Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
CarePlex of Silver Spring,	)	Date: June 11, 1998
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-547
	)	Decision No. CR536
Health Care Financing Administration.	)	
	)	

DECISION ON REMAND

I decide that the Health Care Financing Administration (HCFA) is authorized to collect a civil money penalty from Petitioner, CarePlex of Silver Spring, in the amount of $50 per day for the 79-day period that began on September 28, 1995 and which ended on December 15, 1995. The total amount of the civil money penalty that HCFA is authorized to collect from Petitioner is $3,950. In brief summary, my decision is as follows.

This is a case in which HCFA determined to impose a $750 per day civil money penalty against Petitioner for the period that began on September 28, 1995 and which ended on December 15, 1995. The total amount of the civil money penalty that HCFA determined to impose against Petitioner is $59,250. In determining to impose the penalty, HCFA relied on the following facts. Petitioner operates a long term care facility that had been found, at a compliance survey conducted from September 12, 1995 through September 28, 1995, to have serious deficiencies in complying with Medicare and Medicaid participation requirements for such facilities. The deficiencies caused actual and potential harm to the welfare and safety of the residents of the facility. The deficiencies were pervasive. And, the facility at which the deficiencies were identified had a history of failures to comply with participation requirements.

However, HCFA failed to consider additional relevant facts. Petitioner acquired control of the facility in question on September 11, 1995, the day before the beginning of the compliance survey which led to HCFA's findings of deficiencies. All of the deficiencies at the facility that were identified at the survey were caused by Petitioner's predecessor. Petitioner bears no

responsibility for the facility's poor compliance history, inasmuch as Petitioner had no relationship with the facility during the past episodes of noncompliance. Indeed, Petitioner has an unblemished compliance record as an operator of long term care facilities. Petitioner promptly took extraordinary measures - ultimately spending more than $1.5 million - to correct deficiencies that it did not cause. Petitioner did everything that it could be expected to do to correct deficiencies that it did not cause in as short a time as was possible. Petitioner needed no inducement from HCFA to take the appropriate corrective actions.

The civil money penalty that HCFA determined to impose against Petitioner is unreasonable because it serves no remedial purpose. I reduce the civil money penalty to the sum of $50 per day only because my authority to reduce a penalty does not permit me to impose a penalty of less than $50 per day where, as in this case, some basis exists for a remedy. Otherwise, I would not impose any civil money penalty against Petitioner.

I. Background

A. Procedural history

On March 14, 1996, HCFA notified Petitioner of its determination to impose a civil money penalty against Petitioner. Petitioner requested a hearing and the case was assigned to me for a hearing and a decision.

On January 31, 1997, I issued summary disposition in favor of HCFA. CarePlex of Silver Spring, DAB CR457 (1997). I held that Petitioner was responsible for correcting deficiencies at the long-term care facility in question which originated prior to the date that Petitioner assumed control of the facility, but which continued in existence after that date. I held that HCFA had a basis to impose a remedy against Petitioner premised on the continued existence of deficiencies after the date when Petitioner assumed control of the facility. I held also that Petitioner had waived its right to contest: the existence of the deficiencies that were the basis for the civil money penalty that HCFA had determined to impose; the duration of the deficiencies; and, the amount of the penalty.

Petitioner appealed my decision to an appellate panel of the Departmental Appeals Board. On August 26, 1997, the appellate panel issued its final decision in the case. CarePlex of Silver Spring, DAB 1627 (1997). The appellate panel affirmed all of my findings except that it remanded the case so that Petitioner could contest the amount of the civil money penalty.

The appellate panel affirmed my decision that, as a matter of law, Petitioner was responsible for correcting deficiencies that originated prior to the date Petitioner assumed control over the facility in question but which continued to exist after the date when Petitioner assumed control of the facility. DAB 1627 at 7. The appellate panel also affirmed my decision that HCFA had a basis for imposing a remedy against Petitioner premised on the continued existence of the deficiencies after Petitioner assumed control of the facility. Id. Further, the appellate panel

affirmed my decision that Petitioner was not in substantial compliance with federal participation requirements which govern long-term care facilities during the period that began on September 28, 1995 and which ended on December 15, 1995. Id. at 12 - 14.

The appellate panel held that Petitioner did not waive its right to contest the amount of the civil money penalty that HCFA had determined to impose even if Petitioner no longer had the right to contest the existence of the deficiencies that were the basis for the imposition of a penalty or the duration of the period during which the penalty was imposed. DAB 1627 at 23 - 26. The appellate panel reversed findings of fact and conclusions of law (Findings) 14 and 15 in my January 31, 1997 decision, and remanded the case to me for further proceedings to consider the reasonableness of the amount of the civil money penalty that HCFA determined to impose against Petitioner. Id. at 26. The appellate panel affirmed all of the other Findings that I made in my January 31, 1997 decision. Id.

I held a hearing in the remanded case on January 6 - 7, 1998, in Washington, D.C. At that hearing, HCFA called to testify on its behalf one witness, Timothy J. Hock. Tr. at 95 - 183. Mr. Hock is the chief of the elderly and disabled health branch of the HCFA Regional Office in Philadelphia, Pennsylvania. Id. at 95. Mr. Hock oversees a branch of 20 employees whose primary responsibility is to assure that state survey agencies follow survey and certification procedures and requirements and properly interpret those requirements as they apply standards. Id. at 96. Mr. Hock's testimony addressed the process by which HCFA determined to impose a $750 per day civil money penalty against Petitioner for the September 28 - December 15, 1995 period.

Petitioner called to testify on its behalf three witnesses. These witnesses included Annette O'Brien. Tr. at 185 - 350. Ms. O'Brien is a registered nurse. Tr. at 187 - 188. She is the vice president for resident services of CareMatrix Corporation. Id. at 185. CareMatrix Corporation is a successor to Petitioner CarePlex. Id. at 186. The change in corporate name in part reflects the transformation of Petitioner CarePlex from a privately-held to a publicly-held corporation. Id. Ms. O'Brien is the person who has ultimate responsibility for approval and review authority of clinical operating policies and procedures at long-term care facilities operated by Petitioner. Id. at 189. Her responsibilities include direct review of resident charts. Id. at 190.

Ms. O'Brien's association with the facility in question began in June, 1995 when she conducted a clinical due diligence review of the facility prior to acquisition of control of the facility by Petitioner. Id. at 191. Ms. O'Brien then worked at the facility in a management capacity beginning on September 11, 1995, the date when Petitioner acquired control of the facility. Id. at 199. She came into the facility as part of a team whose responsibility was to develop and implement a plan for upgrading and improving the operations of the facility. Id. at 200 - 201. Her testimony addressed the efforts that she directed on Petitioner's behalf at the facility to improve the operations of the facility.

