



# Direct Connect



## CMS Wins Legal Challenge from Beverly Enterprises

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**O**n September 18th, 2002, the United States District Court for the District of Columbia upheld DHHS's decision to terminate Spring Hill nursing home.

On June 2, 1998, HCFA terminated Spring Hill's contract to participate in the Medicare and Medicaid programs. This termination was upheld by an Administrative Law Judge and also affirmed by the Departmental Appeals Board (DAB).

After the DAB decision was rendered, Beverly Health and Rehabilitation Services, the parent company, sued both Secretary Tommy Thompson and Thomas Scully.

Beverly used the Spring Hill case to challenge the validity of the Federal nursing home enforcement regulations and the standard survey protocol used by the State and Region to monitor compliance. Beverly also challenged the termination decision as being arbitrary and capricious. Beverly asserted that the survey protocol had not been validated.

The Memorandum Opinion, which is **posted in the Direct Connect library**, contains a detailed history of the nursing home legislation and regulation that were considered in this civil action.

The court addressed the six arguments made by Beverly:

- Does Beverly have standing to challenge the survey protocol?
- Does CMS use of the survey protocol violate the statute, the APA or the 5th Amendment?

- Is CMS's enforcement regulations invalid because of a failure to respond to comments regarding the invalidity of the survey protocol or to disclose the Abt Study?
- Was the termination decision arbitrary and capricious, not in accordance with law, or in violation of Beverly's rights to due process and equal protection under the law.?

The 74-page legal Memorandum Opinion concludes:

"Based on the foregoing, the Court concludes that Spring Hill's termination should not be reversed and HHS's survey protocol will not be enjoined. Accordingly, defendants' motion for summary judgement is granted. And plaintiff's motion for summary judgment is denied."

**"At the outset, the Court must reject plaintiffs' attempt to reverse Spring Hill's termination on the grounds that the survey is 'invalid'.**

- Can the survey protocol be used as an enforcement tool if it was not promulgated through notice and comment rulemaking proceedings?

Contributed by: Cindy Graunke

## GAO Follow-Up Study on Nursing Home Oversight and Improvement Program Delayed

The GAO report originally due out in September/October has now been delayed until December or January. GAO is currently working on another part of their investigation—the Nursing Home Quality Initiative. We will keep read-

ers apprised of the progress on this study when we get more information.



**GAO**

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## Expert Witness Contract

**A**fter a year in operation, the Expert Witness contract has almost reached its goal of obtaining a network of 100 experts in the various fields of nursing home care. The *Acquisition of Expert Witnesses for the Administrative Hearing Process*' contract, or the "Expert Witness" contract is designed to develop and maintain a readily available resource network of expert consultants to serve in the capacity of expert witnesses in administrative hearings. Our contractor, American Institutes for Research (AIR), obtains the experts, pays the fees and expenses of witnesses whose services are utilized for the benefit of CMS in administrative hearings concerning survey results. The contractor works with the CMS's project officer, as well as the attorney representing CMS in the litigation process. The contractor will arrange, once an expert is selected by the OGC attorney, the witness' travel, and will pay for fees and associated expenses (airfare, hotel, etc., if applicable). Government travel policies apply.

To date CMS has received a total of 44 requests, five of these cases have either been withdrawn or settled out of court. CMS has received requests from all but two regions. Experts have served in a number of capacities, from pre-briefing consultation and pre-case prep work to testifying before an Administrative Law Judge. Expertise includes: dementias (geriatric psychiatry, psychology and neurology), geriatric nursing, geriatric dentistry, pressure sores, falls, use of restraints, psychotropic medications, psychological effects of abuse and neglect, and multiple medical and surgical specialties. We have identi-

fied experts in medical ethics (e.g., related to do-not-resuscitate orders) and experts in both clinical immunology and entomology for arcane cases such as fatalities due to bites from fire ants. If a case occurs that is extremely unique, i.e. in the case of the fatalities due to fire ants, AIR will research the field to obtain the top subject-matter expert.

The process of acquiring an expert involves a few simple steps and results in the attorney, once a request is made, receiving names and curriculum vitae of the experts within 2 to 3 days. All OGC attorney's who are in need of an expert, must submit an "Expert Request - Case Intake Form," the form is available via email, an inquiry can be made to Carla McGregor, project officer, either by phone at 410-786-0663 or via email at [cmcgregor@cms.hhs.gov](mailto:cmcgregor@cms.hhs.gov). These forms allow CMS to keep track of the providers involved, the number of hours an expert is needed, the types of penalties imposed, the nature of the case itself and the relevant F-tags. This contract is currently been extended until September 2003, and we have begun exploring the possibility of obtaining expert consultants for ICF/MR administrative hearings.

By Carla McGregor

## FOSS Update

### Background

In 1999, CMS awarded a contract to the American Institutes for Research (AIR), to assist with the improvement of the existing oversight survey process. A Federal Oversight Support Survey (FOSS) Redesign Workgroup was formed, and from multiple face-to-face meetings and conference calls, a new procedure and policy was created. During the summer of 2000, the members of the FOSS Redesign Workgroup held three training sessions targeted to Regional Office long term care survey staff. The revised FOSS protocol became effective October 1, 2001.

### What's been happening?

During the last eleven months, several policies and procedures have been clarified and created to assist in implementation consistency. These include the revision

of the State Operations Manual Section 4157 and the development of the process for State Agencies to resolve disagreements resulting from FOSS. In order to improve communication between the Central and Regional Offices, a FOSS Standing Committee was formed and the current members include: Patricia Farren\*, RI, Norma Birkett, RII, Margaret Kosherzenko\*, RIII, Leontyne Holloway, RIV, Jan Suzuki, RV, Betty Andrade-Hayes, RVI, Jeri Jackson\*, RVII, Paul Greenberg\*, RVIII, John Motter\*, RIX, David Kerschner\*, RX, Alisa Overgaard, CO, and Dawn Hawkins Johnson\*, CO. The Standing Committee meets the first Thursday of each month.

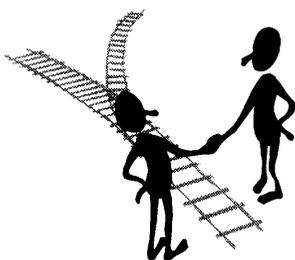
In addition, the FOSS database has been revised to accommodate the new process and scoring system, Comparative survey reports and has been programmed to calculate

the 2002/2003 State Performance Standard #3 reports. This has been a very tedious process and special thanks go to Nancy Walker, RVIII, Alan Zendell, CO, DNS, and Dawn H. Johnson, CO, DNH for seeing this effort through to completion. The FMS/FOSS database is being transferred back to Central Office and the point of contact for all database related issues is Alan Zendell in the Division of National Systems.

### Let's evaluate!

Over the last three months AIR has been performing an evaluation of the process as implemented by CMS. This evaluation will include:

- 1) a database review to see how consistent Regions are in scoring and supporting



## Welcome New Managers

### Boston Regional Office: Syrena Gatewood, Survey and Enforcement Branch

CAPT Syrena Gatewood, USPHS is the new Branch Chief for Survey and Enforcement in the Boston Regional Office. Syrena is a pharmacist by profession with MBA in Health Care Administration.

Syrena's career has included stints at St. Elizabeth's Hospital in Washington D.C., the Indian Health Service in New Mexico and the Federal Bureau of Prisons in North Carolina. In addition she has taught pharmacology and served as a pharmacist for small retail chain and a rural hospital.

Ms. Gatewood is originally from Maine, went to college at University of Connecticut. Her husband of 21 years is retired from the USPHS and they have a 19 year old daughter at St. John's College in Annapolis. They have lived in Washington, DC, Bethel, Alaska, Grants, NM, Butner, NC and now in Swampscott, MA.



### San Francisco Regional Office Caroline Krewson ARA, Division of State Operations

Caroline Krewson is the new ARA for State Operations in San Francisco. Caroline has been in a series of senior management positions with the Department of the Navy, the United States Copyright Office, and most recently the Library of Congress. She was Vice President of a non-profit, consumer counseling organization directing program services in housing, human resources, education, and community relations. She is also a Lieutenant Colonel and squadron commander with the Air Force Reserve. She brings great leadership ability, federal management experience, and a wealth of knowledge to CMS.

### Seattle Regional Office David Kershner Surveyor Quality and Standards Branch

David Kershner is a Captain with the USPHS. He has been Acting Branch Managers for the Survey Quality and Standard Branch "B" in Seattle for some time. He holds a Masters of Science in Nursing. He has been a surveyor since 1989 and was a Public Health Nurse with Indian Health service previous to his job as a surveyor.

He has represented Seattle and CMS by participating on the national redesign workgroup and as regional ICFMR lead for Survey and Certification in Seattle. He is very enthusiastic and is excited about developing his skills as a manager.

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S2-12-25  
Baltimore, Maryland 21244

**Survey & Cert  
Letters on the  
Web—www.cms.  
gov**

**Recent Survey & Certification  
Letters Related to Nursing  
Homes**

**S&C-02-44**  
Impact of Nursing Shortage on  
Hospice Care

**S&C-02-45**  
Comparative Surveys for  
FY'2003

Web Address

[http://www.cms.hhs.gov/  
medicaid/ltcsp/ltcmemos.asp](http://www.cms.hhs.gov/medicaid/ltcsp/ltcmemos.asp)



their scores with documenta-  
tion;

- 2) determining where clarification or re-education may be needed to ensure reliable scoring practices among and within Regions;
- 3) analyzing feedback from questionnaires distributed to RO surveyors who currently conduct FOSS surveys; and
- 4) conducting focus groups with both RO and SA management and survey staff.

AIR has conducted a focus group in Kansas City and Philadelphia thus far and is planning to conduct two more focus groups, in Denver and at the AHFSA meeting in Williamsburg.

\*Members of the FOSS Redesign Workgroup

Dawn Hawkins Johnson

## Basic Course Attendance

In April 2002, we began inviting a small number of outside representatives to attend our Basic Long Term Care courses. The outside representatives may attend by invitation only, and they must come from national provider or consumer advocacy organizations. The number of outside representatives is limited and in proportion to the overall size of each class. Each national organization may send one representative to one class. To date, two outside representatives have accepted our invitation and attended a class.

To participate, the outside representative must agree to abide by a set of ground rules and to share information from the class with

others in the organization. The ground rules are designed to sustain the essential objective of the training while allowing us to share knowledge and information about our program beyond our traditional audience. They include prohibitions on videotaping or audiotaping the class and asking provider-specific or interest-specific questions.

Pam Vocke

## Highlights & Upcoming Events

### September Highlights

- **Activities Satellite** on September 27

### October

- **Happy New Year — First day of FY'2003 — Oct 1**
- **Survey & Certification Group Call**  
— October 9, 2-3 pm  
— October 23, 2-3 pm
- **AHFSA Conference—**  
October 20-23; Williamsburg, VA
- **Nursing Home Open Door Call —October 29, 6-7pm**

### November

- **Seattle RO/SA Meeting** tentatively planned the Week of November 11th.
- **Denver RO/SA Meeting** November 19, 20, and 21, 2002.