

## Long-Term Care Survey Alert

### Eliminate Unfair Deficiencies With IDR - Here's what you need to know to prevail

Winning informal dispute resolution (IDR) often has to do with how you play the game, so it helps to know the ins and outs and unwritten rules.

For example, IDR provides a kind of back door to eliminating enforcement penalties, because even though you can't use the state-run dispute process for that purpose - you can challenge and remove the underlying deficiency. No deficiency, no penalty.

Along the same lines, facilities aren't allowed to use IDR to challenge the scope and severity of citations (except those involving substandard care or immediate jeopardy). Yet they actually do so all the time through their IDR submission, according to **John Lessner**, an attorney with **Ober Kaler Grimes & Shriver** in Baltimore.

Here's how it works: Say the facility is cited with a G-level (actual harm) deficiency for something it agrees did occur, but disputes that the resident suffered harm. "While you never ask to have the scope and severity reduced," Lessner explained, "that's your ultimate conclusion in the facility's written IDR submission" (e.g., the facility did not cause actual harm to the resident in question). In that kind of challenge, "you know you're probably not going to make the deficiency go away, and your best possible scenario is to reduce it to a D, which is frequently the outcome," Lessner noted, speaking at this year's **American Health Lawyers'** "Long Term Care and the Law" conference in Phoenix.

Here are some other inside tips on how to use the IDR process to your facility's best advantage:

**Never take anything in the statement of deficiency's facts and findings for granted.** "Independently investigate the issues and verify the facts and findings," suggests attorney **Ari Markenson** with the New York City office of **Epstein Becker & Green**. Then determine their relationship to the regulatory requirements. "There are cases where what surveyors alleged to have occurred is simply not a violation of what the regulation requires," he cautions.

**In most cases, ask for a face-to-face IDR meeting if the state provides that option.** Federal requirements stipulate that states may conduct IDR in person, by telephone conference or by written submission. But if you have the opportunity for a face-to-face meeting, go for it. "You want to establish credibility with the state agency," Lessner noted, "and it's easiest to do that in person."

Lessner does sometimes advise facilities to do a written submission when they simply want to challenge a D-level tag they view as unfair. That way, the facility's response to the citation is available to residents and families and becomes part of the public record.

**Based on your state's requirements, either incorporate the IDR request in the plan of correction or reference it.** "That's important," Lessner stressed, "because it signals to anyone who looks at the POC that the facility does not agree with the deficiencies." It also tells a plaintiff's attorney reading the POC that he needs to request the IDR document for "the rest of the story."

**Leave a paper trail.** Document all communication with the state survey agency throughout the survey and IDR process. "Follow up phone calls with written correspondence," Markenson suggests.

**Make sure your written request includes a detailed explanation of your position related to each deficiency, including supporting documents.** Review the entire record and other documentation looking for evidence to support

your argument for IDR. The information missing in the nursing or therapy notes might be buried in the physicians' progress notes. Or say your facility is cited with an H-level deficiency for a high prevalence of falls. But upon closer inspection, you find the quality assurance (QA) committee had implemented programs that reduced the overall number of falls or fall-related injuries.

Also, review your staffing records, as surveyors sometimes misunderstand the facility's staffing levels, advises attorney **Michael Cook** with **Jenkins & Gilchrist** in Washington, D.C.

Use sworn statements from family members to describe their involvement in a particular decision-making process, such as fall prevention or addressing a resident's depression, Cook suggests.

"The family's statement may be able to corroborate that a meeting did occur or they were consulted about an issue even though the medical record doesn't reflect it."

**Tip:** Make copies of the documents and highlight the relevant information, as the documents will become part of your IDR submission.

**Clearly state your conclusion in the IDR submission**, i.e., "The facility did not cause actual harm to resident #4." Don't use any names or identifying information so that the state agency can release the document if it receives a public information request.

"Address the regulatory citation at issue and how it pertains to the facts presented," Markenson adds.

**Reference established standards of care and clinical practice guidelines** to support your clinical approach.

"Many facilities are successful at IDR when they bring in their medical director and the **American Medical Directors Association** clinical practice guidelines the facility was using to show that an outcome was unavoidable," says nurse **Jacqueline Vance**, AMDA's director of clinical affairs. (To find out more about how to select guidelines and the one thing you never want to do with them, see the October 2003 Long-Term Care Survey Alert.)

**Tips: Don't go overboard with IDR.** "If you take 20 issues to IDR, the ones that have merit will get lost in the shuffle," Cook cautions.

**Keep an eye on your appeals deadlines.** The IDR process does not push back the deadlines for filing an appeal of any of the enforcement actions, Lessner cautioned.