Petitioner's witnesses also included Kristine P. Rodis. Tr. at 358 - 391. Ms. Rodis is a registered nurse. Id. at 359. Ms. Rodis worked extensively at the facility in question for the first year and one-half after Petitioner acquired control of the facility. Id. at 361. Ms. Rodis was responsible for assisting in effectuating many of the corrective actions that Petitioner implemented. Id. at 361 - 362. Her testimony addressed some of the corrective actions that were implemented at the facility in the period after September 28, 1995.

Finally, Petitioner's witnesses included Elizabeth Wheatley. Tr. at 392 - 472. Ms. Wheatley is a registered nurse. Id. at 393 - 394. Ms. Wheatley worked full time for Petitioner at the facility in question from October 1995 until all corrections were implemented in December 1995. Id. at 396 - 397. Her duties included conducting in-service training of the employees of the facility in order to improve their skills and the quality of services that they were providing to residents. See Id. at 394 - 396. In her testimony, Ms. Wheatley described, among other things, the in-service training sessions that she conducted for the benefit of the facility's staff.

At the January 6 - 7, 1998 hearing, I received exhibits from HCFA. These consist of HCFA Exs. 1 - 14. Of these, I had received previously HCFA Ex. 1 - HCFA Ex. 11 in connection with my prior decision in this case. I also received exhibits from Petitioner. These include P. Ex. 1; P. Exs. 4 - 65; P. Exs. 67 - 97. The exhibits which I received from Petitioner at the January 6 - 7, 1998 hearing included exhibits which I received previously in connection with my prior decision in the case. These had been identified and received previously as P. Exs. 1 - 9. At the January 6 - 7, 1998 hearing, I renumbered these exhibits and received them into evidence as P. Exs. 89 - 97. Tr. at 108.

B. Background facts

These background facts are not disputed. Petitioner is a corporation which operates enterprises that include long-term care facilities which participate in Medicare and State Medicaid programs. See Tr. at 192 - 196. On September 11, 1995, Petitioner acquired control via a lease over the facility whose compliance with federal participation requirements is at issue in this case. P. Ex. 90 at 1; Tr. at 187. Prior to Petitioner's acquisition of control over the facility, the facility was a long term care facility that had done business as "Sylvan Manor Health Care Center," and had been operated by an owner other than Petitioner. P. Ex. 89 at 1; Tr. at 186 - 187. The lease arrangement between that owner and Petitioner by which Petitioner acquired control of the facility was an arm's-length transaction between parties who are not otherwise related. Id. Petitioner continued to operate the facility after September 11, 1995 as a long term care facility which participates in Medicare and Medicaid.

Beginning on September 12, 1995, the day after Petitioner acquired control over the facility, and continuing through September 28, 1995, the facility was surveyed for compliance with federal participation requirements by the Montgomery County, Maryland, Health Department, operating on behalf of the Licensing and Certification Administration of the Maryland

Department of Health and Mental Hygiene (Maryland State survey agency). P. Ex. 90 at 1 - 2; HCFA Ex. 12. Petitioner was not aware prior to the inception of the survey that the survey would be conducted. Tr. at 202.

The surveyors identified numerous failures by the facility to comply with federal participation requirements. HCFA Exs. 5, 12. At least some of the deficiencies were found to be so severe as to have caused actual harm to residents of the facility. Others posed a potential for harm to residents. Some of the more serious deficiencies that were identified by the surveyors included failures by the facility to: promote care for its residents in a manner and in an environment that maintained or enhanced each resident's dignity (HCFA Ex. 12 at 14 - 23); provide ongoing assessments, monitoring, care, services, and interventions to its residents to ensure that the residents maintained optimal well-being (HCFA Ex. 12 at 33 - 47); and, identify and provide care for residents who were at risk for developing pressure sores (HCFA Ex. 12 at 47 - 55).

The Maryland State survey agency notified Petitioner of its findings in a letter dated October 20, 1995. HCFA Ex. 4. In its notice, the Maryland State survey agency advised Petitioner that it would recommend to HCFA that HCFA impose a civil money penalty of $750 per day, beginning effective September 28, 1995, based on the survey findings and on the facility's poor performance history. Id. at 1. The Maryland State survey agency communicated this recommendation to HCFA by letter dated October 23, 1995. HCFA Ex. 6.

On November 3, 1995, the facility submitted a plan of correction to the Maryland State survey agency. HCFA Ex. 12. The plan of correction recited various dates, ranging from early October 1995 through at least December 15, 1995, by which the facility pledged that it would correct the deficiencies that the surveyors had identified at the September 12 - 28, 1995 survey. Id.

On November 9, 1995, HCFA sent a notice to Petitioner. HCFA Ex. 7. In that notice, HCFA advised Petitioner that it concurred with the Maryland State survey agency's recommendation. Id. HCFA told Petitioner that it was contemplating imposing a civil money penalty of $750 per day against Petitioner. Id.

The Maryland State survey agency re-surveyed the facility on December 18 - 20, 1995. HCFA Ex. 9. The surveyors identified some insubstantial deficiencies in the facility's operation. Id. But, they found that the facility was in substantial compliance with federal participation requirements as of the dates of the re-survey. Id.

On February 21, 1996, the Maryland State survey agency notified Petitioner that it was recommending to HCFA that HCFA impose a civil money penalty against Petitioner of $750 per day for a period beginning September 28, 1995 and ending on December 15, 1995. HCFA Ex. 10. On March 14, 1996, HCFA sent to Petitioner the notice from which Petitioner made its hearing request. HCFA Ex. 11. HCFA advised Petitioner that, in determining the

$750 per day amount of the civil money penalty, it had considered factors in addition to the scope and severity of the deficiencies that were identified at the September 12 - 28, 1995 survey, consisting of: "your facility's past history including repeat deficiencies, its degree of culpability and its financial condition . . . ." Id. at 1.

II. Issue, findings of fact and conclusions of law

A. Issue

The only issue to be heard and decided in this remanded case is whether the amount of the civil money penalty that HCFA determined to impose against Petitioner -- $750 per day for the 79-day period beginning September 28, 1995 and ending on December 15, 1995 -- is reasonable.

