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Centers for Medicare & Medicaid Services
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Office of Clinical Standards and Quality/Survey & Certification Group

Ref: S&C: 12-02-NH

DATE: **October 14, 2011**

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Federal Requirements for the Independent Informal Dispute Resolution (Independent IDR) Process for Nursing Homes

Memorandum Summary

- **Independent IDR System Required:** State survey agencies (SAs) must have in place a functioning Independent IDR process with specific elements by no later than January 1, 2012.
- **Applicability:** The Independent IDR process must be offered to nursing homes for deficiencies that lead to the imposition of a civil money penalty (CMP) and for which notice has been provided to the nursing home that the CMP will be collected and placed in escrow.
- **Due Date:** States must submit, by no later than November 30, 2011, a process for Independent IDR to the appropriate Centers for Medicare and Medicaid Services (CMS) Regional Office (RO) for approval.
- **Cost Allocation:** Standard cost allocation methods for long term care surveys apply to the costs of the Independent IDR process, although the initial set-up and initial training expenses were eligible for one-time funds in FY2011. States should submit a FY2012 estimated budget plan for costs associated with this process.

A. Background

This memorandum provides an overview of the Independent IDR process that is required under section 6111 of the Patient Protection and Affordable Care Act of 2010 (the Affordable Care Act) (Pub. L. 111-148), enacted on March 23, 2010, and the final administrative rule published in the *Federal Register* on March 18, 2011, at 76 FR 15106 and accessible at http://edocket.access.gpo.gov/2011/pdf/2011-6144.pdf. S&C Memorandum SC-11-16-NH provided details regarding the final administrative rule.

Section 6111 of the Affordable Care Act added new section (IV) (aa) to sections 1819(h)(2)(B)(ii) and 1919(h)(2)(B)(ii) of the Social Security Act (Act). This new section provides a facility with the opportunity to request an Independent IDR if CMS imposes a CMP against the facility and the CMP amounts are subject to being collected and placed in an escrow account.

States may either develop and implement an Independent IDR process themselves or offer the process through a contract with an acceptable independent entity. All processes are subject to

CMS approval. The requirements and specific core elements that must be included in an acceptable Independent IDR process are specified in the final rule at 42 C.F.R. §§488.331 and 488.431 and are highlighted in this memorandum.

B. Applicability

The Independent IDR process must be offered to a facility when a CMP is imposed and that CMP is to be collected and placed in an escrow account under 42 C.F.R. §488.431(b). Beginning on January 1, 2012, CMS may collect and place imposed CMPs in an escrow account on whichever of the following occurs first:

- The date on which the Independent IDR process is completed, or
- The date which is 90 calendar days after the date of the notice of imposition of the CMP.

In order to phase in the new CMP collection and escrow provisions, CMS intends to initially collect and escrow only those CMPs which are imposed as a result of the most serious deficiencies. Therefore, beginning January 1, 2012, and until further notice, only CMPs which are imposed based on a deficiency or deficiencies cited for actual harm or immediate jeopardy to resident health or safety (i.e., at a scope and severity (S/S) level of G or above) will be subject to the new CMP collection and escrow provisions. Those deficiencies which result in the imposition of such CMPs will trigger a facility's opportunity to participate in the Independent IDR process. For deficiencies that are less than G (S/S levels D, E, and F), any CMPs imposed for those deficiencies will continue to be collected under the current process (without Independent IDR).

C. Key Elements

States that wish to use Federal funds[1] for an Independent IDR process must provide CMS with evidence that their process meets or will meet the requirements specified in regulations and addressed in this memorandum. For FY2012, such information should be sent to the appropriate CMS RO **no later than November 30, 2011**, with a copy to the following email box: **QualityAssurance@cms.hhs.gov.** A copy of the CMS review checklist is attached.

At a minimum, the Independent IDR process must provide for the following:

- **Offer of Independent IDR:** An the opportunity for Independent IDR must be provided within 30 calendar days of notice of imposition of a CMP that will be collected and placed in an escrow account. The CMS RO will communicate the offer for an Independent IDR, along with appropriate SA contact information[2], in its initial *Notice of Imposition of a CMP* letter to a facility. Upon a facility's timely request for an Independent IDR, the SA will provide the following information to the facility:

    - Information on the Independent IDR process including when and how the process may be accomplished, e.g., by telephone, in writing, or in a face-to-face meeting.
    - The name and/or position/title of the person(s) who will be conducting the Independent IDR, if known.

