HALL RENDER

HEALTH LAW IS OUR BUSINESS. | HALL RENDER KILLIAN HEATH & LYMAN

Keys to Avoiding and Defending Civil Monetary Penalties in Skilled Nursing

Presented by:
Sean Fahey | 317.977.1472 | sfahey@hallrender.com
Health Law Attorneys - Hall Render Killian Heath & Lyman
Post-Acute Team

1

HEALTH LAW IS OUR BUSINESS. | HALL RENDER KILLIAN HEATH & LYMAN

Presenter

Sean Fahey
Attorney, Hall Render
sfahey@hallrender.com
(317) 977-1472

2

Agenda

1. Describe the Informal Dispute Resolution Process.
2. Describe the Independent IDR (IIDR) Process.
3. Discuss the preparation and submission of relevant documents.
4. Identify and discuss reasons not to proceed with an Independent IDR hearing.

3

Avoiding Issues

4

Manage Risks

- Survey preparations
  - Ongoing review of policies and procedures.
    - Does staff know where to find those that are applicable to the circumstances? Do they know how they apply?
    - Have facility practices evolved? Is the facility actually following them?
  - Thoroughly investigating incidents.
  - Training

5

Informal Dispute Resolution (IDR)

6

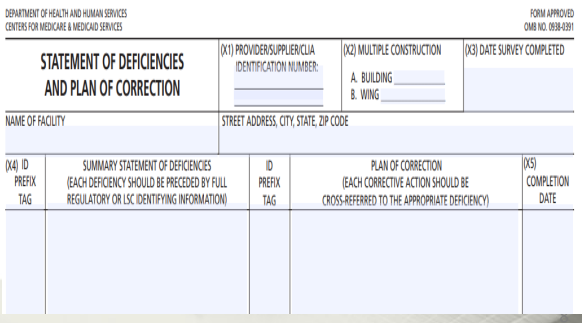
Survey

- Exit conference notes.
- Offer additional information and materials.

7

2567

- 2567 is a record of survey
- Deficiency citation consists of regulatory reference
- Survey tag number
- CFR reference
- Language that specifies noncompliant aspect of requirement
- Explicit statement that requirement was "NOT MET"



DEPARTMENT OF HEALTH AND HUMAN SERVICES
CENTERS FOR MEDICARE & MEDICAID SERVICES

FORM APPROVED
OMB NO. 0938-0391

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION	(X1) PROVIDER/SUPPLIER/CLIA IDENTIFICATION NUMBER:	(X2) MULTIPLE CONSTRUCTION	(X3) DATE SURVEY COMPLETED
		A. BUILDING _____ B. WING _____	

NAME OF FACILITY	STREET ADDRESS, CITY, STATE, ZIP CODE

(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY SHOULD BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION)	ID PREFIX TAG	PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERRED TO THE APPROPRIATE DEFICIENCY)	(X5) COMPLETION DATE

8

2567

- Read the 2567 Carefully
- Pay attention to what state is citing. What facts are they using to support deficiencies?
- What are the deficiencies ? Do you agree? Are they supported by the facts/records/incident reports/staff interviews? Are there facts missing that may help you to clarify the record or mitigate the situation?
- What are the regulatory violations? Federal? State?
- What is the best way to respond ? Do you want to IDR the deficiency?
- Start investigation now.

9

Plan of Correction

- How corrective action will be accomplished for those residents affected by the deficient practice;
- Address how the facility will identify other residents having the potential to be affected by the same deficient practice;
- Address what measures will be put into place or systemic changes made to ensure that the deficient practice will not recur;
- Indicate how the facility plans to monitor its performance to make sure that solutions are sustained; and
- Include dates when corrective action will be completed.

10

What is the IDR Process?