There are a number of issues and arguments which might have been litigated in this case, but which were not raised by Petitioner or which I heard and decided previously and which I am not addressing again in this decision. Petitioner has not contested the accuracy of the findings made by the surveyors at the September 12 - 28, 1995 survey of the facility. I therefore accept as entirely accurate the surveyors' findings of deficiencies, including their findings as to the scope and severity of deficiencies. HCFA Exs. 5, 12.

I am not revisiting my Finding 4 in my first decision in this case that Petitioner did not cause or create the deficiencies that the surveyors identified at the September 12 - 28, 1995 survey of the facility. DAB CR457 at 3. I found then, and reaffirm here, that Petitioner bears no responsibility for the cause of deficiencies whose origins predate Petitioner's acquisition of control of the facility.

The issues of whether Petitioner acquired responsibility for correcting deficiencies that predated its acquisition of control of the facility and whether HCFA had a basis to impose a civil money penalty against Petitioner for deficiencies that persisted after Petitioner acquired control of the facility were at the center of my previous decision and the appellate panel's final decision. DAB 1627 at 5 - 11; 26. I found in my first decision that Petitioner assumed responsibility for correcting those deficiencies which predated Petitioner's acquisition of control of the facility. DAB CR457 at 3 - 4, Findings 9 - 12. I do not revisit those Findings here. Nor do I revisit my Finding in my first decision that Petitioner is responsible for any remedial civil money penalty that may be imposed against it based on the facility's noncompliance with federal participation requirements between September 28, 1995 and December 15, 1995. DAB CR457 at 4, Finding 13.

The issue of the duration of the period during which the facility was not in substantial compliance with all federal participation requirements is not now before me. In my first decision in this case, I held that the facility was not in substantial compliance with all federal participation requirements as of September 28, 1995 and did not attain compliance with all

federal participation requirements until December 15, 1995. DAB CR457 at 3, Findings 2, 3, 5. The appellate panel affirmed these findings. DAB 1627 at 26.

What also is not at issue in this case is whether the civil money penalty that HCFA determined to impose should be reduced based on Petitioner's correction prior to December 15, 1995 of some, but not all, of the deficiencies that were manifest at the September 12 - 28, 1995 survey. That is an issue which I raised in prehearing proceedings but which Petitioner assures me it does not advocate. In a prehearing ruling, I hypothesized that, arguably, proof by Petitioner that it corrected some, but not all, deficiencies prior to December 15, 1995 might affect my ultimate decision whether the amount of the civil money penalty that HCFA determined to impose for each day of the September 28, 1995 - December 15, 1995 period is reasonable. Ruling Clarifying Prehearing Order of October 8, 1997, at 2 - 3. HCFA continues to object to this ruling, asserting that applicable regulations foreclose any consideration of whether a civil money penalty ought to be reduced based on partial but incomplete correction of deficiencies by a facility. See HCFA's posthearing brief at 20 - 24. However, Petitioner now asserts that it is not Petitioner's position that the civil money penalty that HCFA imposed against it should be reduced by virtue of Petitioner's partial correction of outstanding deficiencies prior to December 15, 1995. Petitioner's posthearing brief at 10.

In its posthearing brief, HCFA argues at considerable length that, in a civil money penalty case, a long term care facility has no right to a hearing to challenge HCFA's finding as to the level of the facility's noncompliance with participation requirements except that it may challenge a finding that noncompliance posed immediate jeopardy to residents. HCFA's posthearing brief at 11 - 18. Whatever may be the merits of HCFA's argument, it is not an argument that I need decide in this case. Petitioner is not challenging the surveyors' findings of the scope and severity, and hence, the level, of the facility's noncompliance with participation requirements.

B. Findings of fact and conclusions of law

I make Findings which support my decision to reduce the civil money penalty in this case to a penalty of $50 per day for each day of the 79-day period that begins on September 28, 1995 and ends on December 15, 1995. I set forth each Finding as a separately numbered heading. I discuss each of my Findings in detail.

1. A basis exists in this case to impose a civil money penalty against Petitioner. After Petitioner acquired control of the facility, the facility failed to comply substantially with all federal participation requirements governing long-term care facilities for the period beginning on September 28, 1995 and ending on December 15, 1995.

As I discuss above, I found in my first decision in this case that the facility failed to comply substantially with applicable federal participation requirements during the period beginning September 28, 1995 and ending on December 15, 1995. The failure of the facility to comply substantially with federal participation requirements during this period, while under the control of Petitioner, is a basis under the Social Security Act (Act) and applicable regulations for HCFA to impose a civil money penalty against Petitioner for each day of the period. Act, sections 1819(h)(2), 1919(h)(3); 42 C.F.R. §§ 488.400, 488.406(a)(3). Under the Act and regulations, failure by a facility to comply substantially with federal participation requirements is a basis for HCFA to impose against that facility or its operator any of a wide range of remedies. Id. These remedies may include a civil money penalty of up to $10,000 per day for each day that the facility does not comply substantially with federal participation requirements. Id.

Petitioner now asserts that HCFA is without any basis to impose a civil money penalty against it. Petitioner's argument has two elements. First, Petitioner asserts that HCFA did not make a reasonable showing that the facility was, in fact, not in substantial compliance with participation requirements on dates after September 28, 1995. According to Petitioner, HCFA's failure to offer such evidence comprises a failure by HCFA to make out a prima facie case that the facility was not in substantial compliance after September 28, 1995. Petitioner's posthearing brief at 10 - 11. Petitioner argues that HCFA merely assumed that the facility was noncompliant after September 28, 1995, without evidence of actual noncompliance by the facility. Petitioner asserts that HCFA could not assume reasonably that the facility remained noncompliant after the completion of the survey, given the intensive efforts that Petitioner had initiated to correct those deficiencies that the surveyors identified. Id.

Second, Petitioner argues that, by the completion of the September 12 - 28, 1995 survey of the facility, Petitioner had corrected virtually all of the deficiencies that the surveyors identified at the survey. Petitioner's posthearing brief at 2. Petitioner thereby suggests that any deficiencies that were not corrected by September 28 were minimal and did not amount to a failure by the facility to comply substantially with federal participation requirements.

I find these arguments to be without merit. Petitioner is essentially seeking to reopen my Findings in my first decision in this case that the facility was not in substantial compliance with all federal participation requirements between September 28, 1995 and December 15, 1995. DAB CR457 at 3, Findings 2, 3, 5. As I explain above, those Findings are now final and may not be reopened.

