

Long-Term Care Survey Alert

Survey Appeals: SET RECORD STRAIGHT WITH IDR

Nursing facilities can benefit from informal dispute resolution to challenge deficiencies for almost as many reasons as there are F tags even when surveyors' observations were largely on the mark.

IDR can, for example, help protect a facility that may be facing litigation for an adverse outcome. Any resident injury potentially will lead to a lawsuit, says **Barbara Miltenberger**, an attorney with **Husch and Eppenberger** in Jefferson City, MO. "In such a case, the facility should look at the strength of the evidence and contest the deficiency" if possible, she says.

"Providers have been successful [using IDR] to get certain troubling or inaccurate facts removed from the statement of deficiencies," says **Annaliese Impink**, an attorney with **The Law Offices of Bianculli & Impink** in Arlington, VA. This is often important not only if there are pending civil cases that turn on these facts, she says, but also in the case of potential federal or state criminal investigations.

The Rest of the Story

In most cases, the facility can point to something at IDR that surveyors got wrong, says **Gene Larrabee**, president of **Primus Care** in Valparaiso, IN, says. "It's rare for deficiencies to be black and white," he notes.

Say a resident choked on a hot dog when he was supposed to get a pureed diet. That might sound like an open-and-shut case, but "the facility might have evidence that the resident frequently refused the pureed food and insisted on non-pureed food, despite being told of the dangers," Miltenberger suggests. "Also, suppose that family members often brought in food that was not pureed and the resident had no trouble swallowing it. The statement of deficiencies probably won't mention those facts."

You should include that kind of information in the plan of correction, if possible, or at the very least in an IDR. Facilities need to keep in mind, however, that any information submitted to the survey agency more than likely will end up in the hands of a plaintiff's attorney. So if the facts are truly bad, facilities might want to consider submitting the IDR as a paper review, after their attorney checks it, to avoid any admissions by the facility employees, says Impink.

Reducing Scope and Severity, Sanctions

IDR has also been known to reduce the levels of deficiencies (from a G to a D or from a J to a G) or to delete deficiencies altogether. As an example, Impink points to facilities that have successfully used IDR to challenge F tags for resident abuse (F223), when the findings did not really meet the regulatory definition of abuse.

In some instances, facilities were cited with "immediate jeopardy" because a resident received a bruise after a transfer or when being lifted out of bed.

"Yet there was no evidence that the staff willfully caused injury or harm to the resident," says Impink. "Instead, the facts demonstrated that an accident occurred or a staff member did not use good judgment when moving a resident."

In these cases, the facilities cited a number of departmental appeals board decisions where the administrative law judges had concluded that random accidents or even isolated incidents of actual abuse don't mean the facility on the whole failed to follow regulatory requirements. "In some of the cases the scope and severity levels were reduced. In one case in Indiana, the deficiency was deleted," Impink relates.

In other cases, facilities decide to challenge even D-level deficiencies where they believe surveyors were completely off the mark. "It's important to call surveyors on blatantly inaccurate findings," Miltenberger insists, "so they won't keep doing it."

Challenging false citations is also important for staff morale. "Staff can get very discouraged when they work hard to care for residents and get cited for things that are incorrect or miss the point," Miltenberger says. "It's important for them to feel like the administration will go to bat for them and for the facility's reputation."

Dress Rehearsal for Federal Appeal

IDR can serve as a form of "dress rehearsal" in the event the facility decides to forge ahead with a more expensive and time-consuming federal appeal, Impink says. "Furthermore, the IDR package can be an important mechanism for preserving witness testimony and evidence while it is still fresh in the minds of those who were involved with a particular survey," she says.

Facilities can also use their "IDR packages" as a bargaining tool during settlement discussions with government counsel.