- 42 CFR 488.331 require that CMS and the States, as appropriate, offer skilled nursing facilities an informal opportunity to dispute cited deficiencies upon facility's receipt of the official Form CMS-2567.
- CMS S&C: 12-08-NH Memo (Dec. 2, 2011).
- State Operations Manual Chapter 7 - Survey and Enforcement Process for Skilled Nursing Facilities and Nursing Facilities. https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/som107c07pdf.pdf

7212 - Informal Dispute Resolution
- 7212.1 - Introduction
- 7212.2 - Purpose
- 7212.3 - Mandatory Elements of Informal Dispute Resolution
- 7212.4 - Additional Elements for Federal Informal Dispute Resolution

11

IDR and IIDR

You want to:		
Dispute survey facts and findings resulting in deficiency and s/s SQC or IJ.	Dispute surveys resulting in CMP and subject to being placed in escrow. (s/s G or above) AND you want the review to be done independent of State Survey Agency BUT you still want an informal process	Dispute surveys resulting in CMP AND you want a formal/evidentiary hearing through federal government w/ appellate procedure
⇩	⇩	⇩
IDR	IIDR	ALJ
		⇩
		DAB
		⇩
		Federal Court

12

What is the IDR Process?

- 42 CFR 488.331 requires CMS and state's facility representatives an informal opportunity, at their request, to dispute survey findings subsequent to the receipt of the official SOD or 2567
- If successful, the findings should be removed or modified and a revised 2567 will be issued.

13

13

Not the IDR Process.

- No disputes just for sake of arguing.
- Do not be argumentative or belligerent.
- Not the platform to air concerns about survey process or Surveyors.
- Consider whether a call to DHS and sending further documentation may resolve issue.
- Scope and Severity (S/S) Cannot be Disputed unless you have Substandard Quality of Care Citation (SQC), but if alleged facts are incorrect and do not support S/S, may lead to lower S/S

14

14

What is the IDR Process?

- The informal dispute resolution process may not be used to challenge any aspects of the survey process, including the:
  - Scope and severity assessments of deficiencies, with the exception of scope and severity assessments that constitute substandard quality of care or immediate jeopardy;
  - Remedy(ies) imposed by the enforcing agency;
  - Alleged failure of the survey team to comply with a requirement of the survey process;
  - Alleged inconsistency of the survey team in citing deficiencies among facilities; or
  - Alleged inadequacy or inaccuracy of the IDR process.

15

15

Citations

- South Dakota IDR Summary

State: South Dakota
Survey Focus: Health
Year Type: Calendar Year
Year: 2020
Month: Full Year

Tag #	Tag Description	# Citations	% Providers Cited	% Surveys Cited
	Totals represent the # of providers and surveys that meet the selection criteria specified above.		South Dakota Active Providers = 104	Total Number of Surveys = 372
F0880	Infection Prevention & Control	54	40.4%	14.5%
F0658	Services Provided Meet Professional Standards	11	9.6%	3.0%
F0610	Investigate/Prevent/Correct Alleged Violation	5	4.8%	1.3%
F0656	Develop/Implement Comprehensive Care Plan	4	3.8%	1.1%
F0689	Free of Accident Hazards/Supervision/Devices	4	3.8%	1.1%
F0697	Pain Management	4	3.8%	1.1%
F0884	Reporting - National Health Safety Network	4	3.8%	1.1%
F0657	Care Plan Timing and Revision	3	2.9%	0.8%
F0886	COVID-19 Testing-Residents & Staff	3	2.9%	0.8%
E0001	Establishment of the Emergency Program (EP)	3	2.9%	0.8%

16

Citations

- South Dakota IDR Summary

State: South Dakota
Survey Focus: Health
Year Type: Calendar Year
Year: 2021
Month: Full Year

Tag #	Tag Description	# Citations	% Providers Cited	% Surveys Cited
	Totals represent the # of providers and surveys that meet the selection criteria specified above.		South Dakota Active Providers = 105	Total Number of Surveys = 232
F0880	Infection Prevention & Control	59	43.8%	25.4%
F0884	Reporting - National Health Safety Network	32	21.9%	13.8%
F0812	Food Procurement, Store/Prepare/Serve Sanitary	19	18.1%	8.2%
F0658	Services Provided Meet Professional Standards	19	16.2%	8.2%
F0686	Treatment/Svcs to Prevent/Heal Pressure Ulcer	19	15.2%	8.2%
F0700	Bedrails	15	14.3%	6.5%
F0755	Pharmacy Srvcs/Procedures/Pharmacist/Records	15	14.3%	6.5%
F0657	Care Plan Timing and Revision	10	7.6%	4.3%
F0684	Quality of Care	10	9.5%	4.3%
F0550	Resident Rights/Exercise of Rights	10	8.6%	4.3%
	Qualified Dietary Staff			

