

# Nursing & Assisted Living Facility Professional

“NEWS AND VIEWS YOU CAN REALLY USE”

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SENT EACH MONTH TO YOU AS A MEMBER OF THE HEALTHCARE HEROES

## THE HAT ADVANTAGE by Rebecca Adelman

### HEALTH CARE BOARDS – COMPLIANCE PLAN OVERSIGHT RESOURCE FROM THE OIG AND INDUSTRY LEADERS *Risks, Responsibilities and Reporting*



On April 20, 2015, the United States Department of Health and Human Services (HHS) Office of the Inspector General (OIG) in collaboration with the American Health Lawyers Association (AHLA), the Association of Healthcare Internal Auditors (AHIA), and

the Health Care Compliance Association (HCCA) released a joint educational resource to assist governing boards of health care organizations, titled “Practical Guidance for Health Care Governing Boards on Compliance and Oversight” (“2015 Guidance”). This first-of-a-kind resource will assist boards carry out their compliance plan oversight obligations in their organizations. This article identifies the central statements and recommendations for health care boards as well as the fiduciary duties and responsibilities of nonprofit board members, as reflected in the case *In re: Lemington Home for the Aged*, No.13-2707, 2015 WL 305505 (3d Cir. Jan. 26, 2015).

As early as 2003, the OIG has been providing guidance for governing boards of health care organizations consistently emphasizing the need for boards to be fully engaged in their oversight responsibility. These historical resources, available on the [OIG website](#), also include a Toolkit for Health Care Boards. Given heightened industry and professional interest in governance and transparency issues, boards will benefit this educational resource. The 2015 Guidance provides boards with practical tools and tips as they work to effectuate their oversight role of their organizations’ compliance with State and Federal laws that regulate the health care industry.

#### Expectations for Board Oversight of Compliance Program Functions

A Board must act in good faith in the exercise of its oversight responsibility for its organization, including making inquiries to ensure: (1) a corporate information and reporting system exists and (2) the reporting system is adequate to assure the board that appropriate information relating to compliance with applicable laws will come to its attention timely and as a matter of course. (2015 Guidance p.2).

Boards are encouraged to use widely recognized public compliance resources as benchmarks for their organizations including The

Federal Sentencing Guidelines (Guidelines), OIG’s voluntary compliance program guidance documents, and OIG Corporate Integrity Agreements (CIAs). In addition, boards are expected to put forth a meaningful effort to review the adequacy of existing compliance systems and functions.

One area of inquiry should be the scope and adequacy of the compliance program in light of the size and complexity of their organizations. The OIG requires that even smaller organizations “show the same degree of commitment to ethical conduct and compliance as larger organizations.” It recognizes, however, that smaller organizations may be able to do so “with less formality and fewer resources” than a larger organization. The 2015 Guidance states that in smaller organizations, it may be possible to use existing employees for compliance instead of hiring separate staff and suggests that boards may be more personally involved.

Boards should develop a formal plan to stay abreast of the ever-changing regulatory landscape and operating environment. We are working with our clients to offering educational programs that provide them with opportunities to develop a better understanding of industry risks, regulatory requirements, and how effective compliance and ethics programs operate. We are also assisting boards to raise levels of substantive expertise with respect to regulatory and compliance matters, as recommended by the OIG, by consulting on regulatory, compliance, or legal issues.

The 2015 Guidance focuses on four areas relating to board oversight and review of compliance program: (1) roles of, and relationships between, the organization’s audit, compliance, and legal departments; (2) mechanism and process for issue-reporting within an organization; (3) approach to identifying regulatory risk; and (4) methods of encouraging enterprise-wide accountability for achievement of compliance goals and objectives.

