NEW MEXICO INDEPENDENT INFORMAL DISPUTE RESOLUTION (IIDR)
POLICY AND PROCEDURE
DATE: December 21, 2011 (revised 07/13/22)

STATE OF NEW MEXICO CURRENTLY PROPOSES TO CONTRACT WITH THE LOUISIANA DEPARTMENT OF HEALTH (LDH) FOR THE IIDR PROCESS.

All regulatory references are in 42 Code of Federal Regulations (CFR) unless otherwise stated.

1.1 INTRODUCTION:

The New Mexico State Survey Agency (SA), in accordance with sections 1819(h)(2)(B)(ii)(IV) and 1919(h)(2)(B)(ii)(IV) of the Social Security Act (the Act), regulations at 42 CFR §488.331 and §488.431 and the State Operations Manual (SOM) section 7213, will provide the opportunity to participate in an Independent Informal Dispute Resolution (IIDR) within 30 days when the Centers for Medicare and Medicaid Services (CMS) imposes a civil money penalty (CMP) against a Medicare-participating Skilled Nursing Facility (SNF) or a dually (Medicare and Medicaid) participating Skilled Nursing Facility/Nursing Facility (SNF/NF) and the penalty will be collected and placed in an escrow account pending a final administrative decision.

1.2 PURPOSE:

The Independent IDR is an informal administrative procedure intended to provide facilities, under certain circumstances, the opportunity to dispute cited deficiencies through a process independent from the State Survey Agency. The New Mexico State Agency will contract with an independent entity to meet the requirements and ensure compliance with the sections and acts above.

1.3 DEFINITIONS:

Completed means that a final decision from the Independent IDR (IIDR) process has been made by the New Mexico State Agency, a written record generated AND the State Survey Agency has sent written notice of this decision to the facility.
For purposes of the *traditional* Informal Dispute Resolution (IDR) process completed is when the State Survey Agency has sent written notice of the final IDR decision to the facility.

Involved Resident is a resident who was the subject of a complaint, or who filed a complaint that led to a deficiency finding that is the subject of Independent IDR.

Organizationally Separate means a distinct office or division that functions independently from the office or division that conducts survey or certification activities of nursing homes.

Resident representative means either the resident's legal representative or the individual filing a complaint involving or on behalf of a resident.

1.4 INDEPENDENT IDR REQUIREMENTS:

The CMS retains ultimate authority for the survey findings and imposition of civil money penalties. The CMS will offer an opportunity for an Independent IDR to be provided with the notice of imposition of a civil money penalty that is subject to being collected and placed in escrow.

Through the independent reviewer, Louisiana Department of Health (LDH), the New Mexico State Survey Agency will provide a desk/written IIDR. We will ensure compliance with all statutory, regulatory and SOM requirements including Section 6111 of the Patient Protection and Affordable Care Act of 2010. The New Mexico State Survey Agency contract with LDH will accomplish the following IIDR objectives. The IIDR process

1. will be completed within 60 calendar days of a facility's request, if an Independent IDR is requested in a timely fashion by the facility (within 10 calendar days of receipt of the offer of IIDR from CMS);
2. will generate a written record prior to the collection of the penalty;
3. will include notification in accordance with SOM §7213 for the following to provide written comments:
   - involved residents or resident representatives and;
   - the State's Long Term Care Ombudsman.
4. has been 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 IDR process is not used, and which has no conflict of interest, such as:
   - a component of an umbrella State Agency provided that the component is organizationally separate from the State Survey Agency, or
   - an independent entity with a specific understanding of Medicare and Medicaid program requirements selected by the State and approved by CMS, and,
5. does not include the survey findings that have already been the subject of a *traditional* Informal Dispute Resolution under §488.331 for the particular deficiency citations at issue in the independent process under §488.431, unless the Informal Dispute Resolution under §488.331 was completed prior to the imposition of the civil money penalty.
6. will be in writing and available for review upon request, as established by the State Survey Agency and approved by CMS.
7. assures that, if an Independent IDR entity or person provides services in multiple States and/or CMS Regions, each State Survey Agency and its CMS Regional Office (RO) will approve the Independent IDR entity's or person's process and procedures. LDH's process and procedures for independent desk reviews has been approved by the SA and its CMS Regional Office (RO) and customized to fit into New Mexico's overall Independent IDR process.
8. and procedures have been submitted in writing to the CMS Dallas RO for review and prior approval in order to ensure compliance of the Independent IDR process with Federal statute and regulations, the New Mexico State Survey Agency. Any subsequent changes also will be approved by CMS Dallas RO.

