

TEXAS STATE
CONFERENCE
DAY 2
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The LTC Nurses' Role in the Survey Enforcement Process

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LTC Nurses' Role in Survey Enforcement Process

- Importance and Impact of Negative Survey Findings
 - Types of enforcement actions
 - TBON actions
 - Healthcare liability actions

- Minimizing the Damage
 - Importance of Plans of Correction
 - Challenging deficiencies/license violations in the IDR/IIDR process
 - Nurses' Role in the IDR and appeals process

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Recent Survey Activity

- Current hostile survey environment!

- Facility visits:
 - FY 2018 - 11,496
 - FY 2019 - 12,511
 - FY 2020 - 15,641
 - FY 2021 - 14,876
 - FY 2023 - 15,784

26.2% increase between FY 2019 and FY 2023.

Source: HHSC SB 190 Annual Report FY 2022 and FY 2023

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Immediate Jeopardy Deficiencies

- 2021 – 276
- 2022 – 416
- 2023 – 686

➤ More than 20% of SNFs had an IJ deficiency in 2023

Source – THCA Texas Survey Trends

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Immediate Jeopardy Deficiencies

- Top IJ citations in 2023:
 - F 689 - Accidents
 - F 600 – Free from Abuse
 - F 684 - Quality of Care
 - F 580 – Notification
 - F 607 – Develop/Implement Abuse/Neglect policies and procedures

Source – THCA Texas IJ trends

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Survey Enforcement – Facility Based Actions

- Federal enforcement – CMS
- State enforcement – HHSC
- Simultaneous enforcement when Abuse/Neglect is cited

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Federal Enforcement – Facility Based

- Termination of Provider Agreements – 6 months from survey
- DPNA – no reimbursement for Medicaid, Medicare or TriCare new admissions during DPNA period.
 - Statutory – 3 months
 - Optional – 15 days notice (IJ/SQC)
 - DPNA period ends with date of substantial compliance (importance of POC date)
- Civil Money Penalties
 - Per-instance – past non-compliance (\$2,670 - \$26,685)
 - Per-day – default (\$8,140 - \$26,685 per day)

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State Enforcement – Facility Based

- Administrative penalties
 - Right to Correct
 - No Right to Correct
 - Abuse and Neglect violations
- License denial
- License revocation
 - 3 Strikes Law
- AG referrals
 - Civil Penalties and Trusteeship (None in FY 2020 – 2023)

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License Revocation/Denials & 3 Strike Law

- 1 license denial FY 2023
- 0 license revocation in FY 2023
- Three Strike Rule:
 - If a facility receives 3 IJ abuse/neglect deficiencies in separate visits within 24 months, license revocation is mandatory.
 - As of 9/9/24:
 - 100 NFs with 1 strike
 - 13 NF with 2 strikes
 - 2 NFs with 3 strikes (2024)

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Individual Licensure-Based Actions

- Administrator referrals – HHSC LTC Credentialing
 - Automatic referral – IJ or SQC citations
 - Discretionary – Not deficiency specific
 - Conduct during survey process
 - Criminal actions
 - Remedies:
 - CEUs
 - Fines
 - Preceptor
 - License denial/revocations
 - Letter of reprimand

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Individual Licensure-Based Actions

- Referrals to independent licensing agencies - Discretionary
 - Texas Board of Nursing
 - Texas Medical Board
 - Texas Behavioral Health Executive Counsel (Social Workers)
- Employee Misconduct Registry
 - Certified nurse aides
 - Certified medication aides

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Criminal Actions

1. Section 21.02, Penal Code (continuous sexual abuse of a disabled individual),
2. Section 22.011, Penal Code (sexual assault);
3. Section 22.02, Penal Code (aggravated assault);
4. Section 22.04, Penal Code (injury to an elderly individual or disabled individual);
5. Section 22.041, Penal Code (endangering an elderly individual, or disabled individual);
6. Section 35A.02, Penal Code (health care fraud);
7. Section 37.10, Penal Code (tampering with governmental record)

** Charges can result from local police investigation or investigation by the
Texas Medicaid Fraud Control Unit (MFUC)

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Texas Board of Nursing Actions in LTC

- HHSC referrals - Discretionary
 - RNs
 - RN/DONs
 - LVNs
- TBON investigation
 - Subpoena for documents sent to facility
 - Nurse notification of potential violation of the Nurse Practice Act
 - deadline for response – 20 days
 - **Nurse is entitled to all documents TBON has obtained in their investigation prior to filing a formal response.**

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Theory of Liability for DONs

- Failure to supervise
- Failure to ensure sufficient training
- Failure to make proper assignment commensurate with knowledge and training
- T BON Rule 217.11(1):
 - (S) Make assignments to others that take into consideration client safety and that are commensurate with the educational preparation, experience, knowledge, and physical and emotional ability of the person to whom the assignments are made;
 - (U) Supervise nursing care provided by others for whom the nurse is professionally responsible;

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Theory of Liability for DONs

- Examples:
 - Trach care
 - Reading and reporting of labs and radiology
- Situations:
 - DON off duty
 - Holidays, weekends, and afterhours

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Repercussions of TBON Actions

- TBON Disciplinary Actions:
 - Denial of license application or renewal
 - Written warning
 - Public reprimand
 - Restrictions on license
 - Suspension or revocation of license
 - Remedial action (technically not a “disciplinary action” but public)
 - Fine
 - Public service
 - Abstention from alcohol/drugs with periodic testing

**Actions public on TBON website

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Repercussions of TBON Actions

- National Practitioner Databank – Operated by the DHHS. National database of all medical malpractice payments and adverse actions against health care providers (including TBON action)
- Termination or refusals of employment

If obtain knowledge of a TBON investigation – RESPOND.