17

IDR

- South Dakota IDR Summary
- https://doh.sd.gov/documents/Providers/Licensure/NursingFacilityRegulationReport_2022.pdf

Informal Dispute Resolution (IDR) Summary

Federal Fiscal Year	IDRs Requested	Deficiencies Appealed	Deficiencies		
			Removed	S/S Lowered	Upheld
2017	7	18	6	1	12
2018	10	20	5	4	15
2019	13	26	16	2	10
2020	9	20	11	2	9
2021	21	44	18	3	26
Average	**12**	**26**	**11**	**2**	**14**

18

CMP

- South Dakota CMP Summary

Civil Money Penalties Summary

Civil Money Penalties to a facility *by Federal Fiscal Year*					
Year	**Number Imposed**	**Number Removed**	**Total Imposed**	**Total**	**Total Medicaid**
2015	3	0	3	$107,282.50	$89,543.68
2016	9	1	8	$113,850.65	$88,559.49
2017	28	2	26	$1,118,266.50	$904,691.02
2018	7	0	7	$319,626.55	$267,532.28
2019	17	0	17	$461,982.95	$365,943.82
2020	21	1	20	$218,241.20	$186,454.89
2021	86	2	84	$974,383.25	$753,053.94
Total	171	6	165	$3,313,633.60	$2,655,779.12

** 2020 7 CMP's imposed due to F880 (Infection Prevention & Control) or F884 (NHSN Reporting)*

*** 2021 74 CMP's imposed due to F880 (Infection Prevention & Control) or F884 (NHSN Reporting)*

19

19

CMP

- Region VIII CMP Summary
- South Dakota 72 facilities
- 9 were $650 or $1,000

Civil Money Penalty (CMP) Report

Region	Total Number of CMPs		Total Dollar Amount		Average Dollar Amount		Average Days in Effect
	Per Diem	Per Instance	Per Diem	Per Instance	Per Diem	Per Instance	Per Diem
(I) Boston	493	331	$ 7,440,140.37	$ 3,254,846.31	$ 15,091.56	$ 9,833.37	9
(II) New York	787	198	$ 5,315,878.56	$ 1,827,040.96	$ 6,754.61	$ 9,227.48	4
(III) Philadelphia	766	333	$ 9,221,735.96	$ 2,761,619.64	$ 12,038.82	$ 8,293.15	10
(IV) Atlanta	1,820	768	$ 26,397,056.64	$ 5,076,400.40	$ 14,503.88	$ 6,609.90	7
(V) Chicago	2,795	1,044	$ 42,802,127.28	$ 13,068,977.70	$ 15,313.82	$ 12,518.18	9
(VI) Dallas	1,968	729	$ 16,545,534.94	$ 7,597,400.47	$ 8,407.28	$ 10,421.67	5
(VII) Kansas City	1,631	317	$ 16,034,717.57	$ 2,994,510.29	$ 9,831.22	$ 9,446.40	6
(VIII) Denver	740	151	$ 7,918,718.87	$ 1,252,353.57	$ 10,700.97	$ 8,293.73	8
Colorado	353	54	$ 4,236,657.05	$ 497,924.32	$ 12,001.86	$ 9,220.82	9
Montana	133	18	$ 1,475,558.75	$ 156,995.50	$ 11,094.43	$ 8,721.97	7
North Dakota	40	16	$ 302,068.31	$ 136,037.75	$ 7,551.71	$ 8,502.36	7
South Dakota	48	29	$ 859,479.97	$ 179,867.75	$ 17,905.83	$ 6,202.34	11
Utah	140	17	$ 893,367.79	$ 158,448.25	$ 6,381.20	$ 9,320.49	5
Wyoming	26	17	$ 151,587.00	$ 123,080.00	$ 5,830.27	$ 7,240.00	5

20

When to IDR?

