Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Taos Living Center, (CCN: 32-5105),	)	Date: March 9, 2009
	)	
Petitioner,	)	
	)	Docket Nos. C-08-667
- v. -	)	C-08-76
	)	C-09-9
Centers for Medicare & Medicaid Services.	)	Decision No. CR1915
	)	

DECISION

Petitioner, Taos Living Center, did not file a timely hearing request in response to a March 19, 2008 notice letter regarding a survey ending on February 22, 2008. No good cause exists to extend the deadline for filing a hearing request. The denial of payment for new admissions (DPNA) from May 22 through August 13, 2008, is required by law. And, summary disposition of this appeal in favor of CMS is appropriate.[1]

I. Background

Petitioner is a nursing facility participating in the Medicare and Medicaid programs. The New Mexico Department of Health (NMDH) conducted a life safety code survey concluding on February 20, 2008, and a health survey concluding on February 22, 2008, to determine if Petitioner was in compliance with participation requirements. By letter dated March 19, 2008, NMDH notified Petitioner that it was not in substantial compliance with participation requirements. It forwarded the statements of deficiencies delineating the requirements with which it had found Petitioner out of compliance and noted that one isolated deficiency constituted actual harm not at the level of immediate

[1] Petitioner is also precluded from offering a nurse aide training or competency evaluation program (NATCEP) for two years from May 22, 2008, due to the DPNA. Social Security Act (Act), sections 1819(f)(2)(B) and 1919(f)(2)(B).

jeopardy, at 42 C.F.R. § 483.25(c) under Quality of Care - Pressure Ulcers (Tag F 314).[2] While the letter reflected that NMDH was recommending remedies to CMS based on Petitioner's noncompliance — remedies that CMS would evaluate and decide whether to impose — the letter also reflected that NMDH itself was authorized to and was imposing a DPNA, stating that:

> Denial of Payment for New Admissions
> Based on deficiencies cited during these surveys and **as authorized by CMS Dallas Regional Office we are giving formal notice of imposition of statutory Denial of Payment for New Admissions (DPNA) effective May 22, 2008**. This remedy will be effectuated on the stated date unless you demonstrate substantial compliance with an acceptable PoC and subsequent revisit. This notice in no way limits the prerogative of CMS to impose discretionary DPNA at any appropriate time.

CMS Ex. 1, at 2 (emphasis added).

NMDH specifically informed Petitioner that substantial compliance would be demonstrated by an acceptable plan of care verified by a revisit. NMDH also specifically informed Petitioner of its appeal rights based on the March 19, 2008 notice:

> Appeal Rights
> If you disagree with the determination of noncompliance, you or your legal representative may request a hearing before an administrative law judge of the Department of Health and Human Services, Departmental Appeals Board. Procedures governing this process are set out in 42 C.F.R. §§ 498.40, et. seq. You may appeal the finding of noncompliance that led to an enforcement action, but not the enforcement action or remedy itself. A written request for hearing must be filed no later than **60 days from receipt of the notice**.

The March 19, 2008 notice then went on to explain to Petitioner where any potential hearing request should be sent. CMS Ex. 1, at 3. There is no dispute that Petitioner did not request a hearing and did not seek an extension of time to request such a hearing within the 60 allotted days. Petitioner submitted a plan of correction on or about March 26, 2008, asserting correction of the deficiencies as of March 28, 2008. CMS Ex. 6, at 1. The plan of correction was approved by NMDH, but the revisit survey to verify the plan

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[2] The statement of deficiencies, dated February 22, 2008, reflects that following the recertification survey NMDH found deficiencies at 42 C.F.R. §§ 483.13(a) under Resident behavior and facility practices; 483.20(d) and .20(k)(1) and .20(l)(3) under Resident assessment; 483.25(c) and .25(e)(2) and .25(f)(2) and .25(l) under Quality of care; 483.40(c)(1)-(2) under Physician services; and 483.75(e)(8) and .75(l)(1) under Administration. CMS Exhibit (Ex.) 7.

of correction did not take place until August 14, 2008. The DPNA went into effect on May 22, 2008.