However, contrary to Petitioner's arguments, the weight of the evidence is that Petitioner did not attain substantial compliance at the facility prior to December 15, 1995. Petitioner's own evidence is ample proof that it did not fully correct at least some of the serious deficiencies that were identified at the September 12 - 28, 1995 survey before December 15, 1995. Petitioner did not submit a plan of correction in response to the findings of deficiencies that were made at the September 12 - 28, 1995 survey of the facility until November 3, 1995. HCFA Ex. 12. The plan of correction states that the facility would not complete all of its planned corrections before at least December 15, 1995. Id.

Petitioner's witnesses testified at the January 6 - 7, 1998 hearing, that it took considerable time and very substantial efforts by Petitioner's staff to bring the facility into full compliance with participation requirements. Indeed, as I discuss below, it is Petitioner's extensive and diligent efforts to correct deficiencies that it did not cause which is a major reason for my decision to reduce the amount of the civil money penalty in this case.

2. The amount of a civil money penalty that HCFA imposes against an entity where the basis exists to impose a civil money penalty is reasonable only if the penalty amount relates to a legitimate remedial purpose.

Although a *basis* may exist in a given case for HCFA to impose a civil money penalty, that is not to say that HCFA thereby has carte blanche authority to determine to impose any penalty *amount* that it chooses to impose. Even where a basis exists to impose a penalty, the amount of the penalty that HCFA determines to impose is reasonable only insofar as it relates to a legitimate remedial purpose.

The ultimate statutory authority for HCFA to impose a civil money penalty against a deficient facility is section 1128A of the Act. Sections 1819(h)(2)(B)(ii) and 1919(h)(3)(C)(ii) of the Act, which give HCFA direct authority to impose a civil money penalty against a deficient facility, state that: "The provisions of section 1128A . . . shall apply to a civil money penalty . . . [that is imposed by HCFA against a facility] in the same manner as such provisions apply to a penalty or proceeding under section 1128A(a)." Id.

Section 1128A has been interpreted universally to be a remedial statute. Anesthesiologists Affiliated, et al., DAB CR65 (1990), aff'd 941 F.2d 678 (8th Cir. 1991); Tommy G. Frazier, DAB CR79 (1990), aff'd 940 F.2d 659 (6th Cir. 1991); Berney R. Keszler, M.D., et al., DAB CR107 (1990). In its decision deciding the appeal of my first decision in this case, the appellate panel found that the "entire purpose" of the civil money penalty provisions of the Act for cases where HCFA is authorized to impose civil money penalties is to: "motivate noncompliant providers to act quickly in making needed corrections in order to stop the clock on the accruing [civil money penalty]." DAB 1627 at 16.

Labeling a civil money penalty that is imposed in a particular case a "remedy" does not necessarily make the penalty remedial. A civil money penalty meets the Act's remedial purpose only if, based on the unique facts of the case, it is tailored to accomplish that purpose. A civil money penalty may be shown to be punitive in a case involving HCFA if the penalty is proven to exceed what is reasonably necessary to induce the deficient facility to correct outstanding deficiencies promptly and effectively in the light of applicable criteria for determining the amount of the penalty.

The Act establishes the criteria which must be employed by HCFA to determine the amount of a civil money penalty. Act, section 1128A(d). This section states that, in determining the amount or scope of the penalty, the Secretary of the United States Department of Health and Human Services (Secretary) (or her delegate, which in this case is HCFA):

> shall take into account --
>
> > (1) the nature of claims and the circumstances under which they were presented,
> >
> > (2) the degree of culpability, history of prior offenses, and financial condition of the person presenting the claims, and
> >
> > (3) such other matters as justice may require.

Act, section 1128A(d)(1) - (3).

This language in the Act makes it clear that, in order to satisfy a remedial purpose, a civil money penalty must be based on the facts which are unique to the case in which a penalty is imposed. Congress plainly intended that penalties not be applied based on wooden or arbitrary applications of criteria for determining the amount of penalties.

The Secretary has published regulations which are intended to assure that a civil money penalty that HCFA imposes is remedial and not punitive. 42 C.F.R. §§ 488.404, 488.438. That purpose is made evident both by the text of and the preamble to the regulations. A response to a comment in the preamble of the regulations states:

> The purpose of all remedies is to protect residents against inadequate care and to motivate providers to promptly comply with the participation requirements so they may continue to provide quality services.

59 Fed. Reg. at 56,199 (1994).

Under the regulations, as is the case with the Act, no penalty automatically is remedial by virtue of it being labeled to be a "remedy." The regulations require HCFA to examine a broad range of factors, including factors not specified in the regulations that justice requires be considered, in order to determine to impose a civil money penalty that is remedial and not punitive.

As a first step under the regulations, HCFA must determine, based essentially on the seriousness of the deficiencies that a facility manifests, whether the deficiencies fall within the upper or lower range of possible deficiencies. The regulations establish two ranges within which a civil money penalty may fall. An upper-range civil money penalty of from $3,050 - $10,000 per day may be imposed for deficiencies which either constitute immediate jeopardy to the welfare of residents of a facility or for deficiencies which are repeat deficiencies. 42 C.F.R. § 488.438(a)(1). A lower range civil money penalty of from $50 - $3,000 per day may be imposed for deficiencies that do not constitute immediate jeopardy, but which either cause actual harm to residents of a facility or which have the potential for causing more than minimal harm to residents of a facility. 42 C.F.R. § 488.438(a)(2).

Once HCFA makes a determination as to the appropriate range of penalties (upper or lower) that will apply in a case, it must then determine the appropriate amount of the penalty within a range that it should impose. The regulations establish factors that HCFA must consider in order to make this determination. The general factors are stated in 42 C.F.R. § 488.438(f). These are as follows:

> (1) The facility's history of noncompliance, including repeated deficiencies.
>
> (2) The facility's financial condition.
>
> (3) The factors specified in [42 C.F.R.] § 488.404.
>
> (4) *The facility's degree of culpability. Culpability* for purposes of this paragraph includes, but is not limited to, neglect, indifference, or disregard for resident care, comfort or safety. The absence of culpability is not a mitigating circumstance in reducing the amount of the penalty.

As is apparent from the face of 42 C.F.R. § 488.438(f), the general factors incorporate additional factors that are contained in 42 C.F.R. § 488.404. These additional factors are stated in 42 C.F.R. § 488.404(b), under the heading: *"Determining seriousness of deficiencies."*; and, in §488.404(c), under the heading: *"Other factors which may be considered in choosing a remedy within a remedy category."* The factors described in 42 C.F.R. § 488.404(b) include the degree of seriousness of deficiencies, expressed in terms of the potential for harm, or actual harm, caused by the deficiencies, and the scope of the

deficiencies, which may range from isolated to widespread. The factors described in 42 C.F.R. § 488.404(c) include the relationship of deficiencies to each other and a facility's prior compliance history.