- If no harm, more likely to get dismissal
- If serious harm/death, likely to get discipline
- If get discipline, have right to appeal

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Healthcare Liability Actions

- Personal Liability
 - Nurses be sued in their individual capacity for in a healthcare liability claim by resident/family
 - Insurance!
- Witness subpoenas
 - Deposition
 - Trials

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Mitigating the Damage of a Bad Survey Plans of Correction

- Basic 5 bullet points
- POC date
 - The last POC date governs date of substantial compliance (health & LSC)
 - Should be as close to the exit date as possible
 - Generally, no more than 30 days
 - Do not exceed 45 days
- Extended POC dates:
 - Widens window for intervening complaint/incident investigations that would extend survey cycle
 - Possible DPNA imposition, particularly if optional DPNA is imposed
 - Unnecessary continuation of per day penalties
- Revisit/Desk review – Will not be conducted until after the very last POC date

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Mitigating the Damage of a Bad Survey IDR/IIDR Process



IDR – Informal Dispute Resolution Process

Conducted by the Michigan Peer Review Organization (MPRO)

IDR request – 10 calendar days after receipt of 2567/3724

IDR rebuttal – 5 calendar days after submission of IDR request

MPRO issues recommendation within 30 days of receipt of IDR request

HHSC/CMS can reject MPRO's IDR recommendation



IIDR – Independent Informal Dispute Resolution Process

Conducted by HHSC's IDR Program (within Legal Dept).

Only entitled to an IIDR if CMS imposes a CMP.

IIDR Request due within 10 days of receipt of CMS notice letter (must submit CMS notice with IIDR request)

HHSC has 60 days to issue decision

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IDR/IIDR Process

What to challenge?

- Any IJ/SQC deficiency/license violation
- Abuse/Neglect violations for 3 strike purposes:
 - F 600/N 3481
 - F 607/N 3484
 - See TAC provision cited in N tag report (26 TAC 544.601(b) or (c))

What to ask for?

- Delete a deficiency
- Delete a portion of a deficiency
- Move a deficiency
- Change scope and severity of a deficiency but only if the deficiency constitutes SQC or IJ.

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IDR/IIDR Process

What to submit?

- IDR request form – F tags and corresponding N tags!
- IDR narrative rebutting allegations individually
- Supporting documentation
 - Facility records
 - Hospital records
 - Statements

If IDR/IIDR deadline lands on a Saturday, Sunday or legal holiday, due date moves to next business day.

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IDR/IIDR Process

- Reviewers look only to the “4 corners” of the 2567/3724.
- What is in the report “rules” unless directly contradicted by documentary evidence
- “He said/she said” situation – facility will lose
- Can delay revisit/desk review
- Rejection of MPRO decisions
 - HHSC’s data – 2.3% rejection rate
 - My data – 90% rejection rate

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IDR v. IIDR

- If need more time to prepare and have CMS notice letter – IIDR
- If no CMPs – IDR
- If want to challenge non-IJ or actual harm deficiencies – IDR

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Nurses' Role in the IDR & Appeal Process

If any remedies imposed and IDR unsuccessful, have right to appeal:

- State appeal – state administrative penalties, license revocation/denial (SOAH)
- Federal appeal – usually CMPs only (DAB)

Clinical deficiencies – nurse participation vital!

- Medical record review
- Nursing in-services
- Preparation of arguments
 - Example – Pain meds

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Nurses' Role in the IDR & Appeal Process

Standard of care articulation:

- what regulations require
- what standard of care/facility policies require

IDR rebuttal – could result in deletion or reduction of s/s of deficiencies and mitigation of remedies and referrals

Appeals:

- Fosters settlement
- At hearing - presentation of case
 - Written direct testimony
 - Live testimony

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Mitigation Strategies

- Avoid IJs!!
 - If incident or situation with adverse outcome:
 - Identify issues leading to incident/situation
 - Correct immediately (resident affected, identify other potential affected residents, protect residents, remove offending staff, in-service staff, etc)
 - Report
 - Gather and present all documentation that shows problem was corrected and no immediate threat to resident health and safety at exit.
 - Goal at exit is to convince the surveyors/program manager that:
 - No IJ, or
 - Past non-compliance

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Mitigation Strategies

- If receive IJ or deficiency at G or above:
 - POC date – as close to exit as possible
 - Reduce DPNA exposure
 - Reduce possibility of extending survey cycle
 - Reduce CMPs
 - IDR
 - Gather all evidence early to have it in event of appeal of an enforcement action or licensure referral
 - Appeal is option

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Questions?

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