

## CHAPTER 428

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**HEALTH AND ENVIRONMENT**

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**HOUSE BILL 09-1196**

BY REPRESENTATIVE(S) Gerou, Kerr J., Kerr A., McNulty, Schafer S., Summers, Acree, Gardner B., Green, Primavera, Ryden, Stephens, Todd, Liston, Marostica, Nikkel, Roberts;  
also SENATOR(S) Boyd, Gibbs, Hodge, Keller, Kester, Newell, Schwartz, Tapia, Tochtrop.

**AN ACT**

**CONCERNING THE USE OF MONEYS DERIVED FROM CIVIL MONEY PENALTIES IMPOSED ON NURSING FACILITIES TO FUND INNOVATION IN NURSING HOME CARE, AND MAKING AN APPROPRIATION THEREFOR.**

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** 25-1-107.5, Colorado Revised Statutes, is amended to read:

**25-1-107.5. Additional authority of department - rules - remedies against nursing facilities - criteria for recommending assessments for civil penalties - cooperation with department of health care policy and financing - nursing home penalty cash fund - accountability board - reports - repeal.** (1) For the purposes of this section, unless the context otherwise requires:

(a) "ACCOUNTABILITY BOARD" MEANS THE NURSING FACILITY CULTURE CHANGE ACCOUNTABILITY BOARD, AUTHORIZED BY SUBSECTION (6) OF THIS SECTION.

~~(a)~~ (b) "Federal regulations for participation" means the regulations found in part 442 of title 42 of the code of federal regulations, as amended, for participation under Title XIX of the federal "Social Security Act", as amended.

~~(b)~~ (c) "Nursing facility" means any skilled or intermediate nursing care facility ~~which~~ THAT receives federal and state funds under Title XIX of the federal "Social Security Act", as amended.

(2) The department, as the state agency responsible for certifying ~~skilled and intermediate~~ nursing facilities, ~~which receive federal and state funds under Title XIX of the federal "Social Security Act", as amended;~~ is hereby given the authority

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*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

AUTHORIZED to adopt rules ~~and regulations~~ necessary to establish a series of remedies in accordance with this section and the federal "Omnibus Budget Reconciliation Act of 1987", Pub.L. 100-203, as amended, ~~which~~ THAT may be imposed by the department of health care policy and financing when a nursing facility violates federal regulations for participation in the medicaid program. The remedies ~~which are established~~ shall include any remedies required under federal law and ~~shall include~~ the imposition of civil money penalties.

(3) (a) In accordance with rules ~~and regulations~~ promulgated under this section, the department is authorized to recommend to the department of health care policy and financing an appropriate civil money penalty based on the nature of the violation. Any penalties recommended shall not be less than one hundred dollars nor more than ten thousand dollars for each day the facility is found to be in violation of the federal regulations. Penalties assessed shall include interest at the statutory rate.

(b) The department shall adopt criteria for determining the amount of the penalty to be recommended for assessment. ~~Such~~ THE criteria shall include, but need not be limited to, consideration of the following factors:

(I) The period ~~of time over~~ DURING which the violation occurred;

(II) The frequency of the violation;

(III) The nursing facility's history concerning the type of violation for which the penalty is assessed;

(IV) The nursing facility's intent or reason for the violation;

(V) The effect, if any, of the violation on the health, safety, security, or welfare of the residents OF THE NURSING FACILITY;

(VI) The existence of other violations, in combination with the violation for which the penalty is assessed, ~~which~~ THAT increase the threat to the health, safety, security, or welfare of the residents OF THE NURSING FACILITY;

(VII) The accuracy, thoroughness, and availability of records regarding the violation ~~which~~ THAT the nursing facility is required to maintain; and

(VIII) The number of additional related violations occurring within the same ~~time span~~ PERIOD as the violation in question.

(c) (I) ~~In the event~~ IF the department finds that a violation is life threatening to one or more residents or creates a direct threat of serious adverse harm to the health, safety, security, rights, or welfare of one or more residents, THE DEPARTMENT OF HEALTH CARE POLICY AND FINANCING SHALL IMPOSE a penalty ~~shall be imposed~~ for each day the deficiencies ~~which~~ THAT constitute the violation are found to exist.

(II) Except as provided in subparagraph (I) of this paragraph (c), ~~no~~ THE DEPARTMENT OF HEALTH CARE POLICY AND FINANCING SHALL NOT ASSESS A penalty ~~shall be assessed~~ prior to the date a nursing facility receives written notice from the

department of its recommendation to assess civil money penalties. ~~Such~~ THE DEPARTMENT SHALL PROVIDE THE notice ~~shall be provided~~ to the facility no later than five days after the last day of the inspection or survey during which the deficiencies ~~which~~ THAT constitute the violation were found. The notice shall:

(A) Set forth the deficiencies that are the basis for the recommendation to assess a penalty;

(B) Provide instructions for responding to the notice; and

(C) ~~Provide for the submission of~~ REQUIRE THE NURSING FACILITY TO SUBMIT a written plan of correction. ~~by the nursing facility.~~ The department shall adopt criteria for the submission ~~and approval~~ of written plans of correction BY NURSING FACILITIES AND APPROVAL OF THE PLANS BY THE DEPARTMENT. If the facility acts in a timely and diligent manner to correct the violation in accordance with an approved plan of correction, the department may recommend to the department of health care policy and financing that IT SUSPEND OR REDUCE the penalty ~~be suspended or reduced~~ during the period of correction specified in the approved plan of correction.

(d) Except as provided in sub-subparagraph (C) of subparagraph (II) of paragraph (c) of this subsection (3), THE DEPARTMENT OF HEALTH CARE POLICY AND FINANCING SHALL CONTINUE TO ASSESS any penalty recommended under this section ~~shall continue to be assessed~~ until the department verifies to the department of health care policy and financing that the violation is corrected or until the nursing facility notifies the department that correction has occurred, whichever is earlier. ~~In the event~~ IF THE PENALTY HAS BEEN SUSPENDED OR REDUCED PURSUANT TO SUB-SUBPARAGRAPH (C) OF SUBPARAGRAPH (II) OF PARAGRAPH (c) OF THIS SUBSECTION (3) AND the nursing facility has not corrected the violation, THE DEPARTMENT OF HEALTH CARE POLICY AND FINANCING SHALL REINSTATE the penalty ~~shall be reinstated~~ at an increased amount and shall ~~be~~ retroactively ~~assessed~~ ASSESS THE PENALTY to the date the penalty was suspended.

(4) (a) The department of health care policy and financing, after receiving a recommendation from the department, is authorized to assess, enforce, and collect the civil money penalty pursuant to section 25.5-6-205, C.R.S., for credit to the nursing home penalty cash fund, created pursuant to section 25.5-6-205 (3) (a), C.R.S.

(b) (I) The department of public health and environment and the department of health care policy and financing ~~shall~~ have joint authority for administering the nursing home penalty cash fund; except that final authority regarding the administration of moneys in the fund ~~shall be~~ IS in the department of health care policy and financing.

(II) The authority of both departments includes establishing circumstances under which funds may be distributed in order to protect the health or property of individuals residing in nursing facilities ~~which~~ THAT the department of health care policy and financing has found to be in violation of federal regulations for participation in the medicaid program.

(III) The department of health care policy and financing shall promulgate rules ~~and regulations~~ necessary to ensure proper administration of the nursing home penalty cash fund.

(c) ~~Circumstances which shall be considered~~ THE DEPARTMENTS SHALL CONSIDER, as a basis for distribution from the nursing home penalty cash fund, ~~include paying~~ THE FOLLOWING:

(I) THE NEED TO PAY costs to:

~~(F)~~ (A) Relocate residents to other facilities WHEN A NURSING FACILITY CLOSES;

~~(H)~~ (B) Maintain the operation of a nursing facility pending correction of violations;

~~(HH)~~ (C) Close a nursing facility;

~~(IV)~~ (D) Reimburse residents for personal funds lost.