#### Roles and Relationships

Organizations should define the interrelationship of the audit, compliance, and legal functions in charters or other organizational documents. The structure, reporting relationships and interaction of these and other functions (e.g., quality, risk management, and human resources) should be included as departmental roles and responsibilities are defined. For example of structure:

- **The internal audit function:** provides an objective

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# Pathway to Rehabilitation Excellence

By Melissa Ward  
Director of  
Clinical Services

## GERIATRIC WEIGHT TRAINING

### Goals

- Maximize efficiency & safety of functional movement
- Functional activity (ADLs, gait, transfers) improves ONLY when the underlying impairment is addressed
- Be specific with underlying impairments for each task
- Function not form: task analysis vs. rep/set & weight selection

### PLAN OF ACTION

Alignment-->Trunk Initiation-->How Muscle is Used-->Muscle Activation-->Re-education

### Alignment:

- Pick one task at a time
- Assess for proper alignment
- If not in proper alignment, remedial work needed on ROM, flexibility, soft tissue work, core strength & stability

### Trunk Initiation:

- Where does the trunk initiate movement for the task?
- Is resident able to get in that position? If not, that is your exercise!
- If resident is able, then move on to analysis of how muscle is used

### How Muscle is Used:

- Open chain
- Closed chain
- low or fast twitch fibers
- Speed vs endurance task

### Muscle Activation:

- What joints are needed for the task?
- What muscles are responsible for action?

### Start activation:

- Single plane supported à unsupported
- Maintain proximal control
- Begin with low load, high reps (15-20) to build proximal stabilizers in prep for intensity

### Re-Educate:

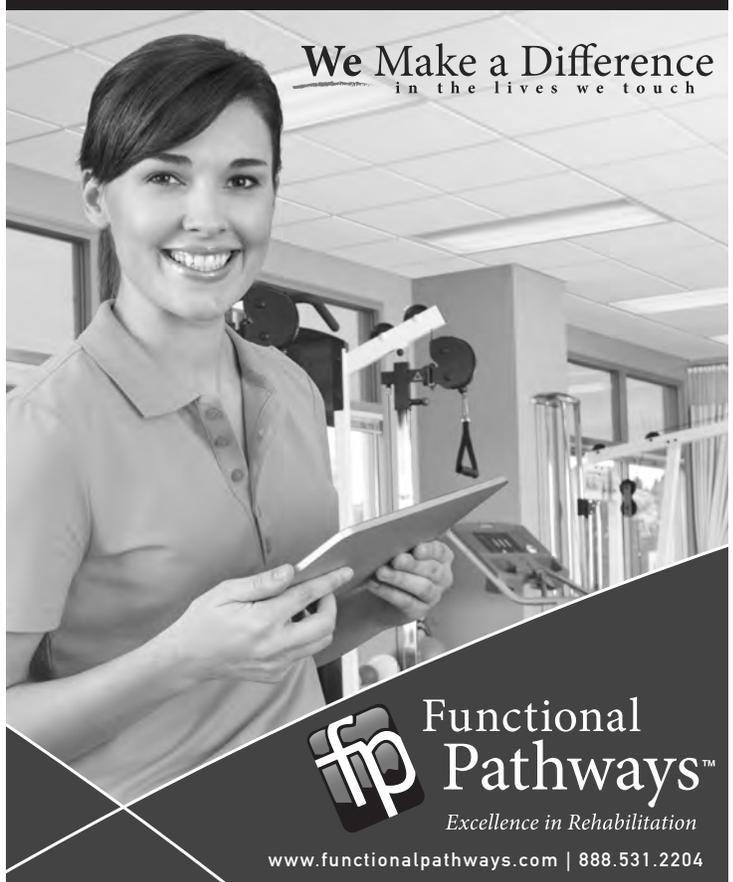
- Re-educate the muscles to work together
- Add the pieces together to get the whole
- Once the client gets the basics of the task, vary attributes to ensure mastery in daily living situations
- Improve the connection between the brain and body vs. hypertrophy only!

## TRAINING SENIORS

### Impact of age:

- Type I and II fibers lost with age in addition to disuse

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- atrophy of type II
- Reduced conduction, especially type II
- After age 60, 1-2% decline in strength and 3-4% decrease in power per year
- Lower extremities show greater decline than upper extremities

### Principals of Strength Training:

- **Overload:** providing a load that is new to the body to get positive training effect

**Specificity:** work muscles in a specific way to get desired outcomes

**Progression:** continually providing overload to get continued benefit without plateau

- Doesn't always mean – add weight
- Can achieve overload by changing:
  - Support surface
  - Lever length
  - Speed of movement
  - Single plane à multi plane
  - Change height of surface

### Mimic the Demands:

- Once you know how a muscle is used in a task, design exercise to mimic the demands
- Each exercise should relate directly to a missing piece of the task

For more information, please contact Melissa Ward, Director of Clinical Services, Functional Pathways at [mward@fp rehab.com](mailto:mward@fp rehab.com) or call 865-531-2204. You may also discover more at [www.functionalpathways.com](http://www.functionalpathways.com)

*Editor's Note: Our group of columnists continues to expand! This month we welcome Paige Hector to Nursing & Assisted Living Facility Professional. As a clinical educator, Paige gives workshops and seminars across the country on diverse topics including clinical operations for the inter-professional team, meaningful use of data, advance care planning, refusal of care, documentation and care plans. She is skilled at inspiring staff to critically evaluate their own organizations and then gives them the resources and guidance to make necessary changes. With over 25 years' experience in long term care, she brings a wealth of experience and knowledge to her work. Paige was recently named as the National Association of Social Worker's representative to the Joint Commission's Professional and Technical Advisory Committee (PTAC) for Nursing and Rehabilitation Centers. In the spring of 2015 she participated in the White House Conference on Aging. Contact Paige at 520-955-3387 or at paigehector@gmail.com plus you may discover more about her at www.paigeahead.com*



## Updating Policies and Procedures: Stop the Groaning!

by Paige Hector, LMSW

Policies and procedures (P&P), certainly not the most exciting aspect of clinical operations management in a nursing facility but they are critically important. Be honest, is your P&P manual up-to-date?

Is it functional, and does it represent what the staff actually does? Or does the manual sit on a dusty shelf or in some obscure file in a computer that no one knows how to access? Just last week, I was talking with a medical director who was expressing frustration at the outdated and incorrect P&P in one of his facilities. He identified several problems (which in my experience as a consultant are not uncommon): 1) the last P&P revision was 8 years ago, 2) the hard copy P&P did not match the electronic version, 3) staff was unable to access the electronic version, 4) the Director of Nurses said staff just come to her when they need a policy. Yikes.

I find it interesting that while facilities continue to be cited with regularity for not following their own P&P's, the prevalence of outdated and inaccurate documents is significant. What will it take to move P&P's out of the realm of "paper compliance" to useful documents that guide resident care, support staff and improve quality?

It will take corporate, regional and administrative staff that understands the importance of up-to-date policies and procedures and who are committed to providing their facilities and communities with great manuals. It means staff will have quick and easy access to current documents and not have to track down a DON or administrator to get a copy. It will take leaders who do not bemoan what is perceived as a mundane task of updating P&P's but instead set a positive example for staff. It will take making your P&P's a living document that changes with your needs.

People "get it" when we talk about empowering residents. Let's empower staff too! While they might groan when you announce that it is time to review and update the P&P's, engage them in the process. Show your own excitement (*yes, excitement*) about working with each department, including floor staff, to ensure the best possible set of P&P's, documents that reflect employees' hard

work and expertise. Actually schedule time to meet with them and allow quiet time to read and make notes of things that need to be changed. Do not just instruct them to "update the P&P's" without helping facilitate the process.

At the very least, every P&P should be reviewed yearly and signed off, usually through the performance improvement process. Read through each step, every bullet point, and validate accuracy. If the P&P references a form, an assessment or another part of the P&P, make sure that information is correct and include those assessments and forms with the relevant P&P. Sometimes staff creates work-arounds to help simplify a cumbersome process or a lengthy, irrelevant assessment tool. Perhaps they are even unaware that the P&P actually stipulates the use of a particular tool, instrument or process. If the work-around represents an improvement to the existing methodology, allow the P&P to be changed and improved. It is the responsibility of the management team, and ultimately the administrator, to make sure that what is actually being done is accurately reflected in the P&P.