[1] Costs that are incurred by the State to conduct Independent IDRs are eligible for federal funding using the existing cost allocation methodology that is in place for the State's surveys of SNF/NF facilities.
[2] The name, address, and telephone number of the person and/or agency or office the facility must contact to request an Independent IDR.

- **Timing:** The Independent IDR is conducted only upon the facility's request. The facility must request an Independent IDR within 10 calendar days of receipt of the offer. The Independent IDR process must be completed within 60 calendar days of receipt of the facility's request. Completed means that a final decision from the Independent IDR process has been made, a written report/record generated AND the State Survey Agency (or the Regional Office in the case of federal surveys) has provided written notice of this decision to the facility.

- **Written Record:** The Independent IDR process must generate a written record prior to the collection of the CMP. The Independent IDR entity will forward the written record to the SA, (or to the RO in the case of Federal surveys) for retention by the surveying entity. The SA, (or the RO for Federal surveys) will make a decision based on the written record of the Independent IDR process and will provide the final results to the facility which shall contain the result for each deficiency challenged in the Independent IDR process and a brief summary of the rationale for that result. The written record shall include:
  - Each deficiency or survey finding that was disputed;
  - A summary of the Independent IDR recommendation for each deficiency or finding and the rationale for that result;
  - Documents submitted by the facility to dispute a deficiency, to demonstrate that a deficiency should not have been cited, or to demonstrate a deficient practice should not have been cited as immediate jeopardy or as substandard quality of care; and,
  - Any comments submitted by the Ombudsman and/or residents or resident representatives.

  If the SA disagrees with the recommendation of the Independent IDR entity the complete written record will be sent to the CMS RO for review and final decision[3]

- **Opportunity to Comment:** The Independent IDR process must ensure notification of the opportunity to submit comments prior to completion of the Independent IDR process. This notification is provided by the SA to the following:
  - The involved resident(s) or the appropriate resident representative(s), and
  - The State's long term care ombudsman.

In addition, the Independent IDR process must:

1. Be accomplished through a process approved by CMS and conducted by the State under section 1864 of the Act, or by an entity approved by the State and CMS, or by CMS or its agent in the case of surveys conducted only by federal surveyors where the State independent dispute resolution process is not used, and which has no conflict of interest, such as:

   (i) A component of an umbrella State agency provided that the component is organizationally separate from the State survey agency.
   (ii) An independent entity with a specific understanding of Medicare and Medicaid program requirements selected by the State and approved by CMS; and,

[3] As provided in 42 C.F.R. §488.431(a) CMS retains ultimate authority for survey findings.

2. Not include the survey findings which have already been the subject of an informal dispute resolution (IDR) under 42 C.F.R. §488.331 for the particular deficiency citations at issue in the Independent IDR, unless the IDR was completed prior to the imposition of the CMP.

As currently stated in section 7212.3 of the State Operations Manual (SOM), States should be aware that CMS holds them accountable for the legitimacy of the IDR process including the accuracy and reliability of conclusions that are drawn with respect to survey findings. This means that while States may have the option to involve outside persons or entities they believe to be qualified to participate in this process, it is the States, not outside individuals or entities that are responsible for IDR decisions. So, when an outside entity conducts an IDR or an Independent IDR, the results may serve only as a recommendation. CMS will look to the States to assure the validity of these decision-making processes, and holds SAs accountable for them.

When a CMP is imposed that is to be collected and placed in escrow, the Independent IDR process must provide the nursing home the opportunity to refute the deficiencies that led to the imposition of that CMP. Similar to the current IDR process guidance found in the SOM at section 7212.3, in the Independent IDR process nursing homes may not challenge other aspects of the survey process, such as:

- Scope and severity (S/S) assessments with the exception of S/S assessments that constitute substandard quality of care or immediate jeopardy;
- Remedies imposed by the enforcing agency;
- Alleged failure of the survey team to comply with a requirement of the survey process;
- Alleged inconsistency of the survey team in citing deficiencies among other facilities;
- Alleged inadequacy or inaccuracy of the IDR or Independent IDR process.