42 C.F.R. § 488.404(c) provides that the "other factors" which HCFA may employ in determining the amount of a civil money penalty within a range of possible penalties may *include, but are not limited to,* the factors which are enumerated under the subsection. The regulation's provision allowing HCFA to consider unstated factors in addition to those spelled out in the regulation gives HCFA the opportunity to consider factors that are not spelled out specifically in the regulations but which bear on the remedial effect of a civil money penalty. I find that the regulation's statement that factors which may be considered by HCFA include but are not limited to those specifically stated in the regulation incorporates the Act's requirement that the Secretary – and HCFA – consider other factors that justice may require in determining the amount of a civil money penalty. Act, section 1128A(d)(3).

The language in 42 C.F.R. § 488.404© which states that factors that HCFA may consider include, but are not limited to, those factors that are specified in the regulation, does not precisely parallel the language in the Act which requires that HCFA consider other factors which justice may require. I am reading much significance into 42 C.F.R. § 488.404© by concluding that it incorporates that statutory requirement. However, the language in the regulation plainly is broad enough to subsume the statutory requirement. I note also that the preamble to the regulations which govern imposition of civil money penalties by HCFA acknowledges that the Act requires HCFA to consider *any* factor, and not just narrowly enumerated factors, in determining the amount of a civil money penalty. 59 Fed. Reg. at 56,204 (1994).

Moreover, if the regulation did not permit HCFA to consider other factors that justice may require in determining to impose a civil money penalty, then the regulations which govern a determination of the amount of a civil money penalty might well be found to be ultra vires the Act. I have no authority to find a regulation to be ultra vires the Act. But, I do have the responsibility to interpret and apply regulations, where possible, in a way that is consistent with the Act's requirements and which precludes the regulations being found ultimately to be ultra vires the Act.

> ***3. Whether a civil money penalty amount is reasonable in the case of a facility that has been acquired by a new owner who did not cause the deficiencies that are the basis for the civil money penalty may depend on the diligence of the new owner in correcting the deficiencies that it did not cause.***

In my first decision, I found that a civil money penalty might be remedial, where it is imposed against an entity that acquires a noncompliant facility, for dates after the acquisition date that the acquired facility remains noncompliant with federal participation requirements.

DAB CR457 at 9 - 11. The appellate panel affirmed this part of my decision. DAB 1627 at 5 - 7; 15 - 17. Two conclusions were central to my analysis. First, the new operator is in a position to correct those deficiencies whose origins predate its acquisition of control. Under such circumstances, the accrual of a civil money penalty for each day of the new operator's continued noncompliance with participation requirements may be a necessary remedial inducement to speedy correction by the new operator of preexisting and continuing deficiencies. Second, the intent of the Act is to protect the welfare of program beneficiaries and recipients. From the standpoint of these individuals, the fact that a new operator of a facility may not have caused deficiencies at the facility matters little if those deficiencies persist after the new operator acquires control and the new operator does not correct them swiftly and effectively.

A civil money penalty would have an obvious remedial purpose in the case of a deficient facility that has been acquired by a new operator who is indifferent to or slow in correcting the deficiencies that were caused by its predecessor. There, a civil money penalty would serve as a spur to the new operator to overcome its indifference to correcting the deficiencies. And, in such a case, the penalty ought to be for the same daily amount as would have been imposed against the new operator's predecessor had the predecessor continued to operate the deficient facility. The factors stated in 42 C.F.R. §§ 488.404 and 488.438 which address the seriousness and pervasiveness of the deficiencies, the compliance history of the facility, and the relationship of deficiencies to other deficiencies would be as applicable to determining the appropriate daily amount of the remedy in the case of a new, indifferent operator, as they would be in the case of that operator's predecessor.

However, it is difficult to perceive of a legitimate remedial purpose for imposing a civil money penalty in the case of a new operator of a deficient facility who spares no expense or effort in correcting as quickly as is possible the deficiencies which its predecessor caused. In such a case, the new owner proves by its diligence and motivation that it needs no spur to correcting deficiencies that it did not cause. In such a case, the added elements of diligence and motivation may be factors under the Act and regulations which justice requires be considered in determining not to impose a civil money penalty that might be justified where less diligence and motivation exists. That may especially be so where, as is the case here, the new operator plans to implement improvements at a facility which will correct any possible deficiencies before becoming aware that HCFA considers the facility to be deficient.

4. My authority to hear and decide the issue of the amount of the penalty in a civil money penalty case constitutes de novo review authority. I am required to decide independently whether HCFA's determination of a civil money penalty amount is reasonable. In doing so, I am required to consider all of the factors that HCFA might consider in making its determination to impose a civil money penalty.

HCFA asserts that, where the basis for imposing a civil money penalty is established, "review of the amount is very narrow." HCFA's posthearing reply brief at 2. HCFA mischaracterizes the scope of an administrative law judge's authority to make findings concerning the reasonableness of the amount of a civil money penalty. A hearing and a decision on the issue of amount of a civil money penalty is not a "review" of HCFA's determination in the sense that it constitutes some quasi-appellate review for regularity of the determination. The Act requires that there be a de novo proceeding in which the administrative law judge decides independently from HCFA whether a penalty amount is reasonable based solely on the evidence that is adduced at the hearing. In such a case, the administrative law judge may consider evidence which relates to any factor that is defined by the Act and regulations as being relevant to the issue of the amount of the penalty. The administrative law judge is not constrained to conduct merely a review of the factors and evidence that HCFA may have considered in making its initial determination to impose a penalty. Nor is the administrative law judge obligated to presume that HCFA correctly assessed the evidence and factors which relate to the amount of the penalty. So limiting the scope of the administrative hearing as to the amount of the civil money penalty would be antithetical to the Act's requirements that there be a de novo hearing and an independent decision by an administrative law judge.

An entity against whom HCFA determines to impose a civil money penalty has a statutory right to a hearing. Act, section 1128A(c)(2). The Act states that:

> The Secretary shall not make a determination adverse to any person . . . until the person has been given written notice and an opportunity for the determination to be made on the record after a hearing at which the person is entitled to be represented by counsel, to present witnesses, and to cross-examine witnesses against the person.

Id.