Spot check P&P now and again. Something unusual happening in your facility, perhaps a resident who is a danger to self by expressing suicidal ideation? Use this opportunity to read the P&P and see if it's working well for staff and if it is being followed. When the admitting nurse identifies a resident as an elopement risk, what should happen next? Is it being done? Is the resident safe? Or, is it possible this event could turn into a travesty played out on the front page of the Sunday paper?

Remember, these examples and ones like them are not intended for administration to take a "gotcha" attitude toward staff if the P&P is not being followed. Everything we do every day is a process. Ask where the process broke down that allowed staff to not follow the P&P. Identify areas for improvement (and not just another inservice), and approach improvement positively by empowering staff to be part of the solution, not blamed for an error.

Happy Updating!



## The Excellence Column: Evaluating Excellence

By Meg Stone, Two-Time Olympic Athlete and Present Olympic Training Coach

***"We are what we repeatedly do, Excellence, therefore is not an act, but a habit." Aristotle***

Too often in sports we hear the phrase "that's awesome, that's excellent". Having a positive up-beat outlook on life is tremendously important as very few of us want to be associated with someone who is continually looking for the potholes in life. On the other hand, I personally find meaningless

praise is equally irritating and of no value. As a former athlete and coach I presently advise over 50 graduate students, the ability to

give honest feedback and evaluate performance is paramount to their success.

As a coach, regular face to face conversations and informal feedback are an expected part of the coaching process. The athlete expects to be regularly and consistently evaluated in order to improve their execution. Just like you in the assisted living and nursing facility profession, the employee expects to have feedback on their performance, which helps to improve their contribution to the

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evaluation of the existing risk and internal control systems and framework within an organization. Internal audits ensure monitoring functions are working as intended and identify where management monitoring and/or additional board oversight may be required.

- **The compliance function:** promotes the prevention, detection, and resolution of actions that do not conform to legal, policy, or business standards.
- **The legal function:** advises the organization on the legal and regulatory risks of its business strategies, providing advice and counsel to management and the board about relevant laws and regulations that govern, relate to, or impact the organization.
- **The human resources function:** manages the recruiting, screening, and hiring of employees; coordinates employee benefits; and provides employee training and development opportunities.
- **The quality improvement function:** promotes consistent, safe, and high quality practices within health care organizations. Quality improvement is critical to maintaining patient-centered care and helping the organization minimize risk of patient harm.

Boards should also evaluate and discuss how management works together to address risk, including the role of each in:

1. identifying compliance risks
2. investigating compliance risks and avoiding duplication of effort
3. identifying and implementing appropriate corrective actions and decision-making
4. communicating between the various functions throughout the process

To operate effectively, the compliance, legal, and internal audit functions should have access to appropriate and relevant corporate information and resources. (2015 Guidance p. 8)

### Reporting to the Board

The board should set and enforce expectations for receiving particular types of compliance-related information from various members of management. The Board should receive regular reports regarding the organization's risk mitigation and compliance efforts - separately and independently - from a variety of key players, including those responsible for audit, compliance, human resources, legal, quality, and information technology. Boards of health care organizations should receive compliance and risk-related information in a format sufficient to satisfy the interests or concerns of their members and to fit their capacity to review that information.

### Identifying and Auditing Potential Risk Areas

The Board should ensure that management and the Board have strong processes for identifying risk areas (e.g. referral relationships and arrangements, billing problems, upcoding, submitting claims for services not rendered and/or medically unnecessary services, privacy breaches, and quality-related events). One of the reasonable steps an organization is expected to take under the Guidelines is "monitoring and auditing to detect criminal conduct." Audits can pinpoint potential risk factors, identify regulatory or compliance problems, or confirm the effectiveness of compliance

controls. Audit results that reflect compliance issues or control deficiencies should be accompanied by corrective action plans.

Emerging trends in the health care industry to increase transparency can present health care organizations with opportunities and risks. For example, as noted by the OIG, boards may choose to compare accessible data against organizational peers and incorporate national benchmarks when assessing organizational risk and compliance. Also, boards of organizations that employ physicians should be cognizant of the relationships that exist between their employees and other health care entities and whether those relationships could have an impact on such matters as clinical and research decision-making. Because so much more information is becoming public, boards may be asked significant compliance-oriented questions by various stakeholders, including patients, employees, government officials, donors, the media, and whistleblowers.