1.5 APPLICABILITY OF THE INDEPENDENT IDR PROCESS:

- The CMP is collected on the date the IIDR is completed or 90 calendar days after the date the notice the CMP is imposed.
- An IIDR request must be timely and submitted in writing. The facility must submit a complete request within 10 calendar days of receiving the offer of IIDR from CMS.
- The facility may request an IIDR for **all** deficiencies on a survey with a CMP imposed. Upon a timely request for an IIDR, an IDR of that survey will stop and all deficiencies will be reviewed by the IIDR entity.
- The Independent IDR is exclusively a Federal process so State deficiencies are not subject to the IIDR process but remain eligible for the traditional IDR protocols. Only Federal deficiencies actually included in the IIDR request as disputed will be considered, independent of which deficiencies were submitted for a pending, traditional IDR.
- The facility cannot raise questions or issues regarding a previous survey.
- The Independent IDR process does not delay the imposition of any remedies.

<u>A Facility May Use the IIDR Process to Dispute The Factual Basis Of The Deficiencies, But It May Not Dispute:</u>

- 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

Although many scope and severity assessments cannot be disputed via the IIDR process, CMS and the State Agency will take into consideration any changes in deficiencies findings that result from the review in the IIDR process and may assess whether an increase or decrease in scope and severity or CMP amount are warranted.

<u>Independent IDR:</u>

- is not a formal or evidentiary hearing and may not exceed the evidentiary standard of the DHHS/DAB;
- is not an initial determination that gives rise to appeal rights;
- may not be disclosed under Federal or State Freedom of Information laws.

1.6 KEY ELEMENTS OF INDEPENDENT IDR:

- Information on the IIDR process including where, when and how the process may be accomplished, e.g., by telephone, in writing, or in a face-to-face meeting, and

- Contact information, including the name, address, phone number and e-mail of the person(s) who will be conducting the Independent IDR, if known.
- IDR and IIDR are part of the survey and certification process.
- Failure of the IIDR entity to comply with IIDR procedures does not invalidate any deficiencies or remedies imposed.

IIDR Request Submission: The written request form and supporting documentation for an IIDR review of specific deficiency(ies) in an eligible survey must be submitted in full to the State Agency and post-marked within 10 calendar days (or the next day if the 10th calendar day falls on a holiday or a weekend) of receipt of Notice of Imposition of a Penalty letter from CMS. As indicated on the IIDR Request Form, the following information must be included to be considered complete. A request that is incomplete on the deadline will be invalid. This form requires the following information:

1. Identification of the specific Federal deficiencies and findings for which the facility is requesting independent review, the scopes and severities and the primary reasons for requesting IIDR for each tag.
2. A written statement or IIDR Brief Description explaining why, based on what occurred during the survey, the facility believes the deficiency should not have been cited or should not have been cited as substandard quality of care (SQC) or Immediate jeopardy (IJ.) (Plans of corrections and information not available to the surveyor during the survey are not reviewed as criteria to determine if a deficiency exists.) Brief Description should include clear reference to any attachments supporting the facility's position and explain each attachment's relevance to the dispute of the deficiency.
3. If Supporting Documents are submitted as attachments, they must be clearly identified, labeled and cross-referenced to the finding/deficiency being disputed. The facility should highlight or otherwise note what is relevant to the deficiency, and mark the relevant sections in the attachments and reference them in the IIDR Brief Description.
    - Facility must submit one copy of all supporting documents which has been properly redacted (with coded identifiers replacing actual identifiers for residents and facilities, see below) according to rules outlined in the IIDR policies and a second copy which has not been redacted.
    - Facility will indicate whether each attachment was provided to or requested by the surveyors at the time of survey.
    - Facility forms used in documentation must be specific to survey findings, with the Brief Description explaining the relevance of the form. Providing a blank form would not support that the form existed or was completed at the time of the survey.
4. If any complaints were investigated as part of the survey, the current contact information for each resident (and their representative) who was included in the survey sample must be provided. The Resident Identification List can be used to identify the residents sampled.
5. The name and telephone number of Administrator whom the State Agency may contact concerning the request and any other information requested on the IIDR Request Form