(II) MEASURES THAT WILL BENEFIT RESIDENTS OF NURSING FACILITIES BY IMPROVING THEIR QUALITY OF LIFE AT THE FACILITIES, INCLUDING:

(A) CONSUMER EDUCATION TO PROMOTE RESIDENT-CENTERED CARE IN NURSING FACILITIES;

(B) TRAINING FOR STATE SURVEYORS, SUPERVISORS, AND THE STATE AND LOCAL LONG-TERM CARE OMBUDSMAN, ESTABLISHED PURSUANT TO ARTICLE 11.5 OF TITLE 26, C.R.S., REGARDING RESIDENT-CENTERED CARE IN NURSING FACILITIES;

(C) DEVELOPMENT OF A NEWSLETTER AND WEB SITE DETAILING INFORMATION ON RESIDENT-CENTERED CARE IN NURSING FACILITIES AND RELATED INFORMATION; AND

(D) EDUCATION AND CONSULTATION FOR PURPOSES OF IDENTIFYING AND IMPLEMENTING RESIDENT-CENTERED CARE INITIATIVES IN NURSING FACILITIES.

(d) (I) THE DEPARTMENTS SHALL DISTRIBUTE THE FOLLOWING AMOUNTS OF MONEYS IN THE NURSING HOME PENALTY CASH FUND FOR THE PURPOSES DESCRIBED IN SUBPARAGRAPH (II) OF PARAGRAPH (c) OF THIS SUBSECTION (4):

(A) FOR THE 2009-2010 FISCAL YEAR, TWO HUNDRED THOUSAND DOLLARS;

(B) FOR THE 2010-2011 FISCAL YEAR AND EACH FISCAL YEAR THEREAFTER, AN AMOUNT EQUAL TO THE LESSER OF THE AMOUNT SPECIFIED IN A BUDGET APPROVED BY THE ACCOUNTABILITY BOARD OR TWENTY-FIVE PERCENT OF THE MONEYS DEPOSITED INTO THE NURSING HOME PENALTY CASH FUND IN THE IMMEDIATELY PRECEDING FISCAL YEAR.

(II) THE DEPARTMENTS MAY ALLOCATE THE MONEYS SPECIFIED IN THIS PARAGRAPH (d) ON A QUARTERLY BASIS, BUT IN NO CASE SHALL THE TOTAL AMOUNT DISTRIBUTED IN ANY GIVEN FISCAL YEAR EXCEED THE AMOUNT SPECIFIED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (d).

(III) NOTWITHSTANDING SUBPARAGRAPH (I) OF THIS PARAGRAPH (d), THE DEPARTMENTS SHALL ENSURE THAT THE BALANCE OF THE NURSING HOME PENALTY CASH FUND DOES NOT FALL BELOW ONE MILLION DOLLARS AS A RESULT OF EXPENDITURES FOR THE PURPOSES DESCRIBED IN SUBPARAGRAPH (II) OF PARAGRAPH (c) OF THIS SUBSECTION (4) AND SHALL NOT DISTRIBUTE MONEYS PURSUANT TO THIS PARAGRAPH (d) FOR SUCH PURPOSES IF MAKING A DISTRIBUTION WOULD CAUSE THE FUND BALANCE TO FALL BELOW THE MINIMUM BALANCE REQUIRED BY THIS SUBPARAGRAPH (III).

