Informal Dispute Resolution Guidelines For Intermediate Care Facilities for Persons with Mental Retardation

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1. Introduction

1.1. The Idaho Department of Health and Welfare (DHW), Bureau of Facility Standards (Department), and the Idaho Health Care Association (IHCA), representing Intermediate Care Facilities for Persons with Mental Retardation (ICF's/MR), have established the following independent review process for the purpose of resolving disputes with ICF's/MR over federal and state deficiencies cited during a survey. The survey process brings together a number of professional interests. The Department, through the survey team, is responsible for meeting a large array of survey requirements in a thorough, professional manner. The foremost interest of all parties is the individual's right to the highest possible quality of care and life, including the prompt correction of deficiencies that interfere with this right.

1.2. This independent review process has been developed with the expectation that all parties act in good faith, treat others with respect and professionalism, and recognize that there will be issues of honest disagreement.

2. Guiding Principles

2.1. The federal Centers for Medicare/Medicaid Services (CMS) do not require states the establishment of an IDR process for ICF/MR providers. To promote consistency, however, the Level 2 review (IDR process) described in this document is basically the same as that currently in use for Long Term Care (LTC) facilities. The LTC process complies with the CMS minimum requirements for informal dispute resolution at 42 CFR §488.331 and related CMS State Operations Manual (SOM) instructions. The Level 2 review also serves as an administrative review of state licensing deficiencies as provided in IDAPA 16.05.03.300. Incorporated into this document from the CMS SOM, are preliminary, or what will be referred to as Level 1, steps designed to resolve disputes prior to Level 2, IDR steps.

2.2. This process does not alter or delay the required timetables associated with licensure or certification, termination or other adverse actions, including especially the short time frames established for immediate jeopardy findings.

2.3. This informal process does not limit any other appeal available under state and federal laws or regulations.

2.4. Facilities may not use the informal process to delay the formal imposition of remedies or to challenge any other aspect of the survey or enforcement process including the:

2.4.1. Remedy (ies) imposed by the enforcing agency;

2.4.2. Failure of the survey team to comply with a requirement of the survey process;

2.4.3. Inconsistency of the survey team in citing deficiencies among facilities;

2.4.4. Inadequacy or inaccuracy of the informal dispute resolution process; or

2.4.5. Failure to follow the Principles of Documentation.

2.5. Allegations of surveyor misconduct should not be reported under this process but rather to the Supervisor of Non-Long Term Care, or Bureau Chief, for separate resolution.

3. Objectives

3.1. The principal objectives of this independent review process are to:

3.1.1. Facilitate resolution of differences throughout the survey process through constructive, clear, and ongoing communication.

3.1.2. Provide a vehicle to informally and quickly resolve disputes related to survey deficiencies,

3.1.3. Promote the mutual exchange of clarifying information, which enhances the understanding of survey decisions and minimizes conflicts and disagreements.

3.2. The review process depends upon open discussion of concerns and significant issues while surveyors are on-site. It also provides a means to informally pursue resolution of deficiency disagreements at higher levels of the survey organization, if requested.

4. General Process -- It is critical that any deficiency disputes be resolved at the earliest possible date. The Department must adhere to specific short time frames in developing and writing the survey report and processing the facility's Plan of Correction (PoC). Once the survey report has been issued in final form and formal distribution made, it becomes much more difficult to resolve a conflict regarding any deficiency.

LEVEL 1 PROCESSES & STEPS TO PREVENT OR RESOLVE DEFICIENCY DISAGREEMENTS INCLUDE:

5. During the Entrance Conference -- The process begins at the entrance conference when the team leader explains the survey process and the nature of the information to be gathered during the survey

6. During the Survey

6.1. Surveyors will use all information made available to them in making their decisions about facility compliance. Information to support survey decisions, regarding noncompliance, must be fully and properly documented. Facility and survey staff must communicate regularly to ensure that surveyors have access to all relevant information throughout the process. Survey staff members are expected to seek information from responsible facility representatives and give the facility a reasonable opportunity to provide additional information on a timely basis, normally no later than the day of the scheduled exit conference.

6.2. Members of the survey team may hold a Pre-exit briefing session or status meeting with key facility staff prior to the exit. The meeting should include team observations, including potentially significant issues that may be known at the time and responses to facility questions and provide the opportunity for the facility to supply additional information.

6.3. If issues arise during the survey that individual surveyors and facility staff cannot resolve, the team leader and the facility's administrator should meet and attempt to overcome any misunderstanding or miscommunication. This meeting may include other surveyors and facility staff as necessary.

