

Department of Health and Human Service

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Columbus Park Nursing & Rehabilitation	)	Date: November 27, 2009
Center (CCN: 14-5834),	)	
	)	
Petitioner,	)	Docket Nos. C-09-758
	)	Decision No. CR2037
v.	)	
	)	
Centers for Medicare & Medicaid Services.	)	

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**DECISION**

The request for hearing of Petitioner, Columbus Park Nursing & Rehabilitation Center, is dismissed pursuant to 42 C.F.R. § 498.70(b), as Petitioner has no right to a hearing.

**I. Background**

Petitioner requested a hearing before an administrative law judge (ALJ) by letter dated September 21, 2009. Petitioner requests review as to deficiencies cited by the survey of its facility completed on July 20, 2009 by the Illinois Department of Public Health (state agency) and proposed enforcement remedies. The request for hearing was docketed as C-09-758 and assigned to me for hearing and decision on September 29, 2009.

On October 15, 2009, CMS filed a motion to dismiss this case and a motion to stay further proceedings pending a ruling upon its motion with CMS exhibits (CMS Ex.) 1 through 3. On November 4, 2009, Petitioner filed an opposition to the CMS motion to dismiss (P. Opp.) with Petitioner's exhibit (P. Ex.) A. The offered exhibits are admitted.

**II. Findings of Fact, Conclusions of Law, and Discussion**

My conclusions of law are set forth in bold followed by my findings of fact and discussion.

**A. CMS imposed no enforcement remedies in this case and therefore Petitioner has no right to hearing before an ALJ.**

**B. I have no jurisdiction or authority to review alleged deficiencies from a survey absent enforcement remedies based upon those deficiencies.**

**C. Dismissal of Petitioner's request for hearing pursuant to 42 C.F.R. § 498.70(b) is appropriate because Petitioner has no right to a hearing.**

### 1. Pertinent Facts

The state agency completed a complaint survey of Petitioner on July 20, 2009. No extended survey was conducted. The Statement of Deficiencies (SOD) for the survey alleges that Petitioner violated 42 C.F.R. § 483.13(b)(1)(i) with one resident suffering actual harm due to the violation. CMS Ex. 1. The state agency notified Petitioner by letter dated July 23, 2009, that it was proposing that CMS impose the following enforcement remedies: directed in-service training and a civil money penalty of \$200 per day effective July 20, 2009. The state agency also advised Petitioner that it would be allowed an opportunity to correct the alleged deficiency before any remedies would be imposed. CMS Ex. 2, at 2. CMS notified Petitioner by letter dated October 5, 2009, that the state agency determined, based on a revisit survey, that Petitioner had returned to substantial compliance with program participation requirements effective August 4, 2009, and that no remedies would be imposed for the alleged deficiency. CMS Ex. 3.

### 2. Analysis

CMS argues in its motion to dismiss that no remedy was imposed; that Petitioner has no right to a hearing; and that dismissal of the request for hearing is required. Petitioner argues that the request for hearing should not be dismissed and that Petitioner should be accorded a hearing. I conclude that Petitioner's request for hearing must be dismissed. CMS determined to impose no enforcement remedies, Petitioner has no right to review, and I have no authority to render a decision that addresses the merits of the alleged deficiency.

Petitioner advances four theories in its opposition to the CMS motion to dismiss, which I summarize as follows: (1) citation of the violation was based on an improper conclusion that Petitioner provided substandard quality of care without giving Petitioner an opportunity to challenge the findings; (2) citation of a regulatory violation and alleging a resident suffered actual harm "amounts to an adverse and significant consequence/interference with a property right;" (3) citation of a regulatory violation without affording Petitioner a right to hearing is "a deprivation of [Petitioner's] rights, in contradiction of fundamental fairness and procedural due process enumerated in the Constitution;" and (4) citation of a violation without the opportunity for hearing

“encourages error and abuse of the survey process.” P. Opp. 1-2. I conclude that the theories Petitioner presents in its opposition to the motion to dismiss are without merit.

Petitioner does not dispute that CMS decided to impose no enforcement remedies in this case. Petitioner does not specifically address the rationale of various ALJs and appellate panels of the Departmental Appeals Board (the Board) in prior cases in which a long-term care facility has been found to have no right to an ALJ hearing when CMS imposed no enforcement remedy or CMS reopened and revised an initial determination and rescinded all enforcement remedies resulting in dismissal of a pending request for hearing pursuant to 42 C.F.R. § 498.70(b). I find the rationale expressed in the prior Board and ALJ decisions persuasive.