The focus of the Independent IDR process is the cited deficiency or deficiencies that led to the imposition of a CMP. However, while such factors as the scope and severity classification, and the amount of the CMP, are not the subjects of the Independent IDR, States or CMS, in the case of Federal surveys, will take into consideration any changes in deficiency findings that result pursuant to State or CMS review of the completed Independent IDR process. Based on such review, States or CMS in the case of Federal surveys will assess whether any changes to S/S or CMP amount are warranted.

D. Qualifications of an Independent IDR Entity

In order to be approved as an Independent IDR entity, whether a State agency or contracted organization, the entity must meet the following requirements:

- ***Expertise and Training:*** The entity has an understanding of Medicare and Medicaid program requirements including, but not limited to:
  - 42 C.F.R. Part 483, Subpart B, and Part 488, Subparts A, E and F
  - The SOM, including;
    Chapter 2, Section 2700
    Chapter 3, Section 3300
    Chapter 5
    Chapter 7, Definitions, Section 7212 and Section 7900,
    Appendix P, Appendix PP, Appendix Q, and;

The Principles of Documentation for the CMS 2567 (SOM Exhibit 7A); and
- Applicable health care, health care management, or life safety code knowledge and experience.

- ***Independence***
  - The entity has no financial or other conflict of interest;
  - The entity may be a component of an umbrella State agency provided that the component is organizationally separate from the State survey agency; or
  - The entity may be an independent entity with an understanding of specific Medicare and Medicaid program requirements selected by the State and approved by CMS.

- ***Documentation***
  - The entity must provide to the State (or to the RO for federal surveys) a written record of the Independent IDR process.

E. Estimated State Budget and Payment for Expenses of an Independent IDR

Costs incurred by SAs for conducting Independent IDRs are eligible for federal funding using the existing cost allocation methodology that is in place for the State's surveys of Skilled Nursing Facilities (SNF)/Nursing Facilities (NF). **By November 30, 2011**, included with the State's process for Independent IDR, each State should also submit a FY2012 estimated budget plan for costs associated with this process.

States may not charge facilities for the Independent IDR process required under 42 C.F.R. §488.431. For deficiencies that are the basis for a CMP which is not collected and placed in escrow under §488.431(b) (or for deficiencies that lead to the imposition of another remedy that is not a CMP) a State is not required to provide Independent IDR. In situations where the Independent IDR process is not required but is provided by the State directly at its option, the State may choose to charge a facility a user fee for its own processes.

If you have any questions regarding this memorandum, please contact Lorelei Chapman at Lorelei.Chapman@cms.hhs.gov.

Additional instructions and guidance will be forthcoming in revisions to the SOM, Chapter 7 – Survey and Enforcement Process for Skilled Nursing Facilities and Nursing Facilities.

Effective Date: Immediately. This policy should be communicated with all survey and certification staff, their managers and the State/Regional Office training coordinators within 30 days.

/s/

Thomas E. Hamilton

Attachment:
CMS IIDR process review tool

cc: Survey and Certification Regional Office Management

Federal Requirements for Independent Informal Dispute Resolution (Independent IDR) Process for Nursing Homes

Sample Worksheet for use by the Centers for Medicare and Medicaid Services (CMS) Regional Office (RO) staff, for their review of State survey agencies (SAs) process for an Independent IDR

SAs must have in place a functioning Independent IDR process with specific elements by no later than January 1, 2012. SAs must provide the CMS RO with evidence that their process meets or will meet the requirements specified in regulations at 42 C.F.R. §§488.331 and 488.431 and outlined in the attached S&C Memorandum SC-12-02-NH. As the Independent IDR is a State process, anything above and beyond the key elements required by regulation is at the State's discretion.

