 2567.
Question Time!

Question #2:
How much information is enough?

Question #2 Continued…

Background: F329 (Unnecessary drugs).

The resident was given 50 doses of Compazine (an antiemetic) over a 30 day period. The facility did not adequately document indications for use; did not monitor side effects; and did not discontinue the drug when she developed serious side effects.

Question #2 Continued…

• The resident had diagnoses including diabetes, depression, and post-hip replacement. She had no neurological signs in the past 3 months. She had normal cognition. The resident was able to ambulate without assistance. The resident complained of nausea on admission. The nurse practitioner (NP) ordered Compazine every 12 hours at the request of the family. The NP was on vacation for two weeks. The facility notified the MD a week later that the resident was experiencing Parkinsonian symptoms.
Let’s Vote!

Right amount of information?

For “Yes” select the Green Check.
For “No” select the Red X.

Shortcuts to Avoid

- Not using patient/resident/staff identifiers and overuse of anonymous sources of information.
- Not copying pertinent documents.
- Using a violation of one regulation as the basis for the violation of another.
Shortcuts to Avoid
Continued….

• Failing to obtaining corroborating evidence: Interview, Observation, Record Review.

• Not enough detail/conclusory statements.

• Not matching the facts and law.

AN EXAMPLE

A Notice Problem

The surveyors allege generally that based on the complaint, record review, and staff interview, it was determined that Petitioner did not ensure that 24 residents received restorative nursing services at the frequency care planned by the PT Department.

AN EXAMPLE CONTINUED…

• The surveyors only made specific allegations regarding Residents 36, 34, 52, 50, and 53. The 5 residents for whom the SOD describes specific facts are the only residents for whom Petitioner received adequate notice of what deficiencies to defend.

• The ALJ considered only the examples cited related to Residents 36, 34, 52, 50, and 53.
A Corroboration Problem

The resident complained of verbal abuse. The surveyors testified that they never actually learned what words were said that allegedly constituted cursing.

The ALJ found that the surveyors improperly cited Petitioner based only upon general and conclusory allegations.

Question Time!

Question #3:

How much information is enough Part II?
Question #3 Continued…

Background: F493 (Governing Body)

Governing Body failed to establish and implement policies to assure effective management and operation of the facility.

Question #3 Continued…

“The facility’s governing body failed to establish and implement policies regarding the operation and management of the facility. Residents were not monitored for adverse medication effects, residents’ drug regimes were not reviewed, facility failed to follow up on pharmacy recommendations concerning questionable medication dosages. This is evidenced by the facility’s noncompliance with F309, F329, F428, and F429.”

Let’s Vote!

Right amount of information?

For “Yes” select the Green Check.
For “No” select the Red X.
Question #3 Continued...

What would have improved this write-up?

- Different tag?
- More facts?
- Both?

Let’s Vote!

What would have improved this write-up?

For both a different tag and more facts, select the Green Check.

For one or the other, select the Red X.

HANDLING SURVEY DOCUMENTS
**Why Copy?**
- To support statements in the 2567
- To supplement statements in the 2567
- To use in lieu of live testimony
- As scholarly support

**More on Copies...**
- To use if the surveyor is no longer available to testify
- To rebut provider evidence
- To provide a foundation for expert testimony

**What to Copy**
- Depends on the deficiency
- Must be material
- Must be reliable
What to Copy Continued...

- Missing records or missing or incorrect entries
- Provider policies and procedures
- Staff schedules, facility floor plans, menus, activities, MARs

What to Copy Continued...

- Physician’s orders, ER records for context
- Scholarly articles – Watch out for internet research!
- If you think the provider will produce it later, copy it now!

What to do with Copies

- Compile
- Organize
- Retain
Marking on copies

- Remember: Surveyor notes and copies are evidence
- Any marks must be able to be tracked back to the surveyor
- TIP: Date and initial copies

Real Examples of Real Problems with Real 2567s

Some Common Mistakes

- Citing to state law instead of federal law
- “So what” deficiencies
- Conditions out based on Standards that are not on the 2567
- Wrong dates, arithmetic errors
- Conclusory statements
A Word about Declarations

- Many attorneys and judges prefer declarations to live direct testimony
- Declarations can focus testimony
- Declarations can be used to explain context
- Declarations can be less scary than testifying
- Long 2567s make for long declarations
- Copies of documents help

Lessons Learned from Cases

Notice Problems

- **Pinewood Care Center, DAB CR1621 (2007)**
- A quality of care deficiency was cited referring to 24 residents. The 2567 contained details about just 5 of them. The ALJ declined to consider the impact on the other 19 residents.
Unsupported Inference

- Surveyor cited a dietary deficiency asserting that the meat slicer had not been properly cleaned.
- She testified that brownish chunky particles on the meat slicer appeared to be very hard and she inferred that they were old and present for longer than the meal service.

The Windsor Continued...

- The surveyor admitted, however, that she never actually touched the residue on the meat slicer but only imagined how hard it must have been.
- The ALJ found that the surveyor’s conclusion that the meat residue was hard and old was not supported by the evidence and not credible.