A provider does not have a right to a hearing to challenge every action by CMS with which it disagrees. Only certain actions by CMS or its delegates trigger hearing rights. In general, a participating long-term care facility will have a right to a hearing if CMS makes an initial determination to impose an enforcement remedy against that facility. 42 C.F.R. § 498.3(b)(13). The possible remedies that CMS might impose against a facility are specified at 42 C.F.R. § 488.406(a). No right to a hearing exists pursuant to 42 C.F.R. § 498.3(b)(13) unless CMS determines to impose - and actually imposes - one of the specified remedies. 42 C.F.R. § 488.408(g) (“facility may appeal a certification of noncompliance leading to an enforcement remedy”); *Fountain Lake Health & Rehabilitation, Inc.*, DAB No. 1985 (2005); *The Lutheran Home - Caledonia*, DAB CR674, *aff’d*, DAB No. 1753 (2000); *Schowalter Villa*, DAB CR568, *aff’d*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB CR424, *aff’d*, DAB No. 1607 (1997); *Twin Pines Nursing and Rehabilitation Center*, DAB CR1601 (2007). The Secretary of Health and Human Services specifically rejected a proposal to grant hearing rights for deficiency findings that were made without the imposition of remedies. 59 Fed. Reg. 56,116, 56,158 (Nov. 10, 1994) (“if no remedy is imposed, the provider has suffered no injury calling for an appeal”).

It is specifically the imposition or proposed imposition of an enforcement remedy and not the citation of a deficiency that triggers the right to a hearing under 42 C.F.R. Part 498. When the enforcement remedy is eliminated, so too, is Petitioner’s right to review and my authority to conduct the review. *Fountain Lake Health & Rehabilitation, Inc.*, DAB No. 1985; *Twin Pines Nursing and Rehabilitation Center*, DAB CR1601; *see EagleCare, Inc. d/b/a/ Beech Grove Meadows*, DAB CR923 (2002); *Schowalter Villa*, DAB No. 1688; *Arcadia Acres, Inc.*, DAB No. 1607; *see also The Lutheran Home – Caledonia*, DAB No. 1753; *Walker Methodist Health Center*, DAB CR869 (2002); *Charlesgate Nursing Center*, DAB CR868 (2002); *D.C. Association for Retarded Citizens*, DAB CR776 (2001); *Alpine Inn Care, Inc., d/b/a Ansley Pavilion*, DAB CR728 (2001); *Woodland Care Center*, DAB CR659 (2000); *Fort Tryon Nursing Home*, DAB CR425 (1996). In each of these cases, the failure or inability of the petitioner to demonstrate that the appealed survey findings and deficiency determinations had resulted in a remedy was fatal to its appeal. In each of the cases, the appeal was dismissed. The appellate panels

of the Board and the ALJs who decided the cases have uniformly concluded that a citation of deficiency that is not the basis for an enforcement remedy, or that results in the imposition of a remedy that is later rescinded or reduced to zero, does not trigger the right to a hearing under 42 C.F.R. Part 498.

Petitioner argues that it should be granted the opportunity to challenge the conclusions of the survey as incorrect and against the weight of the evidence. P. Opp. at 2-3. Petitioner argues that the survey conclusions are based upon the unreliable statements of the resident, the subject of the alleged violation, who suffered a chronic mental illness. Petitioner's allegations go to the merits of the regulatory violation cited by the survey and are not subject to my review because, under the controlling regulation, Petitioner has no right to review of the survey allegations. Petitioner argues that the citation of a violation that allegedly resulted in actual harm to a resident has adverse and significant consequences to the facility, including: the violation is easily accessible by the public on the internet without any indication that the violation is subject to dispute; the alleged violation negatively impacts Petitioner's "star rating" and its reputation which will likely deter resident admissions and referrals; and the violation will likely negatively impact future surveys and any resulting enforcement remedies and may jeopardize Petitioner's license. P. Opp. at 4-6. The adverse consequences foreseen by Petitioner are speculative. However, even if I accept that the alleged adverse consequences are possible, the regulations nevertheless limit my authority to reviewing those cases where an enforcement remedy authorized by the regulations is actually imposed. None of the adverse consequences foreseen by Petitioner are enforcement remedies listed in the regulations. Petitioner suggests that CMS has the option of simply removing the alleged violation from its record (P. Opp. at 5), and while that may be correct, it is not within my authority to direct CMS or the Secretary to take such action. Petitioner argues that denying it a hearing results in a violation of its right to due process and undermines principles of fundamental fairness. P. Opp. at 6-8. Petitioner cites cases where the courts have recognized that a party is entitled to a hearing when governmental action deprives the party of a protected interest. However, it is not within my authority to address Petitioner's Constitutional challenges to either the Secretary's regulations or the Social Security Act. Finally, Petitioner argues that depriving it of a hearing facilitates error and encourages abuse of the survey process. P. Opp. at 8-9. This argument challenges the policy underlying the Secretary's regulations, and is not within my authority to review. *Florida Health Sciences Center, Inc., d/b/a Tampa General Hospital*, DAB No. 2263, at 5-6 (2009) (Board and ALJs do not have authority to ignore unambiguous statutes or regulations on grounds that they are unconstitutional).

I conclude, based upon the Secretary's regulations and the rationale of prior decisions by the Board and ALJs, that Petitioner does not have a right to a hearing in this case and I have no jurisdiction to grant the review requested.

**III. Conclusion**

For the foregoing reasons, Petitioner's request for hearing is dismissed pursuant to 42 C.F.R. § 498.70(b).

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Keith W. Sickendick  
Administrative Law Judge