Such information should be sent to the appropriate CMS RO **no later than November 30, 2011**, with a copy to the following email box: **QualityAssurance@cms.hhs.gov**

CMS ROs, survey & certification staff, will review each SA's process to determine whether it meets or will meet, at a minimum, the key elements outlined in the regulations at 42 C.F.R. §§488.331 and 488.431 and outlined in the attached CMS S&C Memorandum SC-12-02-NH. CMS RO will respond to the SA within 10 calendar days of receipt with either:

1. Approval;
2. Denial, with explanation; or
3. Request for more information.

Qualifications of an Independent IDR Entity

In order to be approved as an Independent IDR entity, whether a State agency or contracted organization, the entity must meet the following requirements in expertise, training, independence and documentation:

Expertise and Training: The proposed Independent IDR entity has an understanding of Medicare and Medicaid program requirements including, but not limited to:

- 42 C.F.R. Part 483, Subpart B, and Part 488, Subparts A, E and F
- The State Operations Manual (SOM), including;
  Chapter 2, Section 2700
  Chapter 3, Section 3300
  Chapter 5
  Chapter 7, Definitions, Section 7212 and Section 7900,
  Appendix P, Appendix PP, Appendix Q, and;
  The Principles of Documentation for the CMS 2567 (SOM Exhibit 7A); and
- Applicable health care, health care management, or life safety code knowledge and experience.

Does the SA process provide information to demonstrate how the expertise and training component is determined?

Yes

No Please provide explanation and/or request for additional information.

Independence:

- The entity has no financial or other conflict of interest;
- The entity may be a component of an umbrella State agency provided that the component is organizationally separate from the State survey agency; or
- The entity may be an independent entity with an understanding of Medicare and Medicaid program requirements selected by the State and approved by CMS.

Does the SA process provide information to demonstrate how the Independent IDR entity:

1. **Has no financial or other conflict of interest?**
2. **Is organizationally separate from the State survey agency?**

Yes

No Please provide explanation and/or request for additional information.

Documentation:

The entity must provide to the State (or to the RO for Federal surveys) a written record of the Independent IDR upon its completion.

The Independent IDR process must generate a written record prior to the collection of the CMP. The Independent IDR entity will forward the written record to the SA (or to the RO in the case of Federal surveys) for retention by the surveying entity. The SA (or the RO for Federal surveys) will make a decision based on the written record of the Independent IDR process and will provide the final results to the facility which shall contain the result for each deficiency challenged in the Independent IDR process and a brief summary of the rationale for that result.

The written record shall include:

- Each deficiency or survey finding that was disputed;
- A summary of the Independent IDR recommendation for each deficiency or finding and the rationale for that result;
- Documents submitted by the facility to dispute a deficiency, to demonstrate that a deficiency should not have been cited, or to demonstrate a deficient practice should not have been cited as immediate jeopardy or as substandard quality of care; and,
- Any comments submitted by the Ombudsman and/or residents or resident representatives.

Does the SA process provide information to demonstrate how the Independent IDR entity will provide a written record to the State?

Yes

No Please provide explanation and/or request for additional information.

Opportunity to Comment:

- The Independent IDR process must ensure notification of the opportunity to submit comments prior to completion of the Independent IDR process. This notification is provided by the SA to the following:
    - The involved resident(s) or the appropriate resident representative(s), and
    - The State's long term care ombudsman.

Does the SA process provide information to demonstrate how they will provide the opportunity to comment as noted above?

Yes

No Please provide explanation and/or request for additional information.

State Contact Information: State Survey Agency:_____

Contact Information for the person submitting this Independent IDR process for approval:
Name: _____

E-mail: _____

Phone #: _____

Name, address and telephone number of the person and/or agency or office the facility must contact to request an Independent IDR:
Name: _____

Address: _____

E-mail: _____

Phone #: _____

Estimated State Budget and Payment for Expenses of an Independent IDR

Costs incurred by SAs for conducting Independent IDRs are eligible for federal funding using the existing cost allocation methodology that is in place for the State's surveys of Skilled Nursing Facilities (SNF)/Nursing Facilities (NF). **By November 30, 2011**, included with the State's process for Independent IDR, each State should also submit a FY2012 estimated budget plan for costs associated with this process. CMS ROs, survey & certification staff should review the budget costs associated with this process in the normal course of reviewing each SA's annual budget and consult with CMS central office staff as necessary.

Estimated budget provided?
Anticipated total costs = FY2012 _____

Yes

No Please provide explanation and/or request for additional information.