7. During the Exit Conference

7.1. The team will give appropriate consideration to any additional timely information in determining the facility's compliance with requirements. The survey team will communicate its tentative deficiencies and the general basis for the deficiencies to the facility staff at the exit conference. Due to time constraints, not all examples may be given. Opportunity will be given to the facility staff to provide further information on any deficiencies. Such information must be submitted (faxed or sent by overnight mail) within one (1) business day of the exit conference in order to be considered in preparing the survey report.

7.2. Individuals, family members or guardians, and/or staff determined appropriate by the facility administrator are invited to attend the exit conference. Because of the informal nature of the exit conference and the preliminary nature of the deficiencies discussed, facility attorneys are not expected to be present at the conference. The exit conference is not intended to be a preliminary hearing on the merits of deficiency citations. Any independent consultants engaged by the facility for assistance may attend the exit conference.

7.3. The department may audiotape the exit conference. Two tape recorders are used. One tape is left with the facility at the end of the exit and the survey team keeps the other. The primary reason(s) are to allow the facility to begin the PoC before receiving the final report (2567) and for internal training purposes.

7.4. The Department, in accordance with CMS protocol, may cancel or end the exit conference if the facility creates an environment that is hostile or inconsistent with the informal and preliminary nature of the exit conference. In such cases, a subsequent exit conference may be conducted at the discretion of the department.

8. After the Exit Conference

8.1. Additional information that the facility believes will demonstrate compliance with the tentative deficiencies identified at the exit conference must be submitted to the survey team within one working day of the exit conference as noted in Section 7.1 above. This short time frame is based on the fact that the surveyors begin preparing the formal survey report on the working day following the exit conference. The Non-Long Term Care Supervisor may be involved in the review of such additional information on any disputed areas prior to finalizing the report (2567). The Department may choose to note any comments on disputed areas in the letter transmitting the report.

8.2. The Department is required by CMS to issue the survey reports within ten (10) working days of the survey completion date (exit conference date).

9. Level 2 Review or Informal Dispute Resolution (IDR) After the Survey Report is Issued

9.1. If disputes have not been resolved after the above opportunities have been provided or if disagreement arises or continues after the facility receives the formal written survey report, the facility may request a Level 2 Review, referred to as Informal Dispute Resolution or IDR, of the involved deficiencies.

9.2. The IDR is conducted by a five- (5) person panel (IDR Panel) consisting of one (1) advocate and an alternate, two (2) representatives and alternates selected by and from the ICF/MR industry, and two (2) representatives and alternates selected by and from the Department. The Panelists representing the ICF/MR industry shall serve for a period of at least one (1) year. All Panelists and alternates shall have completed training developed by the Executive Oversight Committee (EOC). Five (5) Panel members, representing the respective interests, must be present to conduct and decide an IDR. The Panel chair shall initially determine if any regular Panel member has a conflict of interest in directing the IDR Support Coordinator to schedule an IDR meeting.

9.3. Panelists' Code of Ethics

9.3.1. The preservation of the highest standards of integrity and ethical principles is vital to the success of the Informal Dispute Resolution process. This Code of Ethics was developed in effort to stress the fundamental rules considered essential to the success of the IDR process.

9.3.2. It shall be the obligation of IDR Panelists to seek to avoid not only conduct specifically prescribed, but also conduct that is inconsistent with the spirit and purpose of informal dispute resolution. Failure to specify any particular responsibility or practice in the Code of Ethics should not be construed as denial of the existence of other responsibilities or practices.

9.3.3. Recognizing that the ultimate responsibility for applying standards and ethics falls upon the individual.

9.3.4. Individual Panel members shall maintain high standards of professional competence. This includes possessing and maintaining the competencies necessary to effectively perform these responsibilities.

9.3.5. The IDR process shall provide a forum for the fair resolution of differences in professional opinion; individual Panel members shall avoid partisanship.

9.3.6. Individual Panelists shall disclose any actual or potential circumstance concerning him or her that might reasonably be thought to create a conflict of interest or have a substantial adverse impact on the Panel or its decisions. Based on any conflict of interest, the Panel may decide, in its sole discretion, to replace the individual Panel member with a backup Panelist. The Panelist with the alleged conflict may not participate in the decision. Examples of circumstances that should be disclosed include, but are not limited to, the following:

9.3.6.1. The Panelist is currently, or was within the past two (2) years, an employee of the facility requesting the IDR or its parent organization;

9.3.6.2. The Panelist is currently, or was within the past six (6) months, under contract to provide service to the facility or its parent organization;

9.3.6.3. The Panelist is a former employee of the facility who left under adverse circumstances;

9.3.6.4. The Panelist has a family member residing or working in the facility;

9.3.6.5. The Panelist has a financial interest in the facility or its parent organization. "Financial interest" shall not include ownership of publicly traded stock purchased on the open market unless the individual owns five percent (5%) or more of the outstanding shares;

9.3.6.6. The Panelist was a member of the survey team for the survey in question; or

9.3.6.7. The Panelist, individually, has filed a lawsuit against the facility or the facility has filed a lawsuit against the individual Panelist.

