



Center for Clinical Standards and Quality/Survey & Certification Group

Ref: S&C: 18-02-NH

DATE: October 27, 2017

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Clarification regarding Nurse Aide Training and Competency Evaluation Program (NATCEP/CEP) Waiver and Appeal Requirements

Memorandum Summary

- **Existing Waiver and Appeal Authorities:** The Centers for Medicare & Medicaid Services (CMS) is providing clarification regarding existing statutory and regulatory authority regarding waivers and appeals of NATCEP/CEP prohibition or loss.

Background

The NATCEP/CEP is a statutory requirement and is the standardized training program that all nurse aides must meet to work in a Skilled Nursing Facility (SNF), Nursing Facility (NF) or a dually participating SNF/NF. States operate the approval process for the NATCEP/CEP programs.

Sections 1819(f)(2)(B)(iii)(I) and 1919(f)(2)(B)(iii)(I) of the Social Security Act (the Act) prohibit the approval, in certain cases, to operate a NATCEP/CEP program for two years based on survey findings or waivers of minimum requirements for licensed nurse coverage.

Specifically, a facility may not operate a NATCEP/CEP program for two years if:

1. It is operating under a waiver for coverage by licensed nurses;
2. It has been subject to an extended survey or partial extended survey;
3. It has been assessed a Civil Money Penalty (CMP) of at least \$10,483 as adjusted by 45 CFR 102*; or,
4. Has been subject to imposition of a denial of payment, temporary manager, or termination.

* The assessed amount is the final CMP amount determined to be owed, e.g., after waiver of right to a hearing, administrative appeals, settlement, dispute resolutions.

Note: Per the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, adjustments to the civil money penalties are expected to be published annually. These adjustments will be published in the Federal Register and located at 45 CFR Part 102.

If a facility loses the authority to operate a NATCEP/CEP program, in some cases, they may regain the ability to operate their program prior to end of the 2-year ban through the following authorities or waivers:

1. State Authority to Waive NATCEP/CEP Disapproval

Sections 1819(f)(2)(C) and 1919(f)(2)(C) of the Social Security Act (the Act) provide waiver authority for NATCEP/CEP if the State—

- (i) determines that there is no other such program offered within a reasonable distance of the facility,
- (ii) assures, through an oversight effort, that an adequate environment exists for operating the program in the facility, and,
- (iii) provides notice of such determination and assurances to the State long-term care ombudsman.

The State is responsible for development of policies and procedures to implement this waiver authority. For example, the state may require that the facility submit a specific waiver request to the State. The State will make the final determination after considering the recommendations and facts of the case as provided by the facility and in accordance with each of the above requirements, as operationalized by the State.

The State's authority to waive the NATCEP/CEP loss can be granted under any of the reasons described above, provided that the statutory requirements and any additional programmatic requirements established by the State are met.

2. CMS Regional Office authority to waive disapproval of NATCEP/CEP Due to Civil Money Penalties (CMPs) - 1819(f)(2)(B)(iii)(c), (D) and 42 CFR §483.151

Facilities may also request a waiver of NATCEP/CEP loss based on a CMP if the amount imposed is at least \$10,483 as adjusted by 45 CFR 102 and the CMP was **not** related to the quality of care furnished to residents. "Quality of care furnished to residents" means the direct hands-on care and treatment that a health care professional or direct care staff furnished to a resident. This definition is not limited exclusively to Substandard Quality of Care (SQC) deficiencies.

A waiver based on NATCEP/CEP loss due to a CMP must be submitted to the State Survey Agency. The State will refer this request to the CMS Regional Office (RO). While the waivers should be submitted to the State, CMS will make the final determination on a case by case basis after considering the recommendation and facts of the case as provided by the State.

3. Appeal Rights in Cases for NATCEP/CEP Disapproved Due to Extended/Partial Extended Survey - 42 CFR §§498.3(b)(14)(ii) and 498.3(b)(16)

When NATCEP/CEP is lost due to an extended or partial extended survey as a result of Substandard Quality of Care (SQC) findings, the facility has the right to request an appeal of these findings to the HHS Departmental Appeals Board (for SNFs and SNF/NFs) or the state (for NFs).

The loss of NATCEP occurs after the time frame for requesting a hearing has expired, after receipt of a written waiver of appeal, or after the civil money penalty is upheld on administrative appeal.

Other Considerations

In addition to a formal appeal process, facilities are offered dispute resolution processes, which may affect the outcome of the disapproval or loss of the NATCEP/CEP program:

- Regulations at 42 CFR §488.331 require that facilities are offered an informal opportunity to dispute cited deficiencies through an Informal Dispute Resolution (IDR) process.
- In addition, sections 1819(h)(2)(B)(ii)(IV) and 1919(h)(2)(B)(ii)(IV) of the Act and regulations at 42 CFR §488.331 facilities are provided the opportunity to request and participate in an Independent IDR process (IIDR) if CMS imposes CMPs and these penalties are subject to being collected and placed in an escrow account pending a final administrative decision.

An IDR or an IIDR that removes or reduces the findings that required the loss of NATCEP/CEP will result in a restoration of that facility's program.

Contact: If the State has questions above the NATCEP/CEP program, please contact the CMS Regional Office. For other questions, please feel free to send these to the dnh_triageteam@cms.hhs.gov.

Effective Date: Immediately. This reminder of current policy should be communicated with all survey, certification and enforcement staff, their managers, State/Regional Office training coordinators and the State Nurse Aide registry staff within 30 days of this memorandum.

/s/
David R. Wright

Attachment: Waiver and Appeals Authority Chart

cc: Survey and Certification Regional Office Management
State Medicaid Agencies

Attachment 1

**WAIVER AND APPEAL AUTHORITIES FOR DISAPPROVAL or LOSS OF
NATCEP/CEP PROGRAMS**

*Facilities may seek any of the following in pursuing review of their disapproval or loss of their
NATCEP/CEP program.*

Reason for Disapproval	Extended/Partial Extended Survey, CMP, Denial of Payment, Temporary Manager, Waiver of Licensed Nurse	CMP of no less than \$10,483 – due and payable	Extended/Partial Extended Survey Finding of SQC
Waivers Allowable	<p>NATCEP program, may be offered in (but not by) a SNF or NF if the State—</p> <ul style="list-style-type: none"> (i) determines that there is no other such program offered within a reasonable distance of the facility, (ii) assures, through an oversight effort, that an adequate environment exists for operating the program in the facility, and (iii) provides notice of such determination and assurances to the State long-term care ombudsman. 	<p>If the deficiency is not related to Quality of Care for residents – meaning direct hands-on care and treatment that a health care professional or direct care staff furnished to a resident</p>	
Appeal Rights			<p>Appeal of Level of Non-compliance - 42 CFR §§498.3(b)(14)(i)(ii), (b)(16)</p>
Who Determines	<p>State determines, does not require CMS approval.</p>	<p>State Recommends/CMS Regional Office Determines</p>	<p>SNF only and SNF/NF - Departmental Appeals Board (DAB) determines. NF only – State determines</p>
Authority	<p>Sections 1819(f)(2)(C) and 1919(f)(2)(C) of the Act</p>	<p>1819(f)(2)(B)(iii)(c), 42 CFR §483.151</p>	<p>42 CFR §§498.3(b)(14)(i)(ii),(16)</p>