On May 29, 2008, NMDH returned to Petitioner's facility and conducted a complaint survey, which found noncompliance. NMDH sent a second notice letter on June 13, 2008, informing Petitioner of its noncompliance. With regard to recommended remedies, it informed Petitioner that based on the February surveys and May 29, 2008 deficiency findings, NMDH was "recommending" to CMS that Petitioner's provider agreement be terminated on July 22, 2008. However, the NMDH letter of June 13, 2008 stated:

> Based on deficiencies cited during the Recertification and Complaint surveys, and as authorized by CMS Dallas Regional Office, imposition of statutory Denial of Payment for New Admissions (DPNA) effective **May 22, 2008** remains in effect. This remedy will remain in effect until Taos Living Center demonstrates substantial compliance with an acceptable PoC and subsequent revisit, or your provider agreement is terminated . . . . **Please note that the remedies for this Complaint survey are a continuation of an enforcement action that began with the Recertification survey conducted on February 20 and 22, 2008 . . . .** Loss of DPNA will also result in the inability of Taos Living Center to become eligible to participate in the Nurse Aide Training and Competency Evaluation Program (NATCEP). This prohibition will be effective for a two (2) year period beginning May 22, 2008 through May 21, 2010.

Appeal rights were again explained to Petitioner for the citations for noncompliance identified in the June 13, 2008 letter. Petitioner appealed the noncompliance identified in the June 13, 2008 letter (from the May 29, 2008 survey) and the case was docketed as Docket No. C-08-667 and assigned to me for hearing and decision.

By letter dated June 26, 2008, NMDH recommended that the remedy of termination of Petitioner's provider agreement, scheduled for July 22, 2008, be extended to August 22, 2008, in order to afford Petitioner additional time to achieve substantial compliance and avoid termination. CMS Ex. 2.

On July 10, 2008, NMDH conducted yet another complaint survey and again found noncompliance. By letter dated July 28, 2008, NMDH notified Petitioner that it had been found out of substantial compliance with participation requirements. The agency also notified Petitioner that it was recommending to CMS that a civil money penalty (CMP) be imposed and that Petitioner's provider agreement be terminated if correction was not made prior to August 10, 2008. The NMDH letter of July 28, 2008 also stated that:

> Denial of Payment for New Admissions became effective on May 22, 2008 and will remain in effect until compliance has been attained or Termination of Provider Agreement has occurred . . . . **Please note that the remedies for this Complaint**

> **survey are a continuation of an enforcement action that began with a previous surveys [sic] conducted on February 20 and 22, 2008; and a Complaint survey conducted on 5/29/08** . . . . Loss of DPNA resulted in the inability of Taos Living Center to be eligible to participate in the Nurse Aide Training and Competency Evaluation Program (NATCEP). This prohibition is effective for a two (2) year period beginning May 22, 2008 through May 21, 2010.

Its appeal rights were explained to Petitioner, and Petitioner appealed the noncompliance identified in the July 28, 2008 letter (from the July 10, 2008 survey); the case was docketed as Docket No. C-08-761 and assigned to me for hearing and decision.

On August 5, 2008, CMS sent a notice letter to Petitioner. It referred to NMDH's February 20 and 22, May 29, and July 10, 2008 surveys and stated that the surveys had found Petitioner not in substantial compliance with participation requirements. It announced that CMS concurred with the state survey agency's findings and that Petitioner's Medicare agreement would terminate as of August 22, 2008, unless Petitioner achieved substantial compliance, informed Petitioner that CMS had imposed per-instance CMPs, and then stated that:

> **DENIAL OF PAYMENT FOR NEW ADMISSIONS: Payment will be denied for all new Medicare and Medicaid admissions, effective May 22, 2008.** *Under CMS's authority, the State Agency had sent you notice of this imposition in their March 19, 2008 notice letter.* Your intermediary will be notified via copy of this letter. **This denial of payment will continue until your facility achieves substantial compliance or your provider agreement is terminated, whichever comes first.**

CMS then notified Petitioner that sections 1819(f)(2)(B) and 1919(f)(2)(B) of the Act require a facility to lose NATCEP if it is subject to a DPNA. Petitioner was told if it disagreed "with **the determination of noncompliance (and/or substandard quality of care, if applicable)**" Petitioner could request a hearing.

By letter dated September 9, 2008, NMDH notified Petitioner that it was found in substantial compliance based on a health revisit conducted on August 14, 2008. CMS Ex. 3.

By letter dated October 3, 2008, Petitioner appealed the August 5, 2008 notice letter, the case was docketed as Docket No. C-09-9, and the case was assigned to me for hearing and decision.

By letter dated October 23, 2008, CMS notified Petitioner that because it had achieved substantial compliance, CMS was rescinding the termination remedy and the per-instance CMP, but that the DPNA "**ALREADY IMPOSED AND IN EFFECT** from **May 22,**

2008 through August 13, 2008" concluded as of August 13, 2008, and, thus, was not rescinded. CMS Ex. 4.