This section of the Act provides for a de novo hearing and an independent decision, based on the record of the hearing, as to whether a determination by HCFA to impose a civil money penalty is reasonable. That is made evident by the Act's requirements that: no final civil money penalty determination be made until after a hearing; any final decision must be made based on the record that is made at the hearing; and, the final decision may be based on evidence that the agency which made the initial determination to impose a civil money penalty did not have before it when it made its determination.

Since 1984, section 1128A of the Act has been applied numerous times in cases involving determinations made by the Inspector General of the United States Department of Health and Human Services (I.G.) to impose civil money penalties. In every case, the final decision as to the amount of the civil money penalty has been based on a de novo hearing and has been made independently from the I.G.'s civil money penalty determination. See, e.g., Anesthesiologists Affiliated and Frazier, supra.

Regulations which the Secretary published at 42 C.F.R. Parts 488 and 498 to implement HCFA's authority to impose a civil money penalty and to establish an entity's hearing and appeal rights are consistent with the requirements of the Act as they have been interpreted and applied historically in civil money penalty cases involving the I.G. These regulations allow for a de novo hearing and an independent decision by an administrative law judge in a case where the amount of a civil money penalty is at issue.

The regulations provide that an administrative law judge conducting a hearing as to the amount of a civil money penalty may consider those factors which HCFA considers in making its initial determination to impose a civil money penalty. 42 C.F.R. § 488.438(e)(3); see 42 C.F.R. §§ 488.438(f); 488.404. Regulations which govern a hearing in cases to which HCFA is a party, including a civil money penalty case, contemplate a de novo hearing by an administrative law judge and a decision which is made independently from HCFA's initial determination. For example, the hearing regulations require that an administrative law judge inquire fully into all of the matters that are at issue and to receive into evidence the testimony of witnesses and any documents that are relevant and material. 42 C.F.R. § 498.60(b). Such evidence may include evidence that HCFA did not consider in making its initial determination to impose a civil money penalty. Moreover, the regulations enable an administrative law judge to identify and decide issues that were not identified by the parties. 42 C.F.R. § 498.56.

The regulations impose minor limitations on an administrative law judge's authority to hear and decide a case involving a civil money penalty determination. The regulations state that an administrative law judge may not reduce to zero a determination by HCFA to impose a civil money penalty in a case where a basis for the penalty is established. 42 C.F.R. § 488.438(e)(1). I read this section as prohibiting an administrative law judge from reducing a civil money penalty to an amount below $50 per day in a case where a basis exists to impose a civil money penalty. That is because the lowest amount that HCFA may impose in such a case is $50 per day. See 42 C.F.R. § 488.408(d)(1)(iii).

The regulations also prohibit an administrative law judge from reviewing the exercise of discretion by HCFA or a State to impose a civil money penalty. 42 C.F.R. § 488.438(e)(2). This section effectively requires an administrative law judge to sustain at least some civil money penalty where HCFA has determined, correctly, that a basis exists to impose one, and where HCFA has exercised its discretion to impose a civil money penalty. It reinforces the

prohibition in 42 C.F.R. § 488.438(e)(1) against an administrative law judge reducing to zero a civil money penalty determination where a basis is established to impose a civil money penalty.

Finally, the regulations prohibit an administrative law judge from deciding whether a civil money penalty amount is reasonable based on evidence which is beyond the scope of that which regulations define to be relevant to determining the amount of the civil money penalty. 42 C.F.R. § 488.438(e)(3). As I discuss above, at Findings 2 and 3, such evidence may include evidence which relates to factors that are specifically described in the regulations and it may also include evidence which relates to other, unspecified factors, which justice may require be considered.

The minor limitations that the regulations place on the administrative law judge's authority in a civil money penalty case involving HCFA underscore the overall authority of the administrative law judge in such a case to conduct a de novo hearing and make an independent decision as is required by the Act and regulations. The prohibition against an administrative law judge considering evidence which exceeds the scope of that which is permitted under 42 C.F.R. § 488.438(f) (and, by reference, 42 C.F.R. § 488.404) is at the same time an affirmation that the administrative law judge may consider *any* evidence that might be relevant to the amount of a civil money penalty even if HCFA did not actually consider that evidence in making its determination. 42 C.F.R. § 488.438(e)(3). In prohibiting an administrative law judge from reducing to zero a civil money penalty, the regulations highlight the administrative law judge's authority to reduce a civil money penalty to as low as $50 per day in the appropriate case.

> ***5. HCFA's determination to impose a civil money penalty against Petitioner in the amount of $750 per day for each day of the September 28 - December 15, 1995 period might be reasonable if the only factors that are relevant to the amount of the penalty consist of the compliance history of the facility that is the subject of this case and the scope and severity of the deficiencies that were extant during the period.***

In determining to impose a civil money penalty of $750 per day against Petitioner, HCFA relied on evidence which relates to factors that are identified in the regulations as being relevant to determining the amount of the penalty. If this evidence is viewed in a vacuum, it makes out a case to support the $750 per day penalty. However, as I discuss below, at Finding 6, the evidence on which HCFA relies depicts a distorted and inaccurate picture of the need for a penalty. Moreover, HCFA did not consider additional relevant evidence which it ought to have considered. The additional relevant evidence makes it evident that no civil money penalty is needed here. I discuss that additional evidence below, at Finding 7.

The March 14, 1996 notice which HCFA sent informing Petitioner of HCFA's determination to impose a civil money penalty in the amount of $750 per day for each day of the September 28 - December 15, 1995 period, advised Petitioner that HCFA had considered four factors in determining the amount of the civil money penalty. These factors consisted of: the scope and severity of the deficiencies that were identified by the surveyors in their report of the September 12 - 28, 1995 survey of the facility; the past history of the facility, including the facility's history of repeated deficiencies; the facility's culpability; and, the facility's financial condition. HCFA Ex. 11 at 1. Each of the factors identified by HCFA in its notice is a factor which is described in relevant regulations as a factor which HCFA may consider in determining to impose a civil money penalty. 42 C.F.R. §§ 488.438; 488.404.

The facility's compliance history and its ongoing, serious deficiencies were the two principal reasons that HCFA determined to impose a $750 per day civil money penalty against Petitioner. Tr. at 114. The evidence obtained during the September 12 - 28, 1995 survey establishes that, as of the survey dates, the facility manifested pervasive deficiencies which caused both actual and potential harm to its residents. The evidence of the facility's past performance establishes it to have had a history of compliance problems.