- Do you have one of the following in your 2567:
  - Inaccurate facts in the Citation in One or More Examples.
  - Incomplete Facts in the Citation Examples that Could Change S/S or the Entire Citation.
  - Incorrect Statements or Quotes of What was Stated so that could create Liability.
  - Survey Examples Do Not "Fit" the Regulatory Language or Surveyor Guidance (a) Review SOM, Appendix PP and its examples (b) Review the Actual Regulation.
  - Facts do not list specifics, calling into question validity of citation.

21

21

Path?

- Goal tell a persuasive story with facts
- **Read the citation**
- Record review
- Staff and resident interviews
- Does your investigation support the citation -- now what?

22

22

Path?

Does your investigation support the citation - If so, organize your story:

- Facts and writing
- Create a notebook of relevant materials
- Survey citation restate surveyor's position
- Dispute
- What you found in the record and interviews based on facts; clear and concise
- Conclusion
- Include attachments supporting your position, including expert affidavits and even a brief statement of your argument
- Hearing - Ask questions to understand what panel is looking for

23

Outcome

- Successful IDR
  - Original deficiency citation revised or deleted
  - Changes signed and dated by the supervisor
  - Enforcement action reduced or rescinded
  - Entitled to "clean" Statement of Deficiencies

24

Citations

25

May 2020 – COVID-19 Reporting

- § 483.80 Infection control.
- (g) COVID-19 Reporting. The facility must—
- (1) **Electronically report information about COVID-19 in a standardized format specified by the Secretary**. This report must include but is not limited to–
  - (i) **Suspected and confirmed COVID-19 infections among residents and staff**, including residents previously treated for COVID-19;
  - (ii) **Total deaths and COVID-19 deaths among residents and staff**;
  - (iii) Personal protective equipment and hand hygiene supplies in the facility;
  - (iv) Ventilator capacity and supplies in the facility;
  - (v) Resident beds and census;
  - (vi) Access to COVID-19 testing while the resident is in the facility;
  - (vii) **Staffing shortages**; and
  - (viii) Other information specified by the Secretary.

26

May 2020 – COVID-19 Notification

- § 483.80 Infection control.
- (g) COVID-19 Reporting. The facility must—
- (3) **Inform residents, their representatives, and families of those residing in facilities by 5 p.m. the next calendar day following the occurrence of either a single confirmed infection of COVID-19, or three or more residents or staff with new-onset of respiratory symptoms occurring within 72 hours of each other**. This information must—
  - (i) Not include personally identifiable information;
  - (ii) Include information on mitigating actions implemented to prevent or reduce the risk of transmission, including if normal operations of the facility will be altered; and
  - (iii) Include any cumulative updates for residents, their representatives, and families at least weekly or by 5 p.m. the next calendar day following the subsequent occurrence of either: each time a confirmed infection of COVID-19 is identified, or whenever three or more residents or staff with new onset of respiratory symptoms occur within 72 hours of each other.

27

May 2020 – F884: COVID-19 Reporting

- Review for F884 will be conducted offsite by CMS Federal surveyors (state surveyors should not cite this F-tag).
- Following an initial reporting grace period granted to facilities, CMS will receive the CDC NHSN COVID-19 reported data and review for timely and complete reporting of all data elements.
- Facilities identified as not reporting will receive a deficiency citation at F884 on the CMS-2567 with a scope and severity level at an F (no actual harm with a potential for more than minimal harm that is not an Immediate Jeopardy [IJ] and that is widespread; this is a systemic failure with the potential to affect a large portion or all of the residents or employees), and be subject to an enforcement remedy imposed as described below.

28

May 2020 – F884: COVID-19 Reporting

- F884 – new tag created by CMS for federally required reporting to the NHSN. The citation is received for non-compliance and is cited by federal surveyors off site as NHSN data is reviewed.

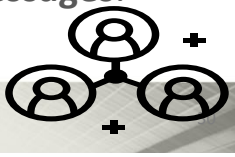
- F884 Tip –
  - Ensure that your data is reported.
  - Check your policy and procedure for reporting.
  - Always have a back up team member that can enter the data.

