

Legal issues



By Janet K. Feldkamp, JD, RN, LNHA

Prepare for a Successful Informal Dispute Resolution

Facilities frequently feel a sense of relief after the completion of a Medicare/Medicaid certification survey, even if they've received a moderate number of citations. However, since the implementation of Nursing Home Compare and the Five-Star Quality Rating System, skilled nursing facility leaders should carefully consider the impact of all levels of deficiencies for

Table 1: Health Inspection Score: Weights for Different Types of Deficiencies

Severity	Scope		
	Isolated	Pattern	Widespread
Immediate jeopardy to resident health or safety	J 50 points* (75 points)	K 100 points* (125 points)	L 150 points* (175 points)
Actual harm that is not immediate jeopardy	G 20 points	H 35 points (40 points)	I 45 points (50 points)
No actual harm with potential for more than minimal harm that is not immediate jeopardy	D 4 points	E 8 points	F 16 points (20 points)
No actual harm with potential for minimal harm	A 0 point	B 0 points	C 0 points

Note: Numbers in parentheses indicate points given for deficiencies that are for substandard quality of care. Shaded cells denote deficiency scope/severity levels that constitute substandard quality of care if the requirement which is not met is one that falls under the following federal regulations: 42 CFR §483.13 resident behavior and nursing home practices; 42 CFR §483.15 quality of life; 42 CFR §483.25 quality of care.

*If the status of the deficiency is "past non-compliance" and the severity is "Immediate Jeopardy," points associated with a "G-level" deficiency (i.e., 20 points) are assigned.

Source: Centers for Medicare & Medicaid Services.

Medical Expert Perspective

Ms. Feldkamp brings up many excellent points in discussing the IDR process for regulatory deficiencies. I agree that it pays to choose our battles — there are often deficiencies with low scope and severity that are probably not worth fussing over, even if they are plainly wrongheaded. Each scope/severity rating carries a number of points that can impact Five-Star. For example, a "B" deficiency (a pattern of deficiencies that causes no actual harm and presents potential for minimal harm) is assigned 0 points (so are "A" and "C" deficiencies), whereas a "G" deficiency (an isolated deficiency that causes actual harm) carries a burden of 20 points (see Table 1). The most recent survey carries the most weight (50%), but the preceding two surveys also are considered, so damage to your star rating can stay with you for quite awhile.

On the other hand, as with any interaction with the legal or regulatory system (or the medical system, for that matter), try to have realistic expectations. In many parts of the country — at least anecdotally — it seems vanishingly rare for an IDR to succeed. Indeed, it feels like sometimes the IDR process is just a rubberstamp for what the initial surveyors found. At that point, the decision to launch a more formal appeal of a deficiency is another level of commitment and expense. And it's by no means guaranteed that the ultimate decision will be in your favor, even if the facts are clear that the initial citation was excessive or flat-out inappropriate. It's worth knowing what the climate is like in your own area, and talking with other nursing home administrators about their history is worthwhile — as is talking to a knowledgeable health care attorney who works in this arena.

To summarize, it's worth fighting deficiencies that are both clearly inappropriate and carry sufficient negative impact to make the time, effort, and possible expense worth your while (especially if a meaningful appeal involves hiring experts to review files and provide opinions). And don't expect a fair outcome: have low expectations; hope for the best but prepare for the worst. Remember, deficiencies and your Five-Star rating have some meaning and influence the reputation of a nursing home, but they don't define the care you give in your facility — even if a lot of people think they do!

—Karl Steinberg, MD, CMD
Editor in Chief

potential informal dispute resolution (IDR,) as even low-level deficiencies can have a negative impact on the facility's public reputation and their star rating and have potential implications for participation in managed care.

In 1998, the Department of Health and Human Services, through the Health Care Financing Administration — now known as the Centers for Medicare & Medicaid Services (CMS) — launched the Nursing Home Compare website to include national information of past performance for all Medicare and Medicaid certified nursing homes. Nursing Home Compare provides information directly to residents, families, and the public regarding nursing home quality.