The scope and severity of the deficiencies that the surveyors identified at the September 12 - 28, 1995 survey is not in dispute in this case. HCFA Exs. 5, 12. The deficiencies address almost every aspect of the facility's operations, ranging from the maintenance of the facility's physical plant to the care given to specific residents for particular medical problems. Id. In some instances the amount of harm that these deficiencies caused to the facility's residents approached the highest extent of harm that is not in the range of immediate jeopardy. Id.

This facility had a history of deficiencies that were similar to those which were identified by the surveyors at the September 12 - 28, 1995 survey. The facility had been surveyed previously for compliance with federal participation requirements and had been found to be deficient. HCFA Ex. 6. For example, a compliance survey that was performed on May 26, 1994 showed the facility to manifest some of the same kinds of deficiencies as of that date as it manifested subsequently at the September 12 - 28, 1995 survey. HCFA Ex. 13. The surveyors at both the May 26, 1994 and the September 12 - 28, 1995 surveys found that the facility was not promoting care for its residents in a manner which maintained or enhanced the residents' dignity. HCFA Ex. 12 at 14 - 23; HCFA Ex. 13 at 1- 4.

HCFA determined that it would not reduce the civil money penalty that it imposed against Petitioner in light of Petitioner's lack of culpability for the deficiencies that are the basis for HCFA's civil money penalty determination. See Tr. at 114. HCFA predicated this determination on the regulations' specific prohibition against considering a facility's lack of culpability as a basis for reducing the amount of a penalty. Id.; see 42 C.F.R. § 488.438(f)(4). HCFA did not consider whether the facility's history was relevant to the issue of a need for a penalty in light of Petitioner not having any involvement with the facility prior to September 11, 1995.

HCFA did not consider Petitioner's diligence and dispatch in correcting the deficiencies as a basis for reducing or not imposing the civil money penalty. Finally, HCFA determined not to accept the recommendation of the Maryland State survey agency that a significant civil money penalty not be imposed against Petitioner. P. Ex. 90 at 3. The Maryland State survey agency premised this recommendation on its conclusion that it would not be in the public interest to impose a civil money penalty against Petitioner in light of Petitioner's willingness to take over and renovate a deficient facility. Id. at 1; 3. The Maryland State survey agency made the recommendation that no significant penalty be imposed in internal communications with HCFA. See Id. I note the contrast between what the Maryland State survey agency recommended to HCFA in its internal communications and what it told Petitioner it recommended in its notice to Petitioner. See HCFA Ex. 4.

> ***6. The unique facts of this case make the facility's compliance history irrelevant to the issue of whether a civil money penalty will serve a remedial purpose. Indeed, the reasonable inference that I draw from Petitioner's unblemished compliance record as a long term care facility operator is that no civil money penalty was necessary to induce Petitioner promptly to correct deficiencies that it did not cause.***

The evidence which HCFA relied on as a basis for imposing a $750 per day civil money penalty paints a distorted picture of the need for a penalty. The evidence of the history of the facility as a noncompliant facility, which HCFA relied on as principal evidence to justify imposing a $750 per day civil money penalty against Petitioner, is irrelevant in light of the fact that Petitioner had no connection with the facility during its previous episodes of noncompliance. In fact, Petitioner's unblemished compliance record as a long term care facility operator is strong evidence that there was no need to impose a civil money penalty against Petitioner to induce Petitioner promptly to correct deficiencies that it did not cause.

A facility's poor compliance history may be a relevant predictor of a need to impose a civil money penalty against that facility's operator where there is continuity of operation of that facility. Where a facility has had a history of poor performance, and there is continuity of control by that facility's operator, it is reasonable to infer that a civil money penalty might be a necessary spur to that operator to correct ongoing deficiencies.

But here, the facts are very different from the circumstance which I have just described. Petitioner proved that it had nothing to do with the facility during its past periods of noncompliance with participation requirements. The facility's compliance history therefore says nothing about what Petitioner was likely to do when confronted with deficiencies.

Petitioner proved that, not only that it did not have any responsibility for the facility's poor compliance history, but that it has a spotless compliance record in operating long term care facilities. Tr. at 192 - 196. I infer from *Petitioner's* compliance history – in contrast to the compliance history of the facility – that Petitioner is a conscientious operator who did not

need the threat of a civil money penalty, much less the imposition of one, to induce it to promptly and effectively correct deficiencies that it did not cause.

HCFA asserts that it is required by the regulations to impose a civil money penalty based, in part, on a facility's poor compliance history without regard to whether transfer of control of the facility may render the history of poor compliance to be irrelevant. HCFA's posthearing brief at 26. It cites as authority for this assertion a response to a comment in the preamble to the regulations governing imposition of civil money penalties. That response states that:

> [t]he burden of proof is on the new owner to demonstrate that poor past performance no longer is a predictive factor.

59 Fed. Reg. at 56,174 (1994).

I do not read the regulations as being so rigid as HCFA asserts them to be. The regulations authorize HCFA to consider whether a facility's performance history justifies imposing a civil money penalty. But, they do not require HCFA to impose a penalty - much less a substantial penalty - in every instance where a facility has a history of compliance problems. All that the regulations do is to establish that a facility's compliance history is a factor which HCFA should consider in determining whether there exists a remedial need to impose a civil money penalty. A facility's performance history is a factor that HCFA is to take into account under 42 C.F.R. § 488.438(f)(1) in determining the amount of a civil money penalty to impose. Under 42 C.F.R. § 488.404(c)(2), HCFA may, but not must, consider a facility's performance history in determining the amount of a civil money penalty.

The response to the comment in the preamble to the regulations cited to by HCFA provides no support for HCFA's argument that HCFA must ignore the reality of a transfer of control of a facility with a poor compliance record. To the contrary, the response says that an operator may prove that it bears no responsibility for the compliance history of a facility whose operation it has acquired and thereby may establish that a penalty should not be based on that history. That is precisely what Petitioner has done here.

> ***7. HCFA's determination to impose a $750 per day civil money penalty against Petitioner fails to take into consideration an additional factor which HCFA should have considered. This additional factor is Petitioner's extraordinary unprompted diligence in correcting deficiencies that it did not cause. Petitioner's diligence establishes that there was no need for a civil money penalty to induce it to correct deficiencies.***

The aggressive and unprompted efforts that Petitioner made at upgrading the facility and the quality of the services that it provided to residents show that Petitioner needed no inducement from HCFA to correct deficiencies. The evidence establishes that Petitioner corrected deficiencies as quickly and effectively as any operator could have corrected them. The

possibility that HCFA might impose a civil money penalty did not induce Petitioner to correct the deficiencies any faster or more completely than it corrected them. I find Petitioner's extraordinary, unprompted diligence in correcting the deficiencies to be another factor as justice may require which HCFA ought to have considered, but which HCFA did not consider.