9.3.7. Information shall be kept confidential. Individual Panel members shall not discuss particulars of its deliberations in any forum outside the IDR process itself or the Department including, but not limited to, the following:

9.3.7.1. The particular circumstances of any facility's survey in such a way as would identify the facility;

9.3.7.2. The name(s) of any individual(s) referred to in survey findings or identified through the IDR process; or

9.3.7.3. Any recommendations relating to sanctions imposed against a facility.

9.3.8. Panel members shall not discuss or in any way disclose the voting history of any Panel member. Discussions held during decision deliberation shall be held strictly confidential.

9.3.9. Individual Panel members shall inform the Panel chair of actual or potential violations of this Code of Ethics, and fully cooperate with the Panel's inquiries into matters of professional conduct related to this Code of Ethics.

9.3.10. Individual Panel members shall not defend, support, or ignore unethical conduct perpetrated by colleagues or peers.

9.3.11. Panel members shall display professionalism and respect for one another at all times.

9.3.12. Panel members shall act with integrity and shall avoid conflicts of interest in the performance of their professional and committee responsibilities.

9.4. Request for IDR

9.4.1. A facility shall request an IDR by completing the attached request form for each disputed deficiency and returning the original form and six (6) copies to the IDR Support Coordinator. If the facility wants the Panel to consider additional evidence, the evidence and six (6) copies of the evidence must also be sent at the time of the request for an IDR. The request and any evidence must be received by the IDR Support Coordinator within thirteen (13) calendar days of the date the survey report (2567) is forwarded to the facility. This date will be identified in the cover letter accompanying the survey report. No requests will be accepted after the date specified in the cover letter.

9.4.2. Any evidence submitted as an attachment to the request form(s) must have been in existence in its submitted form and content as of the survey date. The exception to this is letters from physicians or other persons prepared at the request of the facility to provide additional information on a cited deficiency.

9.4.3. Copies of the pages from the Survey Report (2567) with the Tags and Tag examples being disputed are to be attached to the request forms.

9.4.4. The facility must designate on the request form(s) whether the facility wants to present its position in person, by telephone, or solely in writing to the IDR Panel and whether the facility will be represented by legal counsel at the meeting. Such designations are necessary to ensure that the necessary arrangements are in place for the meeting.

9.4.5. In addition to submitting the IDR request forms, the facility may enter its objection to a deficiency on the PoC.

9.4.6. Submitted IDR requests will be scheduled by the IDR Support Coordinator, provided that:

9.4.6.1. The request is received within thirteen (13) days from the date the Survey Report (2567) is sent to the facility, and

9.4.6.2. The IDR request form plus evidence and six (6) copies of the form plus evidence are provided.

9.5. IDR Coordination

9.5.1. Two weeks in advance of the next regularly scheduled IDR meeting date, the IDR Support Coordinator will send/deliver the materials for the IDR scheduled to be heard. This period of time will give the Panelists time to review the information and be prepared to hear each case. It is each Panel member's responsibility, on receipt of the information, to immediately notify the IDR Support Coordinator if they have to remove themselves from hearing a particular IDR. Immediate notice is critical to allow for alternate arrangements to be made.

9.5.2. If there are too many requests to be heard in one day, the IDR process may be held over two (2) months.

9.6. The IDR Meeting

9.6.1. Parties may participate in the IDR Meeting in person or by telephone. Any witnesses may also participate in person or by telephone. In addition, the parties to the meeting have the option of presenting their case entirely in writing without meeting with the Panel.

9.6.2. Parties have the option of being represented by legal counsel, but, because of the informal nature of the meeting and limited time for presentation, the use of attorneys is neither necessary nor encouraged. The state will be represented by legal counsel only if the provider chooses to be represented by an attorney.

9.6.3. At the meeting with the IDR Panel, the ICF/MR, and the state are given an opportunity to discuss the deficiencies in dispute. The facility will present

its points, followed by the state. The Panel will then have an opportunity to discuss the issues with both parties.

9.6.4. In consideration of the Panelists' work load and the need to keep the process efficient and timely, the presentations by the appealing facility and state are limited in time. The ICF/MR will have fifteen (15) minutes to summarize its position on the deficiencies in dispute. The state will have eight (8) minutes to respond. A facility wanting additional time to present before the Panel must request the additional time as part of its request for an IDR. The IDR Chair shall decide whether additional time will be granted. If additional time is granted, the state will be given half that much additional time to respond to the ICF/MR.

