

Long-Term Care Survey Alert

Survey Appeals: Use IDR, Appeals To Cut Loose Tag-Along Tags

Know when and how to defend your record.

Call it quadruple jeopardy: Your facility has one resident with a pressure ulcer but ends up cited for everything including the kitchen sink tag for quality of care (F309).

That type of survey scenario makes doing informal dispute resolution (IDR) imperative to clear your survey slate, if your facility has a meritorious case, say legal experts.

Yet IDR can be more complicated in such cases because you have one set of facts under F314 (pressure ulcers), but the facility has to respond to different areas of related concern, says attorney **John Lessner** with **Ober/Kaler** in Baltimore. That means the facility may have to include the medical director, dietitian and the care plan team, which it wouldn't necessarily have to do if it were responding simply to an F314 citation, he adds.

So your first step is determining whether you have a winnable case that makes IDR worthwhile. For example, don't bother to IDR a D-level deficiency if you don't think you can win on the G's, cautions **Joseph Bianculli**, an attorney in Arlington, VA.

If the citations have teeth to them, the facility may find its money better spent in investing in internal QA changes to correct the problems rather than fighting the government, in the view of Boston attorney **Michael Kogut**. But Kogut isn't suggesting facilities roll over if they believe surveyors have cited shortfalls that go beyond what the regulations actually require.

If you do go to IDR to battle an F314 citation and tag-along tags, make sure you have good clinical support from the interdisciplinary staff and QA team, and the data and documentation to contest the citations, Kogut advises.

In that regard, "an objective review of the situation by an outside clinical expert respected by the state agency is a major help," he says. "Then you can say at IDR: 'We had a QA partner respected in the industry look at this issue who believes we provided appropriate care.'"

Also, "have the medical director offer some written opinions and support, if he or she concurs that the facility and physician met the standard of care," advises Kogut.

Don't Lose Your Appeal Window

Be prepared to proceed to an appeal if you don't prevail at IDR.

In fact, your facility can use IDR to gather evidence and as a dress rehearsal for a hearing before an administrative law judge (ALJ).

Remember: "Facilities must file a Departmental Appeals Board appeal within 60 days after the facility's receipt of the **Centers for Medicare & Medicaid Services'** or state notice imposing a federal remedy, including denial of payment for new admissions (DPNA)," cautions Bianculli. "That's true even if the DPNA does not take effect until more than 60 days later," he adds.

"There are many DAB cases throwing out late appeals, even where the facility appeared to have a good excuse," Bianculli says.

Beware this trap: Some facilities believe that the fact they have an IDR in the works pushes back the deadline for filing an appeal. Not so. "The 60-day limit is the same in every state," emphasizes Bianculli. Also, the Request for Hearing must be quite detailed - in other words, a notice saying "we appeal" won't work, he adds. So don't wait until the 59th day while waiting for a favorable IDR result to get the appeal ball rolling.

Your odds of winning an appeal challenging tag-along tags depend on the strength of your case - and the luck of the draw, say legal experts.

"The DAB has held ... that each tag has to stand on its own, with its own legal 'elements,' and there is no legal basis for citing purely derivative tags," says Bianculli. "On the other hand, some ALJs are perfectly willing to infer or assume that, for example, the administration must be inadequate if [such and such deficiency] occurred."