Petitioner engaged in aggressive planning to upgrade and improve operations at the facility weeks before it acquired control of the facility on September 11, 1995. Ms. O'Brien reviewed the facility's compliance history in the weeks preceding Petitioner's acquisition of control of the facility. Tr. at 197 - 200. Ms. O'Brien made an assessment of the facility's major problems before Petitioner ever assumed control of the facility and formed preliminary judgments as to what problems needed to be treated as priorities. Id. at 200. Ms. O'Brien decided that the most important problems that needed to be addressed consisted of those that potentially affected the residents' quality of life or potentially posed jeopardy for the residents. Id.

Petitioner timed the implementation of its plan to improve the facility's operations to coincide with the moment it acquired control of the facility. On September 11, 1995, Ms. O'Brien arrived at the facility accompanied by a team of clinical personnel. Tr. at 199, 205. The team intended to implement decisions that Ms. O'Brien made prior to September 11, 1995, about how to correct the problems that she identified as being extant at the facility. This team's purpose was to take a facility that was in poor condition and to revitalize it. Id. at 205.

Among the early steps that Petitioner's new management team implemented in order to address problems at the facility was to stop voluntarily receiving new admissions at the facility while it addressed and corrected problems. Tr. at 207 - 208. On September 12, 1995, Ms. O'Brien personally performed physical inspections of all of the facility's residents in order to judge the quality of care that the residents were receiving from the facility's staff. Tr. at 201. She inspected all of the mattresses in the facility and determined that 72 of them needed to be replaced. Id. at 201 - 202. She obtained replacements for these mattresses within the first week of Petitioner's operation of the facility. Id. at 202 - 203.

By the time that Petitioner learned that a penalty might be imposed against it, it had already committed itself to an ambitious renovation program that would eventually cost it more than $1.5 million to complete. Tr. at 232. Petitioner was unaware that the Maryland State survey agency would recommend to HCFA that a civil money penalty of $750 per day be imposed against Petitioner until after October 20, 1995, nearly a month after completion of the September 12 - 28, 1995 survey, and after Petitioner made substantial efforts to upgrade the facility's physical plant and the quality of care that the facility provided to residents. HCFA Ex. 4. In fact, prior to October 20, 1995, Petitioner already had made substantial expenditures totaling thousands of dollars, as part of its campaign to renovate the facility. P. Exs. 25 - 27, 72, 73.

Petitioner's efforts included addressing and correcting the specific deficiencies that were identified at the September 12 - 28, 1995 survey of Petitioner. But, these efforts were made in the context of a much more intensive campaign by Petitioner to significantly upgrade the facility and to improve the quality of care that it gave to residents. These efforts and connected expenditures were planned and initiated by Petitioner in advance of its receiving any notice that a civil money penalty might be imposed against it. For example, the surveyors who conducted the September 12 - 28, 1995 survey of Petitioner identified as deficiencies the failure of the facility to respect the privacy of some of its residents. Tr. at 232. Petitioner addressed these problems as part of spending $1.5 million to renovate the facility. Id. Problems with the food service that the facility provided to its residents were addressed as part of an extensive effort by Petitioner to upgrade kitchen and dining facilities. Id. at 463 - 466; P. Ex. 72, 73, 75, 76.

It is evident from the report of the September 12 - 28, 1995 survey that many of the facility's most serious deficiencies related to the failures of the facility's staff to provide care to residents that was of an acceptable professional quality. The absence of good quality care was accompanied by a lack of respect for the rights and dignity of residents. Petitioner attacked these problems aggressively. Petitioner's efforts to improve the quality of care that was provided by the facility's staff emanated from the decisions which the facility's new management team made prior to or at the inception of Petitioner's assumption of control of the facility about upgrading operations at the facility. None of these efforts were engaged in by Petitioner because it was laboring under the threatened imposition of a civil money penalty by HCFA.

These efforts which were planned and implemented by Petitioner as part of its takeover of the facility included extensive retraining of the facility's staff. In the months of September - December, 1995, Petitioner conducted a series of in-service training classes for its staff, which were designed to upgrade the staff's skills and the quality of care that the staff provided to residents. Tr. at 468 - 470; P. Ex. 5. Petitioner presented in-service training in at least the following areas: administration of major medications to residents (P. Ex. 10); self-medication by residents (P. Ex. 18); resident assessment and care planning (P. Ex. 9); residents' skin and wound care (P. Ex. 53); positioning of residents (P. Ex. 23); infection control (P. Ex. 70); sanitation and pest control (P. Ex. 71); fire and safety procedures (P. Ex. 84); monitoring of residents' intake and output (P. Ex. 31); dysphagia (P. Ex. 11); use of an emergency cart (P. Ex. 30); emergency response procedure (P. Ex. 63); disaster drills (P. Ex. 85); the emergency fire plan for the facility's kitchen staff (P. Ex. 87); operations during a disaster (P. Ex. 86); advance directives for residents, such as living wills (P. Ex. 15); residents' rights (P. Ex. 17); and smoking policy (P. Ex. 6).

8. I impose a civil money penalty of $50 per day against Petitioner for the period beginning on September 28, 1995 and ending on December 15, 1995, because Petitioner was deficient in complying substantially with federal participation requirements during the period, and because I must sustain a civil money penalty of no less than $50 per day against Petitioner for that period given that a basis exists to impose a civil money penalty against Petitioner.

I have found that a basis exists to impose a civil money penalty against Petitioner for the period which begins on September 28, 1995 and ends on December 15, 1995. Finding 1. My Finding that a basis exists to impose a civil money penalty against Petitioner means that I must sustain the imposition against Petitioner of at least a nominal civil money penalty for each day of the period. 42 C.F.R. § 488.438(e)(1). I reduce the civil money penalty to $50 per day for each day of the September 28, 1995 - December 15, 1995 period. I do so because I can perceive of no remedial purpose for a civil money penalty given Petitioner's compliance history and its diligence in correcting the deficiencies that were identified at the September 12 - 28, 1995 survey of the facility. Under the unique facts of this case, a civil money penalty would not have served to make Petitioner any more conscientious in correcting deficiencies than it was. Petitioner corrected the deficiencies as quickly and as thoroughly as could be expected.

/s/

Steven T. Kessel
Administrative Law Judge