29

29

May 2020 – F885: Reporting to Residents

- Review for F885 is included in the "COVID-19 Focused Survey Protocol" and will occur onsite by State and/or Federal surveyors.
- If the survey finds noncompliance with this requirement, a deficiency citation at this tag will be recorded on the CMS-2567 and enforcement actions will follow the memo QSO-20-20-All.
- We note that there are **a variety of ways that facilities can meet this requirement, such as informing families and representatives through email listservs, website postings, paper notification, and/or recorded telephone messages**.



30

May 2020 – F885: COVID-19 Information

- F885 - new F-tag established during COVID; a facility must inform residents, representatives, families and staff by 5pm the next calendar day if there is a positive case in the facility or 3 or more residents or staff with new onset respiratory systems.
- **F885 Tip** –
  - Ensure that you have a policy and procedure for informing residents, representatives, families and staff that includes the time frame.
  - How will this communication be completed?
  - Who will communicate and who is the backup?
  - Document the information along with the specifics of the process. Are you using different modes of communication - electronic, paper, in person meetings, phone calls?
  - Whatever is the mechanism make sure staff can relay the process back to surveyors.

31

31

Citations – Top Tags

- As of **February 15, 2022**
  - F-884 Reporting - National Health Safety Network **1,614 (2022)**
    #1 tag for 2021 - 11,064
    – 27 in South Dakota in 2021, and 4 in 2022
    - **Cited 3,731 times in 2020 (#2 tag for 2020)**
  - F-886 COVID-19 Testing-Residents & Staff **718 in 2021**
    – 3 in South Dakota in 2021 and 1 in 2022
  - F-885 Reporting-Residents, Representatives & Families
    - **Cited 518 times in 2020 and 348 in 2021**

32

32

Independent Informal Dispute Resolution (IIDR)

33

CMS CMPs Increased

CIVIL MONETARY PENALTY AUTHORITIES ADMINISTERED BY HHS		Pre 2016	2021
Penalty per day for a Skilled Nursing Facility that has a Category 2 violation of certification requirements:	Per Day	Min: $50 Max: $3,000	Min: $113 Max $6,774
Penalty per instance of Category 2 noncompliance by a Skilled Nursing Facility:	Per Instance	Min: $1,000 Max: $10,000	Min: $2,259 Max $22,584
Penalty per day for a Skilled Nursing Facility that has a Category 3 violation of certification requirements:	Per Day	Min: $3,050 Max: $10,000	Min: $6,888 Max $22,584
Penalty per instance of Category 3 noncompliance by a Skilled Nursing Facility:	Per Instance	Min: $1,000 Max: $10,000	Min: $2,259 Max $22,584

34

34

IIDR

Dear Administrator:

SUBJECT: IMPOSITION OF REMEDY/DISPOSITION OF REMEDIES

- 42 CFR § 488.406 provides CMS the authority to impose penalties on LTC Facilities which are not in substantial compliance with the requirements for participation in the Medicare and Medicaid programs.
- Following a nursing home survey, state survey agencies are required to provide an opportunity for IIDR when Civil Money Penalty (CMP) is imposed.
- Information about availability of IIDR provided in CMS Imposition Notice.
- IIDR not available if IDR process previously used unless IDR process completed before imposition notice sent.

35

35

IIDR

- CMS requires the State Survey Agency to offer Informal Dispute Resolution at no cost to the LTC Provider.
- The Independent Informal Dispute Resolution (IIDR) Process allows the facility to dispute ONLY those deficiencies for which a civil money penalty (CMP) has been imposed and will be collected and placed in escrow.
- Unlike the IDR process which allows facilities an opportunity to challenge deficiency citations, a facility cannot seek an Independent IDR unless they receive notification from CMS of the facility's eligibility to participate in the Independent IDR process.
- The facility's request for an Independent IDR must be made within ten (10) calendar days of the receipt of the offer from CMS to participate in the IIDR.
- The time frame runs concurrent with the submission of the Plan of Correction You must submit a PoC within the 10 calendar days time frame for all deficiencies not challenged or where no IIDR is permitted for a cited deficiency.

