CMS Proposes to Make the IDR and IIDR Processes More Fair

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On July 18, 2019, the Centers for Medicare and Medicaid Services (CMS) published a proposed rule that, among other significant changes, would improve the informal dispute resolution (IDR) and the independent informal dispute resolution (IIDR) process whereby skilled nursing facilities can challenge alleged violations of specific federal regulations at 42 CFR part 483.

By way of brief background, all nursing homes participating in the Medicare program are surveyed at least once a year (sometimes, once every 15 months) and whenever there is a complaint. When the surveyors from State survey agencies typically a State's department of health claim a violation of a federal regulation exists, it is referred to as a "deficiency." Based on the level and number of deficiencies, CMS can impose (must impose, in some circumstances) sanctions such as: per instance or per day civil money penalties (CMP); denial of payment for new admissions (DPNA); directed in-service; temporary management; and/or termination from the Medicare program, which is tantamount to the proverbial financial kiss of death.

The federal regulation at 42 CFR 488.331 provides a mechanism for nursing facilities to dispute the factual and legal basis for alleged deficiencies that serve as the basis for the above sanctions. That process is known as the informal dispute resolution (IDR) process. Additionally, when CMS imposes a CMP and escrows the money, providers have the opportunity to request an Independent IDR (IIDR), pursuant to 42 CFR 488.431. The respective benefits of the IDR and IIDR process are beyond the scope of this article although, according to CMS's data, providers are twice as likely to receive favorable results at an IIDR than at an IDR. An important feature common to both is that the results are considered "recommendations" to the Secretary of HHS and are not binding on CMS.

Perhaps two of the most frustrating aspects of the IDR and IIDR processes are: 1) the length of time for a recommendation after the facility has made its arguments and presented evidence and, 2) the lack of a rationale when a provider prevails at the IDR or IIDR but the State or CMS refuses to accept the panel's recommendation. In some CMS regions, the CMS Regional Office routinely rejects IDR or IIDR results that are favorable to a provider, especially when the underlying alleged deficiencies constitute "immediate jeopardy." As explained below, the proposed rule seeks to ameliorate the above concerns and others.

There are essentially four discrete aspects of the IDR and IIDR process that the proposed rule attempts to improve. They are: 1) requiring that the IDR process must be completed within the same timeframe as the IIDR process (i.e., 60 days from a timely filed request); 2) providing specific instructions to the states regarding when the survey results should be uploaded for inclusion in CMS's national reporting system; 3) clarifying that the independent entity conducting the IIDR must have individuals who are familiar with the Requirements for Participation in Medicare that nursing facilities must adhere to; and significantly, 4) requiring that the final result of an IIDR – including the rationale behind the decision - is provided to the facility in writing by either the State or CMS. The last element is perhaps the most critical as it allows for transparency and touches on fundamental fairness. Each element is addressed below.

The IDR Process Must Be Completed within the Same Timeframe as the IIDR Process

The regulation governing the IDR process does not specify how long the IDR process should take to be completed. Oftentimes, it may be months after a facility has submitted its IDR request and met with a panel before it receives a decision. CMS notes that "in 2016, the completion time for the IDR process ranged from 1 day to 519 days with a median of 21 days."[1] CMS further notes that "Requiring that the process be completed in 60 days, consistent with the Independent IDR procedure, would result in a more timely return of the money being held [escrowed CMP funds] in the case where the provider was successful it their appeal."[2] Requiring that the IDR process must be completed within the same 60-day timeframe as the IIDR process makes sense and is clearly an improvement to the current situation where providers often wait much more than 60 days to receive the results of the IDR. The current unnecessary delay in obtaining IDR results often hampers a provider's decision to file a formal appeal, which must be filed within 60 calendar days from the notice of any sanctions imposed by CMS. Additionally, a prolonged delay in receiving the IDR results creates uncertainty and likely has an adverse impact on staff morale as the facility often waits months to find out if it will be exonerated and unsupportable deficiencies are removed.

Provide Specific Instructions to States Regarding Survey Results

CMS is proposing to provide specific instructions to the States informing them when survey results should be uploaded into its Certification and Survey Provider Enhanced Report (CASPER) system. Survey results are used to calculate a facility's Five-Star quality rating on the Nursing Home Compare website. If alleged deficiencies are being challenged via IDR or IIDR and are uploaded to CASPER before a determination as to their validity is made, that could adversely – and unfairly – affect a facility's Five-Star rating. Such as change seems fair and reasonable as too often survey results are entered into CASPER only for CMS to subsequently find that the deficiencies are unsupportable and that the CASPER data needs to be revised. CMS acknowledges that "this specification will provide consistency to the upload process and prevent survey results from being uploaded prior to completion of the dispute process."[3]

Clarify the Requisite Knowledge of the IIDR Entity

CMS seeks to add regulatory language that specifies that "in order to be approved to conduct an Independent IDR, a component of an umbrella state agency must have a specific understanding of Medicare and Medicaid program requirements." Currently, the requirement that the IIDR panel members are knowledgeable regarding Medicare's specific requirements for nursing homes is only guidance and therefore lacks the force of a regulation. CMS believes that including this requirement in a regulation, rather than merely in guidance, "will strengthen this provision." We agree.

Require CMS and the State to Provide a Written "Rationale" When it Rejects the Favorable Recommendations of an IDR or IIDR

The most significant aspect of the proposed rule concerning the IDR and IIDR process is the proposed regulatory requirement that CMS or the State must provide a written rationale when it rejects a provider's favorable IDR or IIDR results. All too frequently, a facility prevails at an IDR or IIDR, meaning the panel recommends that alleged deficiencies be either deleted or reduced in "scope and severity," and CMS, which has the final say, rejects that recommendation without providing a rationale. Thus, a provider is faced with a favorable result from an IDR or IIDR panel which is nothing more than a pyrrhic victory, and yet there is no explanation why CMS or the State rejected the favorable recommendation. The proposed modification of the existing regulation would address and correct the lack of transparency in the decision-making process. Requiring CMS or the State to formulate a written rationale when it rejects IDR or IIDR recommendations may result in more considered decisions and also would help providers who may wish to file a formal appeal challenging the deficiencies.

1 84 Fed. Reg. 34761 (July 18, 2019).
2 *Id.*
3 *Id.* at 34750.

Conclusion

CMS states, "This proposed rule would reform the Medicare and Medicaid long-term care requirements that the Centers for Medicare & Medicaid Services has identified as unnecessary, obsolete, or excessively burdensome." Indeed, the proposed rule is like a breath of fresh air to providers struggling with the "unnecessary, obsolete, or excessively burdensome"[4] requirements noted by CMS. CMS is to be commended for taking this action. However, this is a proposed rule and as such, subject to comments from the public before it becomes a final rule. Interested parties are encouraged to express their support or offer suggestions no later than September 16, 2019. Comments may be made electronically, by regular mail, or by express overnight mail. The Proposed Rule and instructions for submitting comments can be found here.

4 84 Fed. Reg. 34737 (July 18, 2019).

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