### Encouraging Accountability and Compliance

As we know, compliance is an enterprise-wide responsibility. It is the responsibility of the entire organization to execute the compliance program considering audit, compliance, and legal functions. The guidance recommends that boards consider employee incentive programs that are focused on compliance and tied to bonuses or other incentives. The OIG notes that boards and their organizations can benefit in several ways from compliance programs, noting in particular that repayment of Medicare and Medicaid overpayments within 60 days (60-Day Rule) after they are identified (as required by statute) will be aided by effective compliance and reporting programs. Some companies have made participation in annual incentive programs contingent on satisfactorily meeting annual compliance goals.

### Nonprofit Boards

The *In re: Lemington Home for the Aged* case highlights the need for enhanced governance practices for nonprofits, particularly those facing financial difficulties. On January 25, 2015, the Third Circuit Court of Appeals ruled to hold directors of the nonprofit nursing home liable for failure to meet fiduciary duties. The action was initiated by the nonprofit's creditors and the Court of Appeals affirmed a jury's award of \$2.25 million in compensatory damages against former directors and officers of a bankrupt nonprofit corporation - personal liability for breach of fiduciary duties and "deepening insolvency." The Court also affirmed punitive damages against the officer defendants, but vacated the award of punitive damages against the director defendants.

The evidence presented to the jury established that directors allowed the administrator to manage the home for six years in the face of abnormally high deficiency findings and independent reports documenting her shortcomings and recommending that she be replaced. Even after the administrator ceased working at the home full-time, the directors allowed her to continue in her role and collect full salary all in violation of state regulations. In addition, the directors relied on the advice of the CFO even after the directors discovered he was not maintaining the home's financial records and failed to bill Medicare for at least \$500,000.

Corporate formalities were not maintained and board minutes were incomplete or non-existent. Attendance at board meetings was often below 50% and at least one director failed to participate in a single meeting over several years. Although the home's bylaws required a finance committee with a treasurer as chairperson, the finance committee was not established and the position of treasurer remained unfilled.

According to the Pennsylvania statute, a director must perform his/her duties "in good faith in a manner he reasonably believes

to be in the best interest of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances” and he is “entitled to rely in good faith on information, opinions, reports or statements, including financial statements and other financial data” prepared by employees or experts. However, “[a] Director shall not be considered to be acting in good faith if he has knowledge concerning the matter in question that would cause his reliance to be unwarranted.”

The Court held that the evidence supported the jury’s findings that the directors did not exercise reasonable prudence and care in continuing to employ the administrator and CFO and breached their fiduciary duty of care by failing to take action to remove them once the results of their mismanagement became apparent. The board knew that the CFO had not been maintaining proper financial records but continued to rely on him. It also kept the administrator in her role for six years in the face of abnormally high deficiency findings and allowed her to continue even after she ceased working full time in violation of state law and even after receiving several independent reports documenting her shortcomings and urging that she be replaced. As the court noted, “[t]his [was] not a case where directors, acting in good-faith reliance on ‘information, opinion, reports or statements’ prepared by employees or experts, made a business decision to continue to employ an Administrator whose performance was arguably less than ideal.” The directors in this case had “actual knowledge of mismanagement, yet stuck their heads in the sand in the face of repeated signs that residents were receiving care that was severely deficient.”

The Court also found that there was sufficient evidence to support the jury’s verdict that the defendants deepened the Home’s insolvency. The evidence against the directors included the concealment for over three months of the board’s January 2005 decision to close the home and deplete the patient census before filing for bankruptcy, which resulted in a “slow death” of the home’s ability to generate revenue. As to the officers, the evidence included the mismanagement of finances, inattention to record keeping and patient billing and the failure to collect close to \$500,000 in Medicare reimbursements, as well as the CFO’s failure to maintain a general ledger and refusal to meet with a consultant hired by the Home’s major creditors and make available information about the Home’s financial condition to potential buyers. “All of this conduct damage the Home’s financial viability after it had already become insolvent.”