36

36

IIDR

- The written notice from CMS should include information relative to the Independent IDR Process and document submission requirements.
- Another important reminder is that of requesting a hearing with the Departmental Appeal Board (DAB) before an administrative law judge (ALJ).
- This is a separate process from the Independent IDR.
- You only have 60-days from the date you receive written notice of the imposition of an enforcement action (e.g., CMP, DPNA, etc.) to file a Hearing Request.
- The fact that you have requested, and/or are participating in, an Independent IDR does NOT suspend the 60-day time frame for filing a hearing request nor does it delay the imposition of CMPs or other remedy.

37

37

CMP Financial Hardship

- If you believe that you have documented evidence that should be considered in establishing the amount of the CMP, the following documents should be submitted electronically within 15 days from the receipt of this notice:
  - Written, dated request specifying the reason financial hardship is alleged
  - List of the supporting documents submitted
  - Current balance sheet
  - Current income statements
  - Current cash flow statements
  - Most recent full year audited financial statements.

38

38

CMP Reduced

- CMP REDUCED IF HEARING WAIVED
- If you waive your right to a hearing, **in writing**, within 60 calendar days from receipt of this notice, the amount of your CMP will be reduced by thirty-five percent (35%). To receive this reduction, the written waiver should be sent to CMS

39

39

IIDR Request

- In accordance with 42 C.F.R. § 488.431, when a CMP subject to being collected and placed in an escrow account is imposed, you have one opportunity to question cited deficiencies through an Independent IDR process. You may also contest scope and severity assessments for deficiencies which resulted in a finding of SQC or immediate jeopardy. **To be given such an opportunity, you are required to make a written request, along with the specific deficiencies being disputed, and an explanation of why you are disputing those deficiencies (or why you are disputing the scope and severity assessments of deficiencies which have been found to constitute SQC or immediate jeopardy) to: _____.**
- This request must be sent within **10 calendar days of receipt of this offer**.
- However, a facility may not use both IDR and Independent IDR for the same deficiency citation(s) arising from the same survey unless the IDR process was completed prior to the imposition of the CMP.

40

40

IIDR - Timing

- IIDR Process – Effective Date Jan. 1, 2012
  - The facility must request an IIDR within 10 calendar days of receipt of the offer
- The Independent IDR is conducted only upon the facility's timely request.
- The facility must submit its request in writing to the State survey agency, or the approved Independent IDR entity or person, as appropriate. **If the request is mailed, the POSTMARK must verify that the request was mailed within the 10-day time period.**
- The request should also include documents, such as facility policies and procedures, resident medical record information that are redacted to protect confidentiality and all patient identifiable information, or other information on which it relies in disputing the survey findings.

41

41

IIDR

- State Operations Manual Chapter 7 - Survey and Enforcement Process for Skilled Nursing Facilities and Nursing Facilities.
- https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/som107c07pdf.pdf

7213 - Independent Informal Dispute Resolution
- 7213.1 - Introduction
- 7213.2 - Purpose
- 7213.3 - Independent Informal Dispute Resolution Requirements
- 7213.4 - Applicability of the Independent Informal Dispute Resolution Process
- 7213.5 - Key Elements of the Independent Informal Dispute Resolution
- 7213.6 - Qualifications of an Independent Informal Dispute Resolution Entity or Person(s)
- 7213.7 - Approval of an Independent Informal Dispute Resolution Process
- 7213.8 - State Budget and Payment for Expenses
- 7213.9 - Independent Informal Dispute Resolution Recommendation and Final Decision
- 7213.10 - Additional Elements for Federal Independent Informal Dispute Resolution Process