9.6.5. Although evidence submitted by the facility in support of its appeal normally must by received by the IDR Support Coordinator within thirteen (13) calendar days after the date the Survey Report is forwarded to the facility, there may be relevant evidence that could not have been anticipated. The IDR Panel, in its sole discretion, shall determine whether the facility can submit additional evidence. Such evidence shall be delivered or faxed to the IDR Support Coordinator prior to the Panel's deliberation of the case later that day.

9.7. IDR Meeting Suggestions

9.7.1. Because time and space for oral presentation is limited:

9.7.1.1. The Panel will rely heavily on documentation. The Panel's consideration of the facility's documents will be enhanced if the documents are tabbed to correspond to the tag to which they apply;

9.7.1.2. The oral presentation should focus on the specific reasons that the survey results are invalid and point the Panel to the submitted documentation that supports the ICF/MR's position;

9.7.1.3. Submission of large volumes of overly detailed, redundant, or irrelevant material will impede the review process; and

9.7.1.4. Keep the number of persons in the meeting room to the minimum necessary. Remember that people can participate by telephone, if requested in advance.

9.7.1.5. Non-panelist observers may view the proceedings at the discretion of the Panel chair. However, all observers, by being present, must agree to the same confidentiality requirements as the panelists, facilities, and department staff members. Observers will not be allowed to take part in any of the proceedings.

9.8. IDR Decision

9.8.1. Five (5) Panel members constitute a quorum for purposes of making a decision. It is hoped that the Panel can make its decisions by consensus. If no consensus can be reached, a decision requires the affirmative vote of four (4) Panel members. If the panel is unable to reach a decision by an affirmative vote of four (4) Panel members, the survey findings being disputed are deemed to be accepted and final.

9.8.2. The facility shall be notified of the Panel's decision, or if further deliberations are needed, within fourteen (14) days of the IDR meeting. Later in the day of the IDR meeting, the Panel shall meet to determine, for each dispute heard, whether the deficiency cited is supported, amended, or deleted. The decision of the Panel will be noted on the request form(s) and then sent to the Department Bureau of Facility Standards (BFS). The final decision(s) is the Department's to ensure compliance with CMS regulatory intent/requirements pursuant to the State's contractual agreement with CMS and to ensure compliance with state law and rules. If the Department finds that the decision is consistent with state and federal requirements, the Department will notify the facility of the decision.

9.8.3. If the IDR review results in a decision to amend or delete a deficiency, the following steps will be taken:

9.8.3.1. If the deficiency is to be deleted, the deficiency citation will be electronically deleted from the Bureau data system. Any enforcement actions(s) imposed solely because of that deficiency will be rescinded.

9.8.3.2. If the deficiency is to be amended (but still cited), the deficiency will be electronically revised. Any enforcement action(s) imposed will be reviewed by the IDR Panel for continued applicability.

9.8.3.3. The facility has the option to request a "clean" (new) copy of the survey report. However, the clean copy will be the releasable copy only when a "clean" (new) PoC is both provided and signed by the facility. The original survey report is disclosable when a clean PoC is not submitted and signed by the facility. In either case, any CMS 2567 and/or PoC revised or changed as a result of informal dispute resolution must be disclosed to the public as required by law.

9.8.4. Whether or not a facility has already used the one (1) opportunity for IDR, the following table sets forth when another opportunity for IDR would be appropriate if requested by the facility, based on the results of a Revisit survey or of an IDR:

Results of Revisit or of IDR	Eligibility for Another IDR
Continuation of same deficiency at revisit survey	Yes
New deficiency (i.e., new or changed facts, new tag) at revisit survey or as a result of IDR	Yes
New example of deficiency (i.e., new facts, same tag) at revisit survey or as a result of IDR	Yes
Different tag but same facts at revisit or as a result of IDR	No

NOTE: A deficiency not originally contested by the facility in the first IDR cannot be contested by the facility during the second IDR.

9.9. Appeal from IDR Decision.

9.9.1. Federal Deficiencies. Further appeal is available only when adverse action has been initiated against the facility as a result of one or more CoPs being found out of compliance. The federal appeal process is described at 42 CFR §431.151 - 431.154.

9.9.2. State Deficiencies. Any state survey deficiencies which result in action to revoke, suspend, or modify a facility's license may be appealed to a state hearing officer. Information on how to file an appeal will be contained in the notice of the IDR decision. Procedures governing this state appeal process are set out in IDAPA 16.05.03.300