

## MDS Alert

### Surveys and Compliance: CMS Provides New Guidance on 'Immediate Jeopardy'

**Streamlined guidance intended to keep residents safer.**

The Centers for Medicare and Medicaid Services (CMS) released new guidelines on immediate jeopardy March 5, 2019, and CMS Administrator **Seema Verma** expounded on the guidance.

**Background:** State surveyors can claim immediate jeopardy if they feel like a resident's well-being is at risk. "Immediate jeopardy is a situation in which a recipient of care has suffered or is likely to suffer serious injury, harm, impairment or death as a result of a provider's, supplier's, or laboratory's noncompliance with one or more health and safety requirements. Immediate jeopardy represents the most severe and egregious threat to the health and safety of recipients, as well as carries the most serious sanctions for providers, suppliers, and/or laboratories," says **Karen Tritz**, acting director of the quality, safety and oversight group at **CMS** in Baltimore.

#### Know These Changes

The original immediate jeopardy guidance was drafted in 2004. Know these four takeaways from the new Core Appendix Q, according to the memo put out by Tritz:

- Surveyors must judge a situation's likelihood instead of potential. "... In order to cite immediate jeopardy in situations where recipients have not already suffered serious injury, harm, impairment or death, the nature and/or extent of the identified noncompliance creates a likelihood (reasonable expectation) that such harm will occur if not corrected, not simply the potential for that level of harm to occur."
- Surveyors will cite noncompliance rather than culpability. "Because the regulatory definitions of immediate jeopardy do not require a finding of culpability, that requirement has been removed and has been replaced with the key component of noncompliance, since the definitions of immediate jeopardy require noncompliance to be the cause of the serious injury, harm, impairment or death, or the likelihood thereof."
- Surveyors must imagine impact of a situation on a "reasonable person" to judge potential of psychosocial harm. "The reasonable person approach considers how a reasonable person in the recipient's position would be impacted by the noncompliance (i.e., consider if a reasonable person in a similar situation could be expected to experience a serious psychosocial adverse outcome as a result of the same noncompliance."
- Surveyors must evaluate each situation to decide whether it should be deemed immediate jeopardy. "Each immediate jeopardy citation must be decided independently and there are no automatic immediate jeopardy citations."

#### CMS Increases Oversight

In her blog post, Verma says a lot about how the current administration and CMS, under her leadership, are making healthcare facilities and nursing homes, in particular, safer for all residents by strengthening oversight, enhancing enforcement, increasing transparency, improving quality, and, ultimately, putting patients before paperwork.

"CMS works in partnership with State Survey Agencies(SSAs) to oversee nursing homes, since these agencies are generally also responsible for state licensure. The SSAs visit and survey every Medicare and Medicaid participating nursing home in the nation at least annually to ensure they are meeting CMS' health and safety requirements as well as state licensure requirements. To be effective, SSAs must be fair and consistent in applying CMS rules," Verma says.

She points out that some residents have been falling through the cracks, and residents should not be at greater risk of unsafe situations because of where they live or who's responsible for monitoring their facilities' compliance.

"When surveyors determine that a nursing home is providing care poor enough to seriously harm residents or is likely to cause serious harm - a situation called 'Immediate Jeopardy' - that finding should be based on consistent application of standards nationwide. Patients must be protected from dangerously poor quality, no matter where they live," Verma says.

### **Some Aspects Still Hazy**

However, she does not elaborate on the potentially arbitrary elements of the new Core Appendix Q, like what constitutes psychosocial harm and who makes the determinations in the "reasonable person" approach. Though Tritz mentions the creation of a template for immediate jeopardy, she notes that surveyors should use it after immediate jeopardy has been identified, and lays out steps for notifying other entities to increase transparency.

Verma's description of the nuts and bolts is a little vague, but she notes that long-term care surveyor training materials are now public and available online. "Going forward, SSAs will be armed with clearer procedures so, as they conduct their review of each nursing home, dangerous issues will be discovered and promptly reported to CMS so residents are kept safe through appropriate enforcement actions intended to bring about rapid and sustainable compliance," she says.

**Resource:** To find out more about long-term care surveyor training, visit the CMS Survey Training tool, here, <https://surveyortraining.cms.hhs.gov/index.aspx>.