

# Informal Dispute Resolution

Rules, Process, and Case Theory

# The Rules

- KSA 39-947a and KAR 26-39-438 through 440 provide the statutory and regulatory framework for the IDR process.
- The CMS SOM and supporting S&C memos provide the overarching rules for the IIDR process, but the implementation of the IIDR is done through state policy as approved by CMS.

# IDR Request

- Any deficiency written by KDADS can be disputed in the IDR process.
- Instructions for requesting an IDR can be found in the letter provided by **KDADS** at the time they formally exit.
- The request must be made in writing, within 10 calendar days of the survey exit.
- Request must include:
  - A statement requesting either an in person, or phone conference IDR.
  - Identification of the deficiencies in dispute.
  - 5 hardcopies of your argument and any supporting evidence you want the panel to review.

# IDR Request

- The exit letter will provide a contact name and address to send the IDR request. Currently requests are sent to;
  - Commissioner Thurness  
612 South Kansas Avenue  
Topeka, KS. 66603

\*Request for IDR or IIDR will not postpone imposition of any penalties assessed for deficiencies being disputed.

# IIDR Request

- CMS requires states to have an IIDR process in place for nursing homes to dispute deficiencies which resulted in the imposition of civil money penalties.
- The opportunity for an IIDR will be included in a letter from **CMS** when CMS imposes a CMP and determines a facility is eligible for the IIDR.
- Request for IIDR must be made similarly to IDR, within 10 calendar days from the offer made by CMS.
- The CMS letter typically comes out after the KDADS letter.
- CMS does not allow deficiencies to be disputed in both the IDR and IIDR. Facilities must choose one method or the other.

# The Panels

- The IDR panel consists of two provider representatives, usually Administrators or DONs that are not in the same market/region as the facility disputing the tag.

Third panel member is a survey and certification employee, who doesn't have direct oversight over the provider, or the panel members.

- The IIDR panel consists of two provider reps, and “a person with expertise in CMS policies and procedures and the SOM, who is not employed by the KDADS survey and certification division.” This person can be employed by other divisions of KDADS.

KDADS has been using former regional managers, and KDHE employees from the non-LTC survey and certification division.

# The Panels

- KDADS typically convenes IDR and IIDR panels one day a month.
- KDADS distributes copies of the facility request, the facility argument, and supporting evidence to the panel members in advance of the IDR. An IDR panel will typically review 3-5 cases each time.

# The Panels

- The day of the IDR, the panel members are provided a brief on the process, the rules regarding what can and can't be disputed, the authority and limits of the panel, and a chair is selected to run the meeting.
- The chair runs the meeting and uses the following guidelines to facilitate the discussion.
  - The chair typically asks the state to provide their argument first, with the facility presenting second.
  - The chair will ask the participants refrain from speaking out of turn, “cross examining,” or asking the other party follow up questions. All follow up and questions will be reserved for the panel members.

# Delete, Reduce, Uphold

- Following the conclusion of the panel hearings, the panel deliberates and offers its recommendation. The recommendation is made in writing and includes a summary of the reasoning.
- If consensus is not reached, the dissenting opinion can also write their reasoning in the summary.
- KDADS Secretary is ultimately responsible for deleting, reducing, or upholding the deficiencies. The Secretary does read and consider the opinions contained in the panel's recommendations prior to issuing their decision. Regardless the outcome of an IDR, thoughtful arguments made in the IDR can broaden the understanding the Secretary has with respect to your issues, and can impact policy.

# Making your case

- The first opportunity to make your case is with your regional manager. More tags are deleted at the regional manager level than anywhere else in the process.
- The second opportunity to make your case is with the survey director. More tags are deleted by the survey director than the IDR process.
- These opportunities are best at correcting factual discrepancies within the 2567, identifying potential gaps in understanding, and identifying documents or evidence showing compliance previously missed or not reviewed by the survey team.

# Making your case – Listen first

- Speaking with your regional manager or the survey director should occur prior to submitting your request for IDR.
- The 2567 contains the basic argument the state will use during the IDR. If you present a colorful argument, or effectively cast doubt on the surveyors findings, the panel will likely challenge the state with follow up questions. Expect the state to have a good response.
- The better you understand the arguments the state will make, the better you can tailor your argument to refute.

# Making your case

- The panel is made of well meaning volunteers. They are busy just like you. Your ability to communicate your case completely and concisely is critical.
- The timeline for submitting your evidence package is short. You need to send all the pertinent evidence to support your argument, without drowning the panel members in reams of paper they will have to make sense of.
- The panel will use the CMS SOM as their guide to determine their recommendation. It is recommended that you use the SOM as the basis for your dispute.

# Making your case

- The components of your evidence submission should mirror the components of the state's investigation. Assemble all the following that support your case.
  - Assessments
  - Care Plans
  - Nursing notes
  - Staff and resident/family statements
  - Other items pertinent to verifying your compliance with the SOM.
  - A narrative that describes how the facility was in compliance in accordance with the language of the SOM.

# Example: Elopement

- 75 year old female with BIMS of 13 is found by an employee coming on shift in the parking lot of the nursing home. It was 78 degrees outside, she had a lightweight blouse, trousers, sunglasses and a hat on. When asked where she was going, she stated she just wanted to go for a walk. The nursing home is located on a main road in town, with speed limit of 40 mph. The employee brought the resident back inside and a wanderguard was promptly placed on the resident. The investigation identified the door locks and alarms had been checked the day before and were all functioning, checked again immediately following the event. It was determined that the resident had exited behind an elderly visitor to the facility.
- Surveyor wrote F 323 at a “J.”
- Why?



# Example

- Are we going to IDR?
- What's our case theory?
- What evidence do we need to submit?

# Appendix Q- Determining “IJ”

- **3. Culpability**
- a. Did the entity know about the situation? If so when did the entity first become aware?
- b. Should the entity have known about the situation?
- c. Did the entity thoroughly investigate the circumstances?
- d. Did the entity implement corrective measures?
- e. Has the entity re-evaluated the measures to ensure the situation was corrected?
- **Note: The team must consider the entity’s response to any harm or potential harm that meets the definition of Immediate Jeopardy. The stated lack of knowledge by the entity about a particular situation does not excuse an entity from knowing and preventing Immediate Jeopardy. The team should use knowledge and experience to determine if the circumstances could have been predicted. The Immediate Jeopardy investigation should proceed until the team has gathered enough information to evaluate any prior indications or warnings regarding the jeopardy situation and the entity’s response. The crisis situations in which an entity did not have any prior indications or warnings, and could not have predicted a potential serious harm, are very rare.**



# Example- You're the Panel

- Reduce
- Delete
- or Uphold?

# Final thoughts

- Be prepared-know the 2567, the SOM, and all the facts for and against the deficiency.
- Use questions to challenge the assumptions
  - For facilities, ask many questions of the regional and director prior to the IDR.
  - For panel members, ask questions to challenge both parties on the holes in their arguments.
  - Use questions to challenge the state on interpretations they have made which may not be fully supported by the SOM, or which neglect portions of the SOM in favor of others.
- Get all the evidence!

Questions?