42

IIDR

- CMS S&C: 12-08-NH Memo (Dec. 2, 2011)
  - Federal Requirements for the Independent Informal Dispute Resolution (Independent IDR) Process for Nursing Homes – Interim Advance Guidance.
    - A facility may request an IIDR for each survey that cites deficiencies (at a scope and severity of G or above) for which a civil money penalty has been imposed and will be collected and placed in escrow
- CMS S&C: 13-57-NH Memo (Aug. 30, 2013)
  - Escrow and Independent Informal Dispute Resolution Process for Nursing Homes – Applicable to All Civil Money Penalties
    - Effective Oct. 1, 2013, CMPs… all standard or complaint surveys… initiate an enforcement action in which a CMP is imposed where the highest level of deficiency is less than a G level, will also be subject to collection and escrow… also creates opportunity for the facility to request to participate in the IIDR process

43

43

IIDR

- IIDR does not remove or alter the existing informal process at § 488.331(a) which remains for use
- IIDR is in addition to the current IDR process.
  - An IIDR will "Not include the survey findings that have already been the subject of an informal dispute resolution under § 488.331 for the particular deficiency citations at issue in the independent process under § 488.431, unless the informal dispute resolution under § 488.31 was completed prior to the imposition of the civil money penalty"
  - Can you do both IDR and IIDR? Yes, if the informal dispute resolution under § 488.31 was completed prior to the imposition of the civil money penalty.
- The IIDR process does not delay the imposition of any remedies, including a CMP.
- IIDR must be completed within 60 days of request.
- IIDR must generate a written record.
- Requires notification of state ombudsman, involved resident and/or resident representative.

44

44

IIDR - Benefits

- Reducing the impact on the 5-Star Rating;
- Removing and/or decreasing scope and severity can improve the status of the facility on Nursing Home Compare;
- Deficiencies removed will not require a PoC or follow-up survey to review correction;
- When survey tags or scope and severity levels are decreased, the facility may have less exposure or liability for certain claims;
- Individual licenses of the administrator and the facility would be better protected, especially when there is a valid reason to dispute the tag;
- The facility has an opportunity to review its policy and procedure when analyzing disputed deficiencies and can make a determination as to the benefit of modification to prevent further concern in the area;
- Challenging F884 citations and other related IC deficiencies to prevent enhanced enforcement actions for IC deficiencies at a S/S Level of D or above.

45

45

IIDR - Timing

- Regulations at § 488.431(a)(1) requires that Independent IDR be completed within 60 days of the facility's request.
- Every effort must be made to comply with this time frame, however, failure to timely complete the Independent IDR process does not invalidate deficiencies or delay any remedies imposed.
- The Independent IDR process is considered completed if a facility does not timely request or chooses not to participate in the Independent IDR process or when a final decision has been made, a written record has been generated.
- An unchallenged deficiency is deemed final. Substantial noncompliance with only one participation requirement can support the imposition of a penalty.

46

46

IIDR – Not used for

- The facility may NOT use the Independent IDR Process to challenge the following:
  - Remedy(ies) imposed against the facility;
  - Questions or issues from a previous survey;
  - Cited deficiencies when a CMP is not imposed;
  - S/S classifications, except citations that constitute SQC or IJ:
  - Survey findings that have already been the subject of an IDR unless the IDR was completed PRIOR to the imposition of the CMP;
  - Alleged failure of the survey team to comply with a requirement of the survey process;
  - Alleged inconsistency of the survey team in citing deficiencies among facilities;
  - Alleged inadequacy or inaccuracy of the Independent IDR process; or
  - Surveyor behavior/conduct.

47

IIDR - Costs

- The cost of the facility's legal counsel's attendance is the responsibility of the facility.

48

IIDR – Ombudsman/Resident

- Once a facility requests an Independent IDR, the State must notify the involved resident or resident representative, as well as the State's long-term care Ombudsman, that they have an opportunity to submit written comment concerning the facility's Independent IDR request.
  - Once a facility requests an Independent IDR, the state must notify the involved resident or resident representative, as well as the state's long-term care ombudsman, that they have an opportunity to submit written comment.
- The State is encouraged to request from the Ombudsman specific information based on direct involvement or knowledge about the issues being disputed by the facility.
- Information about the facility or provider in general, but not related to the deficiency(ies) at issue, are not relevant to the Independent IDR and should not be considered by the State or the Independent IDR process.