Redaction: All resident, surveyor, facility and staff identifiers and protected health information (PHI) must be redacted (i.e., blacked out or deleted) on one of the two copies of all materials submitted with the facility's IIDR Request. Resident names must be replaced with identifiers that correspond to the Resident Identifier List from the survey. Improperly redacted materials may be rejected which may render the request invalid due to an incomplete request.
Hints to proper redaction include:

- Any codes, dates, initials or other information that inadvertently could lead to the identification of a person or facility must be redacted. All logos, addresses, names and other identifiers must be redacted or blacked out on every page.
    - Redact identifiers in such location as fax headers and medical records and standard forms,
    - Redact medical record numbers, room numbers, phone numbers, survey and facility id codes and dates of birth,
    - Redact every incidence of initials or signatures
- Alternate, anonymous identifiers must replace original identifiers for residents or facilities to assure clarity regarding who or what is being referenced (e.g, Resident #1, Facility #1, Hospital.) All names, including staff names, must be redacted but the facility should not add anonymous identifiers for redactions of staff names: the State Agency will complete this portion of the redaction.

Independent Review: The New Mexico State Survey Agency will complete IIDRs with no charge to the requesting facility. The SA will work through a contract with LDH, as the independent reviewer, to ensure the following:

LDH will work with the SAs to ensure timely completion of reviews so that the written notice of the final decision is provided to the facility within 60 calendar days of the SAs receipt of the IIDR request, as required by §488.431(a)(1).

- Upon receipt of a request for IIDR, the New Mexico State Agency will notify LDH of a pending IIDR by sending them a copy of the IIDR Request Form.
- The State Agency will compile a packet of information from the Facility, the Ombudsman, any involved Residents (or their representatives) and its own files. Once complete, the State Agency will send that packet, appropriately redacted to LDH.
- LDH will complete their desk review and written report within 20 days of receipt of the packet from the State Agency.

The person or persons at LDH who are conducting the independent desk review portion of the IIDR process will have at least the qualifications set forth in SOM §7213.7

This independent reviewer will consider only information related to whether disputed deficiencies should or should not have been cited during the survey or whether it should or should not have been cited at scope and severity level of an IJ or SQC. LDH will communicate

directly and solely with the State Agency regarding the IIDR: Facilities, the Ombudsman and involved residents should direct questions and concerns to the State Agency.

Upon completion of each IIDR, LDH will provide a written record of each review to the SA.

Emergency Backup Plan for Independent Review: If an IIDR is requested at any time when there is not a valid contract in place with LDH or another agency, the review will be conducted by a committee of volunteer reviewers from outside the State Agency.

Long Term Care Ombudsman, Involved Resident and/or Resident Representative Request For Comments:

As set forth in SOM §7213, the New Mexico State Survey Agency will notify the State LTC Ombudsman and Involved Residents and/or Resident Representatives to submit written comments when an IIDR is requested.

Opportunity to Comment for Involved Residents: In the case where a disputed deficiency arose from a complaint, any involved resident (or their representative) must also be notified and offered the opportunity to provide written comment. In forming recommendations, the independent reviewer may only consider comments related to whether disputed deficiencies should or should not have been cited during the survey or should or should not have been cited at scope and severity level of an IJ or SQC.

An Involved Resident is one "who was the subject of a complaint or who filed a complaint that led to a deficiency that is the subject of" IIDR.