I consolidated the three cases for hearing on October 10, 2008, under Docket No. C-08-667. On November 5, 2008, CMS submitted its Motion for Summary Disposition (CMS Br.) accompanied by seven exhibits (CMS Exs. 1-7). Petitioner submitted its Response on November 25, 2008 (P. Br.), accompanied by two exhibits (P. Exs. A and B). CMS submitted its Motion for Leave to File a Reply Brief on December 15, 2008, accompanied by its Reply Brief (CMS Reply), which I accepted. Petitioner submitted its Sur-Reply (P. Reply) on January 6, 2009. In the absence of objection, I admit all exhibits submitted by the parties.[3]

II. Issues

A. Is summary disposition appropriate?

B. Is Petitioner entitled to a hearing as to whether it was in substantial compliance during the February surveys?

C. Is Petitioner entitled to a hearing with regard to the date on which it achieved substantial compliance?

D. Is the DPNA effective May 22, 2008 required by law?

III. Legal Background

The Act sets forth requirements for long-term care facilities participating in the Medicare and Medicaid programs and authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations implementing the statutory provisions. Act, sections 1819 and 1919.

Long-term care facilities participating in Medicare and Medicaid are subject to the survey and enforcement procedures set out in 42 C.F.R. Part 488, subpart E, to determine if they are in substantial compliance with applicable participation requirements at 42 C.F.R. Part 483, subpart B. "Substantial compliance" means a level of compliance with participation

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[3] I also note that where I refer to a letter from NMDH or CMS that was not filed as an exhibit, the letter is in the record as an attachment to Petitioner's hearing request. Specifically, the June 13, 2008 notice letter was attached to Petitioner's August 12, 2008 hearing request; the July 28, 2008 notice letter was attached to Petitioner's September 26, 2008 hearing request; and the August 5, 2008 notice letter was attached to Petitioner's October 3, 2008 hearing request.

requirements such that "any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance," is defined as "any deficiency that causes a facility to not be in substantial compliance." *Id.*

When a facility is found not to be in substantial compliance the facility is subject to various enforcement remedies. Section 1819(h)(2)(D) of the Act requires the Secretary of Health and Human Services to impose a DPNA if a facility has not complied with participation requirements "within 3 months after the date the facility is found to be out of compliance with such requirements[.]" Regulations implementing this statutory provision at 42 C.F.R. § 488.417(b)(1) require that a DPNA be imposed if a facility does not achieve substantial compliance within three months of the survey identifying noncompliance. Payments to a facility "resume prospectively on the date that the facility achieves substantial compliance, as indicated by a revisit or written credible evidence acceptable to CMS (under Medicare) or the State (under Medicaid)." 42 C.F.R. § 488.417(d).

For a facility to be entitled to a hearing, the noncompliance must constitute an initial determination as set out at 42 C.F.R. § 498.3. The regulations require that a facility file a hearing request "in writing within 60 days from receipt of the notice of initial, reconsidered or revised determination unless that period is extended in accordance with paragraph (c) of this section." 42 C.F.R. § 498.40(a)(2). If a facility fails to appeal an initial determination, that determination becomes administratively final and binding. 42 C.F.R. § 498.20(b). An administrative law judge (ALJ) may extend the period of time for filing a hearing request for "good cause." 42 C.F.R. § 498.40(c). "Good cause" has been defined as circumstances beyond the ability of a party to control. *Hillcrest Healthcare, L.L.C.,* DAB No. 1879 (2003); *Glen Rose Medical Center Nursing Home*, DAB No. 1852 (2002); *Hospicio San Martin*, DAB No. 1554 (1996). "Good cause" has not been found where a party chose not to request an extension. *In the Cases of: Hammonds Lane Center, Spa Creek Center, Rose View Center, and Salisbury Center*, DAB No. 1853 (2002).

Except in a situation where a state is taking action against a non-state operated nursing facility, either CMS or a state (as authorized by CMS) may give notice of a remedy, including: the nature of the noncompliance; the remedy imposed; the effective date of the remedy; and the right to appeal the determination leading to the remedy. 42 C.F.R. § 488.402(f)(1). Thus, a state has the authority to impose any remedy CMS has the authority to impose, as directed by CMS. *Medicare and Medicaid Programs; Civil Money Penalties for Nursing Homes (SNF/NF), Change in Notice Requirements, and Expansion of Discretionary Remedy Delegation*, 64 Fed. Reg. 13354 (March 18, 1999).