49

IIDR - Outcome

- Based on a final Independent IDR recommendation and final State and CMS action, if one or more deficiencies on the Form CMS-2567 have been changed, deleted or altered, the facility has the option to request a clean (new) copy of the Form CMS-2567.
- The clean (new) copy will be the releasable copy only when a clean (new) plan of correction is both provided and signed by the facility.
- The original Form CMS-2567 is disclosable when a clean (new) plan of correction is not submitted and signed by the facility.
- Any Form CMS-2567 and/or plan of correction that is revised or changed as a result of Independent IDR must be disclosed to the State long-term care ombudsman in accordance with § 7904.

50

IIDR - Preparation

- When submitting supporting documentation to Independent IDR, you should include the following:
  - The tag number(s) you are disputing;
  - The reason(s) why the deficiency is disputed;
  - The reason(s) why the scope and severity should be reduced (if SQC or IJ level);
  - The desired outcome;
  - Documentation that directly demonstrates that the deficiency is not sustainable;
  - The type of Independent IDR format desired (e.g., written review, telephone, face-to-face meeting);
  - If legal counsel is attending (as permitted by the Independent IDR plan);
  - Other data as may be required by the Independent IDR plan.

51

51

IIDR - Preparation

- Documentation should be relevant to the disputed survey findings.
- Documents from appropriate facility records (i.e., if the dispute regards a care plan that a surveyor found deficient, submit that care plan).
- Nurse's notes, physician's notes, medication orders, assessments, etc.;
- Applicable policies and procedures;
- Inservice training records (e.g., curriculum summary, signature lists, etc., to indicate the training context and attendance at the training session.)
- You may be required to submit a copy of the Statement of Deficiencies (2567) (without a plan of correction), and/or resident/staff identifier lists as used in the disputed survey process and.
- You may also be asked to explain why the submitted material was not shown to the survey team during the discussion of survey findings (e.g., at the exit conference).

52

52

IIDR - Preparation

- Evidence which is almost never relevant includes such items as:
  - Time, event, or person other than identified on the Statement of Deficiencies (SOD);
  - Events occurring after the date of the SOD;
  - Subsequent remedial measures (e.g., policy change after the alleged deficiency);
  - Offers to pay medical expenses;
  - Past determinations of deficiencies (e.g., presenting an exhibit which shows a previous survey from another facility in which the same deficiency was removed during an Independent IDR.);
  - Evidence relating to the SOD which are not disputed.

53

IIDR - Burden

- Because the purpose of the Independent IDR is to provide the facility with an opportunity to refute certain cited deficiencies, **it is the facility that has the burden of proof** of presenting evidence which can persuade the Independent IDR entity that the necessary elements of the regulations were met.

54

IIDR – Should you do it?

- Questions that may arise concerning whether or not you should submit an Independent IDR request include:
  - Do I have an argument that is supportable and appropriate?
  - Are the time and financial resources needed to proceed with Independent IDR worth it?
  - Are their future hearing or litigation consequences?
  - What are the consequences of the cited deficiency?
  - What is the scope and severity of the cited deficiency?
  - Will Independent IDR create the potential for new tag citations?
  - Will Independent IDR create suspect with regard to the evidence submitted?

55

Future of IDRs and IIDRs

56

Future

- On July 18, 2019, CMS published a proposed rule that made changes to IDR process and IIDR process.
- Proposed rule require that the IDR process must be completed within the same 60-day timeframe as the IIDR.
- CMS is proposing to provide specific instructions to the States informing them when survey results should be uploaded into its Certification and Survey Provider Enhanced Report (CASPER) system.
- CMS seeks to add regulatory language that specifies that "in order to be approved to conduct an Independent IDR, a component of an umbrella state agency must have a specific understanding of Medicare and Medicaid program requirements."
- CMS or the State must provide a written rationale when it rejects a provider's favorable IDR or IIDR results.

57

HEALTH LAW IS OUR BUSINESS. | HALL RENDER KILLIAN HEATH & LYMAN

Questions?
Thank you.

Sean Fahey
Attorney, Hall Render
sfahey@hallrender.com
(317) 977-1472

58