The notification to involved resident and their representative will include:

- Involved Resident or Involved Resident Representative request for comment
- A cover letter including a brief, plain language, description of the findings of noncompliance for which the facility is requesting the IIDR that involved the resident, as well as reference to the relevant survey date.
    - Contact at State Agency for general questions and questions regarding when, where and how potential commenters may submit their comments.
    - Contact for State's Long Term Care Ombudsman regional coordinator for residents and their representatives.
    - Description of the IIDR process as a "pre-decisional and deliberative procedure" which protects their comments from disclosure.
    - Deadline for returning written comments and the address to send it to (10 working days from the date of the letter)

The opportunity to comment will be offered to a resident when the link between the complaint and a disputed deficiency finding can be made (i.e. that the complaint "led to a deficiency finding" being disputed.)

- For complaint surveys, only disputed tags linked to the complaint will be cited in resident letter for comment.
- For complaints investigated during annual recertification surveys, involved resident will only be contacted about challenged deficiencies that are related to the investigation of their complaint.
- If multiple complaints are being investigated in the same survey, each involved resident will be contacted about any disputed deficiency that is related to the investigation of their complaint.

The State will confirm which disputed deficiencies are linked to a complaint and demonstrate due diligence to contact the involved resident and/or the resident's representative. If there is a designated Power of Attorney or other representative, letters or email will be sent to both the resident and the representative. State records will be checked against the current contact information the facility submits for all residents sampled.

Opportunity for Comment by State Ombudsman's office. Once a facility requests an Independent IDR, the State Long Term Care Ombudsman will be notified of the request and given the opportunity to comment. Comments must be returned to the State within 10 working days after the date of the email notice of the opportunity to comment.

Notification to the Ombudsman will be sent by email (with phone follow-up as needed) and will include:

- A brief description of the findings of noncompliance for which the facility is requesting the IIDR and reference to the relevant survey date;
- Contact at State Agency for general questions and those regarding when, where and how to submit their comments;
- Description of the IIDR process, including that it is a pre-decisional and deliberative procedure and, as such, all comments are protected from disclosure;
- A copy of the relevant sections of the CMS-2567;
- Request for a response: send either comments or decline to comment
- A request that Ombudsman assist any involved resident with comments, as needed. To comply with HIPAA rules, the involved resident's name and contact information will be provided to the Ombudsman by phone, fax or encrypted email, subsequent to the email notification;
- Deadline for response (10 working days from date of email.)
- In forming recommendations, the independent reviewer may only consider comments related to whether disputed deficiencies should or should not have been cited (or cited at an IJ or SQL level) during the survey.

Timing

- The Independent IDR is conducted only upon the facility's timely request. The facility must request an Independent IDR within 10 calendar days of receipt of the offer from CMS.

- The facility will submit its request in writing to the State Survey Agency via the Independent IDR Request Form.
- The facility's request will include copies of any documents, such as facility policies and procedures, resident medical record information, or other information on which it relies in disputing the survey findings.
- Resident records will be redacted to protect confidentiality and all patient identifiable information.
- All relevant information requested on the IIDR Request Form must be provided within this time frame or the request will be invalid. Any materials received after Day 10 will not be considered.

Written Record - Disposition

- LDH will generate and submit a written record to the New Mexico Survey Agency no later than 10 calendar days after completing its review and no later than 20 days after the receipt of the IIDR packet.
- IIDR records generated by the LDH will be kept secure and confidential in accordance with applicable laws and SOM §7213 and LDH will delete files associated with the review per LDH rules, as approved by CMS.
- The written IIDR record will be forwarded to the SA for retention.
- The SA will provide its final decision to the facility no later than 10 calendar days of its receipt of the written record.

Written Record – Content

- The written record provided by LDH will list each deficiency or survey finding that was disputed;
- A summary of the IIDR recommendation for each deficiency or finding at issue and the rationale for that recommendation;
- 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 substandard quality of care; and,
- Comments submitted by the State's Long Term Care Ombudsman and/or involved residents or involved resident's representatives.

1.7 QUALIFICATIONS OF AN INDEPENDENT IDR ENTITY OR PERSON(s) EXPERTISE AND TRAINING INCLUDE:

The person or persons conducting IIDR will have at least the qualifications set forth in SOM §7213.

