

## Long-Term Care Survey Alert

### Survey Management: LESSONS LEARNED FROM A SURPRISE IJ CITATION

Waterman Village in Mt. Dora, FL had no idea what was coming last September when surveyors arrived for a routine survey that the facility's staff felt well prepared to pass with flying colors.

Instead, they ended up with a K-level deficiency at F326 for a situation involving a resident who had refused thickened liquids, reports the nursing facility's administrator, **Michael Fogg**.

Waterman Village got out of immediate jeopardy within 24 hours of doing its plan of correction, and a year later, awaits an administrative law judge's ruling on whether the IJ citation will stand, Fogg says. The experience has left the facility's administrators with some instructive insights for other providers, including just how broadly surveyors can apply the definition of immediate jeopardy.

Precipitous Slide into IJ

The facility's overnight slide from the ranks of a "good performer" into immediate jeopardy started when a surveyor observed a resident coughing as he drank his coffee.

"The nurse at the station didn't get up to check on the resident because she was familiar with the fact that he coughed at times when drinking fluids," Fogg explains. In retrospect, this was probably a mistake from a survey standpoint.

Yet the resident and his usual patterns of behavior were quite familiar to the interdisciplinary staff.

"The resident had previously received a swallowing study which documented his difficulty swallowing," Fogg reports. Based on the study, the physician suggested a feeding tube, but the family declined because of the resident's advanced age and quality-of-life concerns.

"So the physician then suggested honey-thickened liquids as an alternative," Fogg reports. "But the resident would get irate with staff when they offered the fluids, demanding his usual thin black coffee."

As a next step, staff met with the family and explained the risks of aspiration if the resident didn't have thickened liquids.

"But the family signed a waiver saying that they wished the resident to have what he wanted and for the emphasis to be on quality of life." Staff also observed that the ninety-something resident really enjoyed his coffee and could manage drinking it but not without coughing some in the process.

"The physician had also written an order for the resident to receive 'pleasure foods,' a term that came back to haunt the facility during the survey because the surveyors said they didn't know what it meant," Fogg says. "And they didn't like our staff's definition of the term as referring to foods that the resident enjoyed." The facility no longer uses the term, Fogg reports.

The surveyors remained alarmed that the resident was "choking" when he drank his coffee and wasn't getting thickened liquids. "They also claimed we used the wrong form for the waiver which the family signed [saying it was OK to give the resident what he wanted to drink]," Fogg says.

Also, the surveyor found another resident in the dining room who had refused thickened chocolate milk, so we'd given it to him thin," Fogg relates. "The surveyor suggested that we simply thicken it without telling him and he'd never notice the difference."

Trading a 'G' for a 'J'?

Waterman Village staff, however, had a different take on both these situations. As Fogg asks incredulously: "A resident can refuse medications but not thickened liquids?"

The situation could be viewed as a classic "Catch 22" where if a facility meets one regulatory requirement, it must violate another one, says **Annaliese Impink** with **The Law Offices of Bianculli & Impink** in Arlington, VA, who is familiar with similar cases. "Except a facility isn't likely to get IJ for not allowing a resident the right to choose," Impink notes.

In Impink's view, this type of scenario might cause some facilities to reason they'd do better with a G deficiency for resident rights than a J or higher-level deficiency for not insisting residents accept thickened liquids or a certain dietary consistency.

Fogg says he believes the deficiency involving the coughing resident might have been cited as a C or D level but not IJ.

"Here's a situation where all these qualified health professionals have evaluated the resident and come up with a plan that we're implementing," he says.

Search for Kernel of Truth

Dale Lind, executive director of Waterman Village, says the facility's administration took steps to understand their role in the survey outcome. "You tend to believe that if the surveyors find a problem, there might be some truth to it, even if you don't see it," he tells **Eli**. Lind hired experts to review the situation, including the documentation. "And they just couldn't see how it was immediate jeopardy," he reports.

"We believe the trail of documentation should have satisfied the surveyors as the chart clearly spelled out the steps we had taken," Lind continues. Like Fogg, he concludes a C or D deficiency would have sufficed.

If there's a lesson, it's probably for nursing staff to jump up and attend to a resident when a surveyor is watching, even if they know, based on the resident's usual behavior, he's OK, Lind notes.

Impink agrees that's the lesson taught by the reality of the situation, but it shouldn't be the lesson in a more ideal survey world. "If a nurse has lots of experience with a resident, then the surveyor shouldn't make a snap judgment about a situation," she says.

Broad Reach on IJ Definition

The administrative law judge hearing at which the facility appealed the IJ citation was also illuminating for Fogg, who reports that surveyors all defined IJ differently or as "something bad that could happen" to the resident. "And doesn't that include just about anything?" he asks.

The regulations actually define immediate jeopardy as a situation where the provider's noncompliance with one or more participation requirements "has caused or is likely to cause serious injury, harm, impairment or death of a resident."

As Impink notes, "Nowhere does the definition of immediate jeopardy say 'remote possibility.'" Even so, she reports seeing some "administrative law judges who are, to some extent, buying into the idea that IJ exists where there's a remote possibility of serious harm."

Meantime, Waterman Village has had good surveys since last year's survey disaster and its census continues to thrive, Fogg reports. But the IJ tag carried a huge price tag in addition to the anxiety, legal costs and tarnish to its reputation. As Lind reports, the facility lost out on a low interest Housing and Urban Development loan as the result of the IJ tag.