Insufficient Evidence

- Facility cited for failure to implement policies and procedures to prohibit neglect based on its failure to orient a newly-hired nurse resulting in a resident’s fall.
Woodland Continued...

- The ALJ found that “the application of the regulation and Petitioner's policy is triggered in this case by the surveyor's assumption that the resident fell, even though there is no contemporaneous evidence of a fall other than that [the resident] was sitting on the floor when observed by the CNA and LPN.”

Facts and Tag Don’t Match

- Beechwood Sanitarium, DAB CR966 (2002)
- The surveyors cited F493 based on deficiencies under F224, F314, F324, F514.
- The ALJ found there was no evidence to show that the facility’s management structure failed to conform to the regulatory requirements.

Beechwood Continued...

- The regulation addresses the management structure of a SNF.
- It requires that the facility have a governing body that establishes certain policies and positions. The regulation says nothing about the performance of the facility's governing body.
- Here, the evidence that the surveyors identified did not speak at all about facility’s management structure. It addressed only the question of how effectively the management functioned.
Hearsay

- The Windsor Place, DAB CR1775 (2008)
- The regulation requires that a facility protect and promote a resident’s right to “[v]oice grievances without discrimination or reprisal.”
- The 2567 stated that some residents “did not feel” grievances were resolved and some residents “felt intimidated by facility staff and feared repercussions.”

The Windsor Continued...

- The surveyors did not testify and their surveyor notes were excluded.
- The ALJ concluded that even if they had been allowed to testify, the evidence was problematic.

The Windsor Continued...

- First, the surveyor notes do not include complete statements of complaining residents and family members but rather just summary notes the surveyors made during interviews.
- Second, the 2567 contains nothing but conclusions and the surveyors’ versions of what they think they heard.
• Third, the surveyors failed to actually record what questions were asked of the residents and what answers were given.

• “The hearsay evidence that is at issue here is unverified and unreliable. It is not possible to discern whether the surveyors accurately reported the statements that are recited in the survey report, or whether the statements are unbiased and otherwise credible.”

PRACTICE TIP:

Record questions and quotes exactly if you are relying on them in the 2567.
Wrong Regulation?

- **Countryside Manor, DAB CR1679 (2007)**
- The regulations provide that Resident Assessments must accurately reflect the resident’s status. An RN must conduct or coordinate each assessment with the appropriate participation of health professionals.

---

Countryside Manor Continued…

- The surveyors found that the RN did not properly sign the care plan portion of 8 residents’ RAP Summary Sheets.
- The surveyors also found that the RN failed to properly sign one resident’s MDS.

---

Countryside Manor Continued…

- The ALJ found that the surveyors did not make any allegations or produce any evidence to show that the RAP sheets or the MDS form in question were not accurate or that an RN was not involved in the coordination of the assessments.
Know the Language of the Regulation
• Hotel Reed, DAB CR1494 (2006)
• CMS substantiated its findings under F353 by cross-referencing the violations under F324.
• The ALJ found that CMS cannot rely solely on the mere cross-referencing of previously cited tags to establish its prima facie case.

Hotel Reed Continued...
• The presence of deficiencies may be indicative of an insufficient number of nursing staff, but it is necessary to show that the occurrence of those deficiencies is, in some way, linked to inadequate numbers of staff.
• CMS has made no attempt to establish a nexus between the deficiencies in F324 and an insufficient number of staff in Petitioner's facility under F353.

Mistakes
• Mountain Crest Nursing, DAB CR1481 (2006)
• The surveyor did the initial measurement on R95's bed.
• On direct examination she testified that her notes show that she recorded a 5-6 inch gap on the right with no gap on the left.
• In the SOD she wrote there was a 6 inch gap on the left side and no gap on the right.
• In surveyor notes she wrote there was a 6 inch gap on one side and a 2-3 inch gap on the other.
Mountain Crest Continued...

• The surveyor tried to explain these discrepant measurements.

• The ALJ found that her testimony was “clearly confused and not particularly credible.”

Final Thoughts

• Know and Use the Principles of Documentation

• Know and Follow the “Five Rights”

• Avoid: Assumptions/Inferences/Conclusory Statements

Final Thoughts Continued...

• Don’t Misuse Shortcuts

• Don’t Become a Negative Example

• Be One of These Examples--
Final Thoughts Continued...

• “I find that the surveyor was credible. His allegations are supported by the clinical records for the resident that he obtained from the facility.”

   Elm Heights Care Center, DAB CR1774 (2008)

Final Thoughts Continued...

• “I find [the surveyor] to be credible. I find no inconsistencies in the records associated with her survey and investigation of the incident, or in her hearing testimony. [The surveyor] pursued her duties aggressively and diligently, which I find commendable, and I conclude that it does not reflect poorly upon her credibility.”

   Hazel Hawkins Memorial Hospital, DAB CR1753 (2008)

QUESTIONS