IV. Findings of Fact, Conclusions of Law and Discussion[4]

A. Summary disposition is appropriate.

CMS is entitled to summary disposition if, after I have viewed all evidence in the light most favorable to Petitioner, and have viewed all inferences reasonably to be drawn from that evidence most favorably to Petitioner, I find CMS has made a *prima facie* showing that Petitioner was not in substantial compliance with participation requirements, that there is no dispute about any material fact supporting CMS's case, and that CMS is otherwise entitled to judgment as a matter of law. *Brightview Care Center,* DAB No. 2132 (2007); *Madison Health Care, Inc.,* DAB No. 1927, at 5-7 (2004). 42 C.F.R. Part 498 does not specify detailed summary disposition procedures, but this forum looks to FED. R. CIV. P. 56 for guidance in applying those procedures in the context of the regulations; *see, e.g., Matsushita Elec. Industrial Co. v. Zenith Radio*, 474 U.S. 574, 587 (1986); *Alden-Princeton Rehabilitation and Health Care Center*, DAB No. 1978, at 5, n.1 (2005). As explained below, in light of Petitioner's failure to timely request a hearing with regard to the deficiencies cited in the March 19, 2008 notice letter, and that Petitioner was not found to be in substantial compliance until after May 22, 2008, the DPNA imposed is required by law and summary disposition in favor of CMS is warranted.

B. Petitioner is not entitled to a hearing with regard to the February surveys.

Petitioner asserts that the March 19, 2008 letter is not a "Determination Letter." P. Br. at 6. Petitioner argues that the letter was not sent to Petitioner by CMS and thus did not comport with the express requirements of 42 C.F.R. § 498.20(a), which reflects that CMS or the OIG, as appropriate, mail notice of an initial determination to an affected party, setting forth the basis for the determination, the effect of the determination, and the parties right to reconsideration or hearing. Petitioner asserts the March 19 letter did not set forth with specificity the required findings of noncompliance and only refers to the statement of deficiencies. And, argues Petitioner, the letter fails to set forth a determination of noncompliance, stating instead that it was a finding of noncompliance and a recommendation by NMDH, the state survey agency.

Petitioner also asserts that even if I determine that the March 19, 2008 letter constitutes an initial determination, it was expressly revised and replaced by the August 5, 2008 letter from CMS, which expressly permitted Petitioner to request a hearing on the determinations of noncompliance and propriety of remedies involved within 60 days of August 5, 2008. Moreover, Petitioner asserts that the express terms of the August 5, 2008 letter constitute an extension of any deadline to request a hearing until October 3, 2008,

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[4] My findings of fact and conclusions of law are shown as topic headings below. Each finding is shown in bold and italics.

and Petitioner argues that I should conclude that the August 5, 2008 letter constitutes just cause to extend the deadline for filing a hearing request related to the March 19, 2008 letter. P. Br. at 6-10. However forcefully presented, Petitioner's arguments are unavailing.

The regulations expressly permit a state survey agency such as NMDH to send notice letters and impose remedies, including a DPNA. 42 C.F.R. § 488.402(f)(1); *see* 42 C.F.R. §§ 488.330(a)(1)(i)(C); 488.330(a)(1)(i)(A); *Medicare and Medicaid Programs; Civil Money Penalties for Nursing Homes (SNF/NF), Change in Notice Requirements and Expansion of Discretionary Remedy Delegation,* 4 Fed. Reg. 13354 (March 18, 1999). Petitioner's interpretation of the express language of the March 19, 2008 letter is not reasonable. The March 19, 2008 letter stated explicitly that it was giving formal notice of the imposition of the DPNA, effective May 22, 2008, "as authorized by CMS" and "[b]ased on deficiencies cited" during the February surveys. CMS Ex. 1, at 2. Moreover, the March 19, 2008 letter, by referring back to the statement of deficiencies and the deficiencies cited during the February surveys, gave Petitioner sufficient specificity with regard to the deficiencies upon which the noncompliance findings were based. CMS Ex. 1; *Birchwood Manor Nursing Center*, DAB No. 1669 (1998). Petitioner's assertion that the March 19, 2008 letter constituted only a finding and a recommendation and not a determination under 42 C.F.R. § 498.20 is also unreasonable. Section 498.3(b)(13) of 42 C.F.R. defines an initial determination with respect to a skilled nursing facility or nursing facility as a "finding of noncompliance that results in the imposition of a remedy specified in § 488.406 . . . ." The DPNA referenced here is such a remedy and it was based on findings of noncompliance identified in the statements of deficiencies from the February surveys.