Notably, *In re: Lemington* warns not-for-profits that placing undue reliance on officers of the corporation and a lack of appropriate oversight may have financial consequences, not just for the corporation, but also for directors themselves. While focused on Pennsylvania state law, regardless of jurisdiction, the opinion states the reality that the corporate officers as well as board members

of not-for-profit health care organizations may be held to the same standards of accountability as those of for-profit, public corporations.

The 2015 Guidance recommendations are intended to assist boards with the performance of those activities, which is key to their compliance program oversight responsibilities. As stressed in *In re: Lemington*, the board should include individuals who know the industry and have the requisite financial and health care experience to competently oversee the organization and its executive staff. A savvy and well-informed board is also more likely to detect and prevent self-dealing and suspect transactions engaged in by officers and executives.

#### **Takeaways for health care organizations governing boards**

1. Be Proactive - take an active role in oversight of the organization’s compliance program
2. Define Functional Roles and Relationships - be aware of the “adequacy, independence, and performance” of the various organizational functions related to compliance (e.g., compliance, legal, internal audit, human resources, quality improvement) and evaluate these factors on an ongoing basis
3. Set and Enforce Expectations for Reporting - provide regular compliance-related reports to the Board on issues such as risk mitigation
4. Implement a Strong Process for Identifying and Addressing Potential Risk Areas - draw upon internal and external sources to establish an effective process for identifying risk areas, which should include auditing, monitoring, and implementation of corrective action plans.
5. Encourage Accountability and Compliance - encourage self-disclosure and reasons why a board may wish to inquire about the organization’s efforts to comply with the 60-Day Rule and its process for addressing the identification of potential compliance violations.

Regulatory risk is inevitable in the health care industry, and the risk areas differ by industry sector. Healthcare organizations face a multitude of state and federal laws and regulations. Our firm works with clients to establish and implement effective compliance programs, addressed by the 2015 Guidance. We advise clients on the beneficial use of this newly available information, in addition to identifying industry trends, designing risk assessment programs, and implementing corrective action plans. We encourage you to take advantage of the practical tips offered in this educational resource. If you would like to further discuss the 2015 Guidance or have any questions, please feel free to contact Rebecca Adelman at [radelman@hatlawfirm.com](mailto:radelman@hatlawfirm.com) or 901.201.4017.

organization. This evaluation is a road map that keeps the employee or athlete on track toward the goals they have set for themselves and the organization. It is important that the coach (or in your case your supervisor or a higher up in your organization) communicate, clearly, thoroughly, and concisely in a fashion the individual understands in order to have that person be the best team player they can be, and this is equally important in any job situation.

In discussion with athletes (employees) it is key that they understand clearly what is expected of them. What role do they play on the team and how do they interact with the others on the team. In pro football, Tom Brady knows his role is to quarterback the New England Patriots and he does not take on the role of linebacker

who plays on the other side of the ball (i.e. trying to stop the quarterback). Both roles are very important to team success, but each role is very different, with a different contribution.

Everyone likes to hear positive reinforcement and praise for a job well done, and is eager to have help with challenges they encounter. Continual evaluation helps continual improvement, if done in a manner which is not intrusive or irritating. As an athlete the last thing I wanted was being assessed everyday, as one needs time to understand an evaluation, think about ways to improve, and then show improvement. All this takes a little time. Staying in tune with your athlete or employee requires patience and time.

In athletics there is a process of building a training plan called Periodization. This involves taking all the pieces of a training program, placing them in the right order, at the right time, with the goal to produce a great training program that can bring out the best in an athlete. In order to qualify for the Olympic Games, an Olympic qualifying standard for that sport must be attained. This is a performance evaluation that's standard, and reflects if you can then compete in the Olympic Games. Fail to reach the standard, and you find yourself staying at home. This is a clear cut goal and easily defined. When you are employed in the workforce you and your employer's expectations must be clearly defined and goals clearly set and met just like an Olympic athlete.

In the months to come I hope to share with you many similarities between working in a nursing or assisted living facility, and that of the Olympic athlete. The conscientious employee and the Olympic athlete share many similar traits, I look forward to sharing those with you.

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