In December 2008, CMS enhanced the Nursing Home Compare website to include a set of quality ratings for each listed skilled nursing facility. CMS's goal in adding the Five-Star Rating system to the website was to provide consumers an easy way to understand CMS's assessment of nursing home quality. CMS hoped to make a system to provide for simple distinctions between high and low performing facilities, as judged by multiple factors measured by the government entities. In recent years, insurers and managed care organizations have frequently used the Five-Star Rating of SNFs to restrict or limit some SNFs from inclusion on provider panels, which can dramatically limit the potential referrals for facilities and reduce their financial viability.

To Dispute or Not To Dispute

The Five-Star system includes ratings related to staffing, quality measures and inspection results. These three data groups result in an overall star rating for the SNFs; the best rating is 5, and the lowest is 1. Fewer points results in a higher inspection rating for a SNF that is included in the overall Five-Star rating calculation. With successful IDRs, the facility can lower their point total, but there are some important considerations in the determination of whether or not to dispute a citation. Consider the following:

- ▶ Informal dispute resolution does not stop or delay enforcement of remedies.
- ▶ The survey process itself, or any lack of compliance with the survey protocol by the state agency, cannot be challenged.

Table 2: Weights for Repeat Revisits

Revisit Number	Noncompliance Points
First	0
Second	50% of health inspection score
Third	70% of health inspection score
Fourth	85% of health inspection score

Note: The health inspection score includes points from deficiencies cited on the standard annual survey and complaint surveys during a given survey cycle.

Source: Centers for Medicare & Medicaid Services.

▶ Some IDR processes do not allow challenge of deficiencies that do not result in imposition of remedies.

▶ The SNF cannot challenge any inconsistency in citation of deficiencies by a survey team.

▶ Consider the documentation and definitive support that can be submitted to support that the SNF was in substantial compliance with the requirements.

▶ Disputing the entire set of deficiencies can lead to decreased credibility by the SNF with the state agency, so consider disputing the most severe or most impactful citations.

▶ Be creative and look for support of the SNF's compliance with requirements, such as use of professional articles or the Society clinical practice guidelines, to support that the SNF provided care in compliance with the current standard of care.

▶ Use the SNF medical director as a resource to explain or clarify medical issues that may be beyond the scope of a Health Facilities Evaluator Nurse (HFEN) surveyor's knowledge or licensure.

▶ Whether the IDR process is an oral presentation, a written submission of documentation, or a combination process, maintain a professional tone in the process while being assertive in support of the facility's assertion of compliance with the requirements.

The IDR process can result in positive outcomes. For one nursing facility in Ohio, an IDR resulted in the elimination of 76 days of retrospective immediate jeopardy. The facility successfully argued for a 1 day past non-compliance immediate jeopardy on an elopement based upon the thorough evaluation and implementation of a comprehensive plan to prevent future elopements. This win for the facility resulted in the elimination of costly proposed fines and other potential sanctions.

Other providers have seen positive outcomes when multiple actual harm deficiencies have been eliminated with IDRs and removed from their public

profile, thus reducing the total number of assigned points for deficiencies.

Carefully select citations that are incomplete, inaccurate, or not correctly cited — especially those with high scope and severity.

If your facility is contemplating an IDR, the following are suggested action items:

- ▶ Know your state requirements and carefully review the notification letters for the facility's rights in the IDR process.
- ▶ Carefully select citations that are incomplete, inaccurate, or not correctly cited — especially those with high scope and severity.
- ▶ Collect appropriate and complete information for a dispute as soon after the survey is completed as possible. If you wait until the citations arrive, the facility may not have adequate time to develop the thorough dispute information and strategy.
- ▶ Tell the story about why the citation is not supported by the facts and/or the regulatory requirements.
- ▶ The facility knows their residents well and can provide information that, although not necessarily understood by the survey team, can have an impact on the citation.
- ▶ Obtain support from the appropriate supporting professionals, such as letters or affidavