

Health Care Association of New Jersey
20 Hour Symposium

**Informal Dispute Resolution and
Independent IDR**

March 21, 2013

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Overview Of Topics

- ☐ **When and How to request Informal Dispute Resolution (IDR)**
- ☐ **Selecting Deficiencies to appeal**
- ☐ **Preparations for IDR**
- ☐ **The New “Independent” IDR**
- ☐ **The Departmental Appeals Board
Hearing Process**

What Is IDR And Where Is It Authorized?

- **Federal LTC Regulations (42 CFR 488.331 and State Operations Manual §7212)**
- **State Regulations (Licensing Procedures and Enforcement Rules: N.J.A.C. 8:43E-2.3)**
- **IDR also is available for Assisted Living, RHCF, Medical Day Care, and all other licensed services**
- **In most states, IDR is not effective and procedures vary widely**

Affecting the Survey Results Prior to IDR

- **Provide the team with documents up to and following the survey exit conference**
- **Follow-up with the team leader after survey in their office**
 - **Forward additional relevant documents/evidence of compliance**
- **Call the Regional Coordinator or Survey Director if there's a procedural issue**
- **Generally, intervention above the team level on substantive issues after the survey usually is not effective**

When Can I Request IDR?



- ☐ **IDR must be requested within 10 days of the receipt of survey results (all documentation must be submitted at least 10 business days before the scheduled IDR)**
- ☐ **The POC cover letter must request IDR**
 - ☐ **Issue: devote time on the POC or IDR?**
- ☐ **The POC should contain a disclaimer statement for disputed deficiencies:**
 - ☐ Please be advised that _____ respectfully disputes the validity of this deficiency and has requested informal dispute resolution. As such, this plan of correction is not an admission of liability, and we are filing it in compliance with state and federal requirements.
- ☐ **IDR may be requested only once for each set of deficiencies (new deficiencies on revisit excepted)**

Scheduling of IDR Hearings

- **The NJDOHSS rules provide 10 business days for the Department to schedule a hearing (N.J.A.C. 8:43 E-2.3)**
- **Current practice – 6-8 weeks before IDR is scheduled for a long term care facility**
- **Only 1 postponement is allowed by the provider**
- **Decisions are generally issued same day as IDR**

Impact Of IDR On Enforcement

- A request for IDR does not delay enforcement by CMS (SOM § 7212 C.2)
 - CMS may impose enforcement while waiting for IDR to be scheduled
 - Civil Money Penalties and Denial of Payment for New Admissions continue to run until compliance date, irrespective of whether IDR is pending
 - DAB Hearing request close date may precede IDR



Impact of IDR on the CMS Five Star Ratings

- An IDR filing will delay any change in the facility's Five Star rankings
- CMS confirms this in the State Operations Manual
 - Deficiencies pending informal dispute resolution should be entered into the *Automated Survey Processing Environment* system (ASPEN) and the *ASPEN Informal Dispute Resolution (IDR) Manager* but will not be uploaded to the *Certification and Survey Provider Enhanced Reporting* system (CASPER) for posting to the *Nursing Home Compare* website until informal dispute resolution has been completed. (see SOM Section 7212)
- Tip: The Department does not always follow this rule- periodically check to make sure your ranking has not been changed prematurely

What are the Odds of being Successful at IDR?

- Historically about 1/3 of contested deficiencies are removed or modified as a result of IDR
- FY 2011-2012 DOH data shows less success today:
 - 82 IDRs held
 - 93 tags challenged
 - 75 tags upheld
 - 11 tags deleted
 - 7 tags scope and severity reduced
 - 12% of all tags challenged deleted
 - 7% of all tags challenged reduced or modified
 - 81% of all tags challenged upheld

Past IDR success rates

- In FY 2006, 41 IDR hearings were requested
 - 74 deficiencies were contested (1.8 per IDR)
 - 16 were deleted (22%)
 - 11 were downgraded (15%)
- IDR requests have increased since this time

Why Not Request IDR?

- **Credibility of the facility may suffer if deficiencies are likely to be upheld**
- **Potential for future survey repercussions from same team?**
- **Preparation costs - investment of time; outside consultant or legal counsel fees**
- **No immediate impact on enforcement**

Why Should We File an IDR request?

- **Eliminate deficiencies driving CMS enforcement actions and penalties**
- **Mitigate the impact on consumer choice and CMS Five Star quality rankings**
- **Limit impact on sale transactions, refinancing, zoning/planning board applications**
- **LNHA Board inquiries result from IJ and Substandard Quality of Care**
- **NATCEP program denials**



More Good Reasons to Challenge Significant Deficiencies

- **Negative impact on obtaining Advisory Standard Surveys (unavailable with “E” or above deficiencies on record)**
- **IJ’s and CMS penalties affect track record for Certificate of Need and Licensing Applications**
- **Limiting liability in civil litigation**
 - **Is there a risk of a lawsuit?**
 - **Unchallenged deficiencies may result in “negligence per se”**
 - **Reduce liability insurance costs**
- **Avoid the need for the DAB hearing process**
- **Management team’s reputation**

What Deficiencies Should Be Appealed?

- **Contest only deficiencies with a reasonable likelihood of success**
 - **Do not use a “shotgun” approach to contest everything on the 2567**
 - **Challenge “piled-on” deficiencies with repeated facts**
- **Appeal deficiencies that may impact a CMP or a denial of payment (highest scope and severity)**
 - **Note that the start date or the date substantial compliance was found can be contested if it impacts CMP’s**
- **Appeal deficiencies with a factual or legal error or an inappropriate scope and severity**

Common Factual Errors

- **Factual error – the surveyor gathered or relied upon erroneous information:**
 - The statement of facts in the CMS 2567 is incorrect
 - The 2567 omits relevant facts
 - The “Services not documented = services not provided” adage can be challenged through:
 - Affidavits/certifications of nursing or medical staff
 - Physician statements particularly good
 - Other sources of verification, such as personnel files, hospital records, inservice charts, etc.
 - Photos or security camera tapes

Common CMS 2567 Survey Errors

- **Hearsay evidence example:**
 - “according to a visitor, Resident #3 did not receive....”
- **Opinions and assumptions are not supported by facts**
 - “Resident #3 did not receive assistance ...”
 - look for statements without any identification of the source of the conclusion
- **Check the CMS “Principles of Documentation”**



Incorrect Legal Conclusions

- The facts cited do not represent a violation of the F-Tag picked by the DOH:
 - check the SOM Interpretive Guide for a statement of the standard and what constitutes appropriate evidence
 - i.e. F225 cited for an injury that is not abuse or neglect
- Immediate Jeopardy is cited that does not meet the requirements of Appendix Q of the CMS State Operations Manual

Issues that Cannot be Appealed

- Invalid survey procedures (i.e. inconsistency or bias – these should be reported during the survey)
- Remedies imposed (e.g. amount of CMP's)
- Scope and Severity that does not affect the amount of a CMP (federal rule)
 - NJDOH enforcement rules (NJAC 8:43E) permit any deficiency to be contested
 - Note that for IJ, the standard of review is higher
 - “Clearly erroneous” – DAB standard of review for Immediate Jeopardy determinations
 - Not just “more likely than not” or a “preponderance of the evidence”

Past Non-compliance

- A deficiency may be considered “past non-compliance” if
 - The facility was out of compliance prior to the date of the current survey
 - There is evidence that the facility corrected the deficiency prior to the date of the current survey
- If the deficiency is not serious and has been corrected, the state is directed to not cite the violation
- Past non-compliance requires a CMP to be imposed
 - it is for a defined number of days
 - Track record, NATCEP, and quality rankings are not impacted

IDR procedures



- What must be filed?
 - First, just a written request within 10 days of receipt of the CMS 2567. This must contain
 - a specific listing of each deficiency being contested
 - A statement of what facts are being disputed or the legal conclusions that are being contested
 - Second, within 14 days of the hearing date, the “IDR Narrative” and all documentation supporting any contention that the survey finding was in error
 - Copies of the CMS 2567 must be attached
 - Ten copies of the entire package

Who conducts the IDR?

- IDR panelists are assigned by the Director of Enforcement and may include:
 - Licensing and Certification
 - Program Manager/Staff attorney from Enforcement
 - Surveyors are not on the panel
- IDR may be requested via teleconference or “on the papers” only



IDR Decision-making Procedures

- In-person IDR sessions are scheduled for 1 hour in Trenton DOHSS Offices
 - 25 minutes for provider presentation
 - 25 minutes for surveyor presentation
 - 5 minutes each for provider/surveyor rebuttal
- Decision made at conclusion of IDR - rarely held over
- Surveyor does not participate in decision-making

Preparing For IDR

- **Prepare the written documentation**
 - Identify each deficiency to be contested in order of appearance on CMS 2567
 - Provide a narrative summary of the facts or legal issues that dispute the deficiency
 - Use exhibits and reference these documents
 - Identify all residents by number (consider privacy issues)
 - Highlight all relevant entries on exhibits

Who Should Come To IDR?



- Both the Administrator and D.O.N. should attend
- Keep it small (3-6 is a good range)
- Bring persons with direct knowledge of facts with ability to present the facts appropriately
 - CNA's, resident family members, physicians, etc. may attend, if useful as presenters or responders
 - Poor witnesses are not helpful
- Nursing Consultants, Physicians, etc are permitted; Attorneys are not welcome

The IDR Presentation

- **Agree on the team and who will present:**
 - Opening Statement (address impact, process, and positive facility history first)
 - Address each Deficiency separately being disputed
 - Present the Facts/Legal Arguments Against the Deficiency, witnesses speak where appropriate
 - Prepare or have an outline to follow
- **Minimize personal criticism of the surveyor(s) and be generally respectful**
- **Prepare for difficult questions, such as :**
 - Why wasn't this documentation available at survey?
 - Is this documentation valid?

The IDR Decision

- **The Enforcement program sends a written confirmation letter of the decision, with a clean CMS 2567 reflecting all changes**
- **The POC must be re-entered onto the new CMS 2567 Form**
- **Ask for reconsideration of CMP's**
- **CMS is NOT obligated to accept state IDR decisions and changes to penalties**
- **Ensure that the data on your record used for the CMS Five Star rankings is revised**

Appealing an Unsuccessful IDR Result

- **There are no further appeals at the state level, unless state licensing penalties have been imposed**
 - **If state penalties are imposed, the hearing request must be filed within 30 days of the receipt of the notice of proposed penalties (not IDR)**
- **If CMS has imposed a CMP or other remedy, there is a right to a federal DAB hearing and IDR**
- **The hearing request must be filed within 60 days of receipt of the CMS letter imposing a remedy**

Appealing a CMP

- **CMP's - not collectable until after DAB hearing is concluded -the backlog of DAB Hearing requests often requires 1-2 years**
- **Consider the waiver of hearing rights, providing a 35% reduction in the CMP**
 - **The Waiver letter must be filed in writing, within the 60 days**
- **Due to CMS motion practice, cost of hearing process is high (eg motions to dismiss, pre-trial briefs, etc.)**

Independent IDR Process

- Mandated by CMS regulations effective January 2012
- Only is offered by CMS upon issuance of an enforcement action
- NJ contracts with the New York DOH to review IDR results “on the papers”, and vice versa
- Many states use a vendor (MPRO)

Independent IDR procedures

- CMS precludes states from charging facilities
- It is in addition to state IDR procedures
- IIDR must be completed in 60 days
- A written decision must be generated
- CMP's are still collected by CMS, but placed in escrow until the decision is rendered

If I-IDR is unsuccessful: Filing A DAB Hearing Request

- **The DAB Hearing Request:**
 - IDR does not extend the filing date (60 days of the CMS Notice)
 - The letter must address all deficiencies being appealed, providing both the legal and factual basis for the hearing request
 - Begin the process with legal assistance
 - Significant numbers of SNF appeals have been dismissed for improper hearing requests

Settlement of the DAB Appeal

- Settlements can be obtained-
CMP are not usually less than
65% of amount imposed
- CMS will often reduce the
scope and severity of a
deficiency or the number of
deficiencies
- Alternative dispute resolution
is available through the DAB
but there is little use of it and
mixed reviews



DAB Hearings

- Cases are assigned to one of several Administrative Law Judges from the DAB
 - Hearings are held in NJ, NYC, or Philadelphia
- Cases are similar to civil litigation, with extensive filings prior to the hearing
 - Statement of Readiness
 - Pre-hearing briefs and motions
 - Discovery
 - generally no depositions
 - surveyor notes available
 - Expert reports and testimony frequently used
 - Hearing held over 2-3 days
 - Post-survey briefs

DAB Decisions and Appeals

- Decisions are published and on the web
 - See <http://www.hhs.gov/dab/>
 - Good source of guidance on cases with similar facts
- ALJ Decisions may be appealed to the Departmental Appeal Board
- Appeals may then be taken in federal court