(IV) IN DETERMINING HOW TO ALLOCATE THE MONEYS AUTHORIZED TO BE DISTRIBUTED PURSUANT TO THIS PARAGRAPH (d), THE DEPARTMENTS SHALL TAKE INTO CONSIDERATION THE RECOMMENDATIONS OF THE ACCOUNTABILITY BOARD MADE PURSUANT TO PARAGRAPH (c) OF SUBSECTION (6) OF THIS SECTION. IF THE DEPARTMENTS DISAGREE WITH THE RECOMMENDATIONS OF THE ACCOUNTABILITY BOARD, THEY SHALL MEET WITH THE ACCOUNTABILITY BOARD TO EXPLAIN THEIR RATIONALE AND SHALL SEEK TO ACHIEVE A COMPROMISE WITH THE ACCOUNTABILITY BOARD REGARDING THE ALLOCATION OF THE MONEYS. IF A COMPROMISE CANNOT BE ACHIEVED WITH REGARD TO ALL OR A PORTION OF THE MONEYS TO BE DISTRIBUTED, THE MEDICAL SERVICES BOARD CREATED PURSUANT TO SECTION 25.5-1-301, C.R.S., SHALL HAVE THE FINAL AUTHORITY REGARDING THE DISTRIBUTION OF MONEYS FOR WHICH A COMPROMISE HAS NOT BEEN REACHED.

~~(d) (e) Neither department is authorized under paragraph (b) of this subsection (4) to~~ THE DEPARTMENTS SHALL NOT utilize moneys from the nursing home penalty cash fund for the purpose of paying ~~its~~ THEIR cost for administering such fund OR FOR ANY ADMINISTRATION COSTS ASSOCIATED WITH ANY SPECIFIC MOVEMENT, ASSOCIATION, OR ORGANIZATION; EXCEPT THAT UP TO TEN PERCENT OF THE MONEYS DISTRIBUTED PURSUANT TO PARAGRAPH (d) OF THIS SUBSECTION (4) MAY BE USED TO PAY THE COST TO ADMINISTER AND OPERATE THE ACCOUNTABILITY BOARD, INCLUDING EXPENSE REIMBURSEMENT FOR ACCOUNTABILITY BOARD MEMBERS.

(5) Repealed.

(6) (a) NO LATER THAN SEPTEMBER 1, 2009, THE NURSING FACILITY CULTURE CHANGE ACCOUNTABILITY BOARD SHALL BE ESTABLISHED AND OPERATED UNDER THE DEPARTMENT OF HEALTH CARE POLICY AND FINANCING EITHER DIRECTLY OR BY CONTRACT WITH OR GRANT TO ANY PUBLIC AGENCY OR APPROPRIATE PRIVATE NONPROFIT ORGANIZATION. THE DEPARTMENT OF HEALTH CARE POLICY AND FINANCING, IN CONSULTATION WITH STAKEHOLDERS, SHALL DETERMINE THE APPROPRIATE ENTITY TO ADMINISTER THE ACCOUNTABILITY BOARD. THE ACCOUNTABILITY BOARD SHALL BE COMPOSED OF TEN MEMBERS AS FOLLOWS:

(I) THE STATE LONG-TERM CARE OMBUDSMAN OR HIS OR HER DESIGNEE;

(II) THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF HEALTH CARE POLICY AND FINANCING OR THE EXECUTIVE DIRECTOR'S DESIGNEE;

(III) THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT OR THE EXECUTIVE DIRECTOR'S DESIGNEE;

(IV) SEVEN MEMBERS APPOINTED BY THE GOVERNOR AS FOLLOWS:

(A) THREE MEMBERS CURRENTLY EMPLOYED IN LONG-TERM CARE NURSING FACILITIES;

(B) ONE MEMBER WHO IS OR REPRESENTS A CONSUMER OF LONG-TERM CARE;

(C) ONE MEMBER REPRESENTING THE DISABILITY COMMUNITY WHO IS EITHER A RESIDENT OF A NURSING FACILITY OR A FAMILY MEMBER OF A NURSING FACILITY RESIDENT;

(D) ONE MEMBER REPRESENTING THE BUSINESS COMMUNITY; AND

(E) ONE MEMBER REPRESENTING THE COLORADO CULTURE CHANGE COALITION, OR ITS SUCCESSOR ORGANIZATION.

(b) THE MEMBERS OF THE ACCOUNTABILITY BOARD SHALL SERVE WITHOUT COMPENSATION BUT MAY BE REIMBURSED FOR EXPENSES INCURRED WHILE SERVING ON THE ACCOUNTABILITY BOARD.

(c) THE ACCOUNTABILITY BOARD SHALL REVIEW AND MAKE RECOMMENDATIONS TO THE DEPARTMENTS REGARDING THE USE OF MONEYS IN THE NURSING HOME PENALTY CASH FUND FOR THE PURPOSES DESCRIBED IN SUBPARAGRAPH (II) OF PARAGRAPH (c) OF SUBSECTION (4) OF THIS SECTION.

(d) BY OCTOBER 1, 2010, AND BY EACH OCTOBER 1 THEREAFTER, THE DEPARTMENTS, WITH THE ASSISTANCE OF THE ACCOUNTABILITY BOARD, SHALL JOINTLY SUBMIT A REPORT TO THE GOVERNOR AND THE HEALTH AND HUMAN SERVICES COMMITTEES OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE GENERAL ASSEMBLY, OR THEIR SUCCESSOR COMMITTEES, REGARDING THE EXPENDITURE OF MONEYS IN THE NURSING HOME PENALTY CASH FUND FOR THE PURPOSES DESCRIBED IN SUBPARAGRAPH (II) OF PARAGRAPH (c) OF SUBSECTION (4) OF THIS SECTION. THE REPORT SHALL DETAIL THE AMOUNT OF MONEYS EXPENDED FOR SUCH PURPOSES, THE RECIPIENTS OF THE FUNDS, THE EFFECTIVENESS OF THE USE OF THE FUNDS, AND ANY OTHER INFORMATION DEEMED PERTINENT BY THE DEPARTMENTS OR REQUESTED BY THE GOVERNOR OR THE COMMITTEES.

(7) (a) SUBPARAGRAPH (II) OF PARAGRAPH (c) OF SUBSECTION (4) OF THIS SECTION, SUBSECTION (6) OF THIS SECTION, AND THIS SUBSECTION (7) ARE REPEALED, EFFECTIVE SEPTEMBER 1, 2016.

(b) PRIOR TO SUCH REPEAL, THE NURSING FACILITY CULTURE CHANGE ACCOUNTABILITY BOARD AND ITS FUNCTIONS, AND THE USE OF MONEYS IN THE NURSING HOME PENALTY CASH FUND FOR THE PURPOSES DESCRIBED IN SUBPARAGRAPH (II) OF PARAGRAPH (c) OF SUBSECTION (4) OF THIS SECTION, SHALL BE REVIEWED PURSUANT TO SECTION 24-34-104, C.R.S.

**SECTION 2.** 24-34-104, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

**24-34-104. General assembly review of regulatory agencies and functions for termination, continuation, or reestablishment.** (47.5) THE FOLLOWING AGENCIES, FUNCTIONS, OR BOTH, SHALL TERMINATE ON SEPTEMBER 1, 2016: THE

NURSING FACILITY CULTURE CHANGE ACCOUNTABILITY BOARD CREATED IN SECTION 25-1-107.5 (6), C.R.S., AND THE USE OF MONEYS IN THE NURSING HOME PENALTY CASH FUND FOR THE PURPOSES DESCRIBED IN SECTION 25-1-107.5 (4) (c) (II), C.R.S.

**SECTION 3. Appropriation.** In addition to any other appropriation, there is hereby appropriated, out of any moneys in the nursing home penalty cash fund created in section 25.5-6-205, Colorado Revised Statutes, not otherwise appropriated, to the department of health care policy and financing, for the fiscal year beginning July 1, 2009, the sum of two hundred thousand dollars (\$200,000) cash funds, or so much thereof as may be necessary, for the implementation of this act.

**SECTION 4. Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: June 4, 2009