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2012 Issue 4

www.ober.com

SPECIAL FOCUS: LONG TERM CARE

Health Care Reform: Independent Informal Dispute Resolution Coming to a State Survey Agency Near You

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Nursing homes now have the option to resolve survey deficiencies through independent informal dispute resolution (IDR) when they receive civil monetary penalties. The Independent IDR processes have been developed by state survey agencies as required by the Patient Protection and Affordable Care Act and in accordance with the guidelines set out in CMS regulations and memoranda guidance. Christopher Dean reviews the guidelines that apply to Independent IDR processes and considers the possible impact of these processes and the existing IDR process currently available to nursing homes.

In response to guidance from the Centers for Medicare and Medicaid Services (CMS), state survey agencies (SSAs) have developed independent informal dispute resolution (Independent IDR) processes to resolve survey deficiencies over the last few months.

One aspect of the nursing home transparency provisions of the Patient Protection and Affordable Care Act (PPACA)[1] requires that Independent IDR be offered to any nursing home that receives a federal civil monetary penalty (CMP). To take advantage of the Independent IDR process, the nursing home would be required to escrow the anticipated CMP payment. This article reviews the Independent IDR process guidelines, summarizes the guidance in S&C Memorandum SC-12-02-NH, and speculates on the impact of the Independent IDR process and the existing informal dispute resolution (IDR) process currently available to nursing homes.

According to final regulations issued in March 2011[PDF],[2] SSAs were expected to have a functioning Independent IDR process by January 1, 2012 and each process is required to be approved by CMS. CMS assisted this process by issuing S&C Memorandum SC-12-02-NH [PDF] to provide SSAs with additional guidance on how to establish their Independent IDR processes.[3]

These guidelines described minimum elements of a successful Independent IDR process. According to the transmittal the SSA must offer a nursing home an opportunity for Independent IDR within 30 calendar days of notice of the imposition of a CMP that will be collected and placed in escrow pursuant to 42 C.F.R. § 488.431(b). SC-12-02-NH also noted that the Independent IDR process would be phased in so that initially it would apply only to deficiencies that cited actual harm or immediate jeopardy to residents (a scope and severity level of G or above). A nursing home must respond within 10 days of the notice to begin the Independent IDR process and the Independent IDR must be completed within 60 days of the SSA's receipt of the nursing home's request for Independent IDR. The SSA must also provide notice of the Independent IDR to an involved resident, the resident's representative, and the state long term care ombudsman.

The process must provide that there is a written record of the Independent IDR proceedings. The written record must include each survey deficiency being disputed, a summary of the recommendation by the independent reviewer, a rationale for each recommendation, and any documents or comments submitted by the nursing home, the resident, the resident's representative or the state's long term care ombudsman. According to the interim advance guidelines, the written report and other documents created by the state, CMS and Independent IDR agency are protected from disclosure by the deliberative process privilege.

The Independent IDR process must prevent a conflict of interest between the SSA and the independent reviewer. This may be accomplished either by an independent entity with sufficient knowledge of Medicare and Medicaid requirements or by an independent state agency that is under an umbrella different from that of the SSA. For example, the regulatory comments suggested there is no conflict if the

independent agency is under the State Department of Labor and Licensing and the SSA is under the State Department of Health and Mental Hygiene.
Independent IDR must be completed within 60 calendar days of the nursing home's request for Independent IDR. The Independent IDR will be considered complete after the completion of a written record of the Independent IDR proceedings and after the nursing home has received written notice from the SSA of the decision and a rationale for that decision.

Both the regulatory commentary and SC-12-02-NH discuss the similarities and differences between Independent IDR and the existing IDR process. For example, nursing homes cannot use either process to challenge scope and severity assessments unless the assessment constitutes substandard quality of care or immediate jeopardy. An alleged inadequacy in the Independent IDR or IDR processes, and an alleged failure of the survey team to comply with survey requirements or to act consistently when compared to other facilities are not reviewable under Independent IDR and IDR. Further, although the two processes are similar, a nursing home cannot seek IDR and Independent IDR review of the same deficiency.

The regulatory comments raise several other issues that state agencies should consider in the Independent IDR process and that nursing homes and their counsel should also consider when deciding whether to seek a review of a federal CMP. First, only those CMPs that are imposed and are collected to be held in escrow pursuant to 42 C.F.R. § 488.431(b) are eligible for an Independent IDR. Second, Independent IDR will require the SSA to invite the involved resident or the resident's representatives to participate in the proceedings. Although this provision was not required in PPACA, CMS gave deference to a related (but not dispositive) Congressional committee report that Independent IDR should grant residents access to this informal process. Third, one commenter observed that surveyor notes are not considered in the IDR process because in some states an independent entity performs the IDR and relies only on the facility's representations to reach a decision. CMS responded somewhat indirectly that relevant surveyor documents should be properly included with the CMS Form 2567 Statement of

Deficiencies. Fourth, CMS responded to a comment that neither the existing IDR process nor the Independent IDR precluded the involvement of attorneys on behalf of the resident or the nursing home. Some jurisdictions prohibit attorneys at the IDR meeting. CMS also advised that individual states may have additional requirements in their informal review processes.

Ober|Kaler's Comments

Skilled nursing facilities and nursing facilities will have a new option for informal dispute resolution beginning in 2012 and should weigh their options when faced with a survey deficiency with a federal CMP on whether to pursue a formal appeal, Independent IDR, or IDR. Nursing homes will need to weigh the value of an independent written record, the transparency of the process to residents, the possibility of greater involvement by counsel,
and any variation in a state's particular processes before deciding on the appropriate course of action.

In some jurisdictions, the SSA offers IDR with the caveat that a disputed deficiency permits a de novo review of the survey, which can lead to a removal of a deficiency and an addition of new deficiencies. It will be interesting to see if individual SSAs will attempt to include this policy in their Independent IDR process. CMS also made certain assumptions about how much detail should be included in the CMS Form 2567 Statement of Deficiencies. SSAs will need to take into account the possibility of the use of surveyor notes in Independent IDR and the appropriate process to make these notes available to nursing homes upon request. At the same time, nursing homes may also see an increase in the level of detail in the CMS Form 2567 Statement of Deficiencies to include more content from surveyors based on CMS' assumption.

Lastly, nursing homes should expect to see additional details about Independent IDR in future changes to the State Operations Manual sometime after CMS has had an opportunity to review the proposals for each state's Independent IDR processes.

NOTES

[1] Sections 6111(a)(1)(A)(IV)(aa) and 6111(b)(1)(A)(IV)(aa).

[2] 78 Fed. Reg. 15,106, 15,114–120 (Mar. 18, 2011).

[3] CMS issued S&C Memorandum SC-12-02-NH on October 12, 2011[PDF], which was superseded by a new SC-12-02-NH on December 2, 2011.