The Louisiana Department of Health and IIDR review persons meet and have an understanding of Medicare and Medicaid program requirements including, but not limited to:

1. 42 CFR Part 483, Subpart B, and Part 488, Subparts A, E and F;
2. The State Operations Manual (SOM), including;
   - Chapter 7, Definitions and §§ 7212, 7213 and 7900;
   - Appendix P, Appendix PP, Appendix Q;
3. LDH has knowledge of applicable health care standards of practice, health care management, or life safety code knowledge and experience, relevant to the disputed issues.
4. LDH and its staff have no financial or other conflict of interest as set forth in SOM §7213 to include:
   - is not a component of an umbrella State Agency;
   - is an independent entity with an understanding of specific Medicare and Medicaid program requirements selected by the State and approved by CMS.
   - were not employed by the State Survey Agency or the State Ombudsman program within the past year.
   - were not employed by CMS, Survey and Certification, Division of Nursing Homes within the past year.
   - did not have a family member who is either a resident or an employee of the facility involved in the Independent IDR.
   - is not currently employed by the facility or organization requesting the Independent IDR.
   - has not worked within the past year as an employee, consultant or volunteer for the facility or a related corporation, involved in the Independent IDR.
   - has no ownership interest or does not currently serves or has served within the past year on the Board of Directors or Governing Body of a facility or organization involved in the Independent IDR.
   - has not acted within the past year as counsel for or against the facility involved in the Independent IDR.

1.8 APPROVAL OF AN INDEPENDENT IDR PROCESS

- The New Mexico State Survey Agency is submitting its IIDR process via this document to be approved by CMS.
- SA agrees to make any subsequent changes to obtain approval of their IIDR process from CMS prior to these changes taking effect.
- The SA and LDH will enter into a written contract which ensures that the LDH meets all IIDR requirements in SOM §7213.
- A copy of the signed contract will be provided to the CMS Dallas RO upon approval.

1.9 INDEPENDENT IDR RECOMMENDATION AND FINAL DECISION

The New Mexico State Survey Agency will consider LDH's recommendation, in conjunction with the information provided by the facility, Ombudsman and involved resident, and make their final determination regarding the disputed deficiencies:

1. If the SA concurs with the IIDR recommendation(s) and no changes will be made to the disputed survey findings, the SA will notify the facility of the review result and the State's final decision within 10 calendar days of receiving the IIDR written record.
2. If the SA disagrees with one or more of the recommendations of the IIDR, the Survey Agency will notify the facility of the review result and the State's final decision within 10 calendar days of receiving the IIDR written record and will follow procedures set forth in SOM §7213 to forward the case to the CMS RO for review. CMS RO will notify the State Agency and the facility of its decision.
3. If the State Survey Agency agrees with the IIDR recommendation(s) and changes will be made to the disputed survey findings, the SA will still notify the Facility of the review result and the State's decision within 10 calendar days of receiving the IIDR written record from LDH. In this situation or when CMS RO reaches a final decision that involves making changes to the survey findings, the Survey Agency will:
    - Change deficiency citation content findings, as recommended.
    - Adjust the scope and severity assessment for deficiencies, as recommended.
    - Annotate deficiency(ies) citations as "deleted as recommended."
    - A State survey agency manager or supervisor will sign and date the revised CMS Form-2567.
4. The State Survey Agency will promptly recommend to CMS that any enforcement action(s) imposed solely because of deleted or altered deficiency citations be reviewed, changed or rescinded.
5. If one or more deficiencies on the Form CMS-2567 have changed, the SA will provide a revised Form CMS-2567 to the facility, and the facility must submit and sign a plan of correction.
6. Any Form CMS-2567 and/or plan of correction that is revised or changed as a result of Independent IDR will be disclosed to the State Long Term Care Ombudsman in accordance with SOM §7904.
7. Deficiencies pending IDR or Independent IDR will be processed in CMS data systems as set forth in SOM §7213 and applicable ASPEN manuals.