Petitioner's interpretation of the August 5, 2008 letter from CMS is also unreasonable. The letter did not revise the DPNA remedy or otherwise extend any deadlines emanating from the March 19, 2008 letter. Although the August 5 letter may not be a model of clarity, it expressly noted that the state survey agency had sent Petitioner notice of the DPNA, and its effective date of May 22, 2008, in the March 19, 2008 letter. Moreover, nothing in the August 5, 2008 letter references extending the deadline to request a hearing for the deficiency findings related to the February 2008 surveys. The August 5, 2008 letter imposed per instance CMPs based on later surveys and discussed termination on August 22, 2008, but the additional remedies did not revise the March 19, 2008 letter or impose a new DPNA remedy. Reference to a continuing DPNA is not a revised determination.

Petitioner also has not shown good cause for me to extend the time for filing a hearing request. Petitioner failed to explain why it did not initially file a request for hearing with regard to the March 19, 2008 letter or request an extension of time in which to do so. It is also plain, from the sequence of events noted above and the text of the document itself, that the August 5, 2008 letter does not constitute good cause for my extending such

hearing rights via 42 C.F.R. § 498.40(c)(2). It is axiomatic that facilities participating in the Medicare and Medicaid programs are charged with understanding and complying with the procedural rules governing appeals. *Cary Health and Rehabilitation Center*, DAB No, 1771 (2001). And "under any reasonable definition" of good cause for failure to do so, Petitioner must be seen here to lack that good cause. *Brookside Rehabilitation and Care Center*, DAB No. 2094 (2007); *Hillcrest Healthcare, L.L.C.*, DAB No. 1879; *Hospicio San Martin*, DAB No. 1554.

In sum, the NMDH was authorized by CMS to impose a DPNA in the notice letter dated March 19, 2008. Petitioner was specifically afforded the right to a hearing. Petitioner did not request a hearing within the 60 days provided for by regulation, nor did Petitioner ask for an extension of time to submit a hearing request. Since Petitioner failed to file a hearing request timely it lost its opportunity to contest the deficiencies cited in the March 19, 2008 letter or to contest the imposition of the DPNA based on that noncompliance**.**

C. The DPNA imposed is required by law and Petitioner is not entitled to a hearing with regard to the date on which it achieved substantial compliance.

Petitioner asserts that it was in substantial compliance prior to May 22, 2008, and that imposition of the DPNA based on the February 2008 noncompliance and the March 19, 2008 notice letter is thus improper, as Petitioner asserts that it came back into compliance within 90 days, *i.e.*, by March 28, 2008. Further, Petitioner asserts that it should be provided the opportunity to prove it was in substantial compliance prior to May 22, 2008, and should not be denied a hearing on that issue.

Specifically, Petitioner asserts that in its post-certification revisit report following the August 18, 2008 revisit survey, NMDH reflected that Petitioner had corrected all the deficiencies in the February 2008 surveys on March 28, 2008, consistent with its plan of correction. P. Ex. B. Petitioner asserts that CMS's argument that NMDH's finding of substantial compliance must be limited to the date of the actual onsite revisit is simply wrong. According to Petitioner's argument, the purpose of a revisit is to determine whether deficiencies identified have been corrected and substantial compliance achieved. State Operations Manual, section 7317B(2). Petitioner insists that the revisit should have been conducted prior to expiration of the period in which the facility must achieve compliance to avoid imposition of a mandatory remedy. State Operations Manual, section 7317B. Petitioner complains that NMDH did not fulfill its representation to Petitioner in the March 19, 2008 letter that it would revisit Petitioner prior to May 22, 2008, the date of mandatory DPNA. When NMDH finally made its revisit, it found Petitioner in substantial compliance as of March 28, 2008. Petitioner asserts that it is contrary to applicable regulations not to permit Petitioner to present evidence demonstrating that it was in substantial compliance, and capable of remaining so, on a date preceding the revisit. *See* 42 C.F.R. § 488.454(e).

Section 1819(h)(2)(D) of the Act requires the Secretary to impose a DPNA if a facility has not complied with participation requirements within three months after it is found out of compliance with those requirements. 42 C.F.R. § 488.417(d). In this case, the effective date for the DPNA, based on this section of the Act, was May 22, 2008.

The regulations, at 42 C.F.R. § 488.454(a)(1), provide that alternative remedies such as a DPNA continue until "[t]he facility has achieved substantial compliance, as determined by CMS or the State based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit." Further, payments to a facility "resume prospectively on the date that the facility achieves substantial compliance, as indicated by a revisit or written credible evidence acceptable to CMS (under Medicare) or the State (under Medicaid)." 42 C.F.R. § 488.417(d). A plan of correction does not establish substantial compliance, but is rather a promise that remedial action will be taken in strict accordance with the plan. The plan is not proof that the actions have been effectuated. In and of itself, a plan of correction is not necessarily sufficient to overcome the presumption of continuing noncompliance *A. W. Schlesinger*, DAB CR853, at 6 (2002). Significantly, the regulations do not require CMS to provide affirmative evidence of continuing noncompliance. *Barn Hill Care Center*, DAB No. 1848 (2002).

In the case of *United Presbyterian Residence,* DAB CR1305 (2005), the petitioner also missed the deadline to appeal findings of noncompliance that led to a mandatory DPNA, but requested a hearing based on the compliance date. The ALJ found that the petitioner was precluded from contesting the initial deficiency findings, but that it had preserved its right to prove compliance earlier than the onsite revisit date, citing *Mimiya Hospital*, DAB No. 1833 (2002), where the Board affirmed an ALJ finding that the noncompliance upon which a CMP was imposed was not timely challenged, but the petitioner was allowed to challenge the compliance determination date.

In the ALJ's decision in *United Presbyterian*, the ALJ found that Petitioner failed to prove by a preponderance of the evidence that it had achieved substantial compliance as of the plan of correction date because some of the deficiencies involved required onsite verification. The ALJ noted that certain regulations required an onsite visit to verify compliance, including 42 C.F.R. §§ 483.25(h)(2) (Tag F 324); 483.13(c)(1) (Tag F 224); 483.75(f) (Tag F 498); 483.13(c)(ii) (Tag F 225); and 483.15(a) (Tag F 241).

Here, the statement of deficiencies from the February 22, 2008 survey (CMS Ex. 7) cited deficiencies as a direct result of surveyors' observations of care and interviews with staff related to the use of restraints, pressure sore care, and range of motion. CMS alleges that such noncompliance could not be verified by written evidence, as distinct from the situation discussed in *United Presbyterian*, DAB CR1305, at 9, where the ALJ noted that a petitioner cited for not having a backup generator could use written evidence such as a receipt for payment and installation of such a generator to prove substantial compliance without an onsite revisit. I accept CMS's representation that a plan of care alone would

not have been enough to demonstrate substantial compliance here, where the surveyors needed to *go back to the facility* and *observe the care provided* to facility residents. I find that given the nature of Petitioner's noncompliance Petitioner could not have demonstrated compliance until that revisit date. And although Petitioner argues that the post revisit certification report generated after the August 14, 2008 revisit established Petitioner's substantial compliance on March 28, 2008, that substantial compliance was not what the post revisit certification report found. It found only that the deficiencies cited were corrected as of March 28, 2008, not that Petitioner was in substantial compliance with all other participation requirements. The Board has found that a post certification revisit report containing no statement that a facility was in substantial compliance merely indicates that previously reported deficiencies have been corrected, and that a finding that deficiencies have been corrected is not the same as a determination that a facility has achieved substantial compliance with all participation requirements. *Meadowbrook Manor-Naperville*, DAB No. 2173, at 13-14 (2008).

Moreover, although Petitioner asserts that NMDH should have made its revisit prior to May 22, 2008, the timing of a revisit is solely within the state survey agency's discretion. *Arbor Hospital of Greater Indianapolis*, DAB No. 1591 (1996). Alleged irregularities in the timing of the revisit would not relieve Petitioner from meeting all the requirements of program participation and are thus irrelevant to the finding of noncompliance or the length of that noncompliance. *See Beechwood Sanitarium*, DAB No. 1824 (2002).

V. Conclusion

Summary disposition in CMS's favor is warranted by the facts and law discussed above. The DPNA imposed is required by law. Petitioner failed to request a hearing to dispute the noncompliance with participation requirements found during the February surveys. Petitioner is not entitled to a hearing with regard to the date on which it achieved substantial compliance, because the deficiencies identified during the survey ending on February 22, 2008 required an onsite visit to verify substantial compliance, and the onsite visit was not completed until August 14, 2008. CMS's Motion for Summary Disposition should be, and it is, GRANTED.

/s/
Richard J. Smith
Administrative Law Judge