New Mexico Division of Health Improvement (DHI)
Program Operations Bureau (POB)
Independent Informal Dispute Resolution (IIDR)
Procedures for Processing Nursing Facility Appeals of Civil Money Penalties

The Centers for Medicare and Medicaid Services (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. 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. The IIDR process is available for review upon request, as established by the State Survey Agency and approved by CMS.

RECEIPT OF IIDR REQUESTS:

All IIDR requests will be logged in by the Administrative Assistant for the bureau and sent to the Training Coordinator for a review of compliance with submission criteria. The Training Coordinator will also notify involved residents and the ombudsman (Regional Coordinator) and offer an opportunity for comment as allowed. The IIDR process with be completely finished (including sending the written report to the facility) within 90 days from the date of the request. The collection of any applicable Civil Money Penalty (CMP) will be done on the date of the IIDR Committee's decision, but no longer than 90 days from the date of notice to the facility. IIDR requests will not be accepted for issues related to other pending Independent Dispute Resolution (IDR) actions under SOM §488.331.

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 scope and severity 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.
    - The 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.**
    - The 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 the Administrator whom the State Agency may contact concerning the request and any other information requested on the IIDR Request Form

Redaction of Documents: 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.

Suggestions for Proper Redaction of Documents:
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 locations as fax headers, 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. All names, including staff names, must be redacted. The facility should not add anonymous identifiers for redactions of staff names--the State Agency will complete this portion of the redaction.

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

- The scope and severity (S/S) assessments with the exception of S/S assessments that constitute substandard quality of care or immediate jeopardy;
- Any remedies imposed by the enforcing agency;
- The alleged failure of the survey team to comply with a requirement of the survey process;
- Any alleged inconsistencies of the survey team in citing deficiencies among other facilities;
- Any alleged inadequacy or inaccuracy of the IDR or Independent IDR process
- Any deficiencies based on information not available to the surveyor (s) during the survey. Findings that were not available during the survey are not "survey findings" and do not show that a deficiency should not have been cited.

The facility also may not use the IIDR process to delay the formal imposition of remedies.
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 the CMP amount are warranted.

The IIDR is not a formal evidentiary hearing and may not exceed the evidentiary standard of the DHHS/DAB. This process is not an initial determination that gives rise to appeal rights. An IIDR may not be disclosed under federal or state freedom of information laws. IIDR documents and written reports are pre-decisional and deliberative and therefore are protected under deliberative process privilege (see EPA v Mink 410 U.S. 73, 88 (1073) and 5 U.S.C. § 522(b)(5) that provide that inter-agency and intra-agency memoranda and letters generated before adoption of final decision are protected from disclosure under Exemption 5 of the Freedom of Information Act.

Response to Invalid Requests:

Upon discovery of an invalid request for an IIDR, the Training Coordinator will notify the Facility Administrator within 48 hours, in writing, of the reason(s) why the Facility's request has been found to be invalid. The Facility has 48 hours from the date of this notification to correct its submission, or the request will be permanently denied.

The IIDR review 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 the scope and severity level of an IJ or at the level of SQC.

Comments submitted by the Long Term Care Ombudsman and/or involved residents or involved resident's representatives will be considered by the IIDR team. The state agency will provide its final decision to the contracting state agency, the contracting state ombudsman office, the facility, and to involved residents no later than 10 calendar days from the date of its decision. This written notification will address each deficiency or survey finding that was disputed. The report will summarize the IIDR team's decision and rationale for each deficiency or finding at issue. It will be sent to the facility before imposing any CMP.

Any Form CMS-2567 and/or plan of correction that is revised or changed as a result of an IIDR will be disclosed to the State Long Term Care Ombudsman in accordance with SOM §7904. 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.

IIDR records will be kept secure and confidential in accordance with applicable laws and SOM §7213.

Opportunity for Involved Resident (s) and State Ombudsman's Comments:

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 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 Immediate Jeopardy (IJ) or at the level of Substandard Quality of Care (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.

Notification to the involved resident and their representative will include:

- Involved Resident or Involved Resident Representative Form (Comments for IIDR.)
- 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.
    - A contact at the State Agency for general questions and questions regarding when, where and how potential commenters may submit their comments.
    - A contact for the state's Long Term Care Ombudsman regional coordinator for residents and their representatives.
    - A description of the IIDR process as a "pre-decisional and deliberative procedure" which protects their comments from disclosure.
    - The deadline for returning the form and the address to send it to (10 working days from the date of the letter)
    - For residents still living at the facility, an instruction to contact IIDR coordinator (for an extension) should the letter arrive late.

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 the resident letter for comment.
- For complaints investigated during annual recertification surveys, an 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(s) and/or the resident's(s') representative(s). If there is a designated Power of Attorney or other representative, letters 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.

To protect the identity of the involved resident who will be receiving their letter at the facility that is requesting the IIDR, generic letters thanking sampled residents for their cooperation and reminding them of the availability of the survey results may also be sent. Both the generic letters and letters to involved residents will be sent to the facility in a single envelope (with delivery confirmation) to be delivered, unopened, to each resident by the facility within one day of receiving the letters. Included in this packet will be an instruction to notify the State Agency by email or phone when all letters have been delivered. If the facility delays delivery, the IIDR process will be terminated.

Opportunity for Comment by State Ombudsman's office. Once a facility requests an Independent IDR, the State Long Term Care Ombudsman (Regional Office) 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;
- The contact at the state agency for general questions and those regarding when, where, and how to submit their comments;
- A 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;
- A request for a response, whether to send comments or to decline comment
- A request that the 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 or fax, subsequent to the email notification;
- The deadline for response (10 working days from the date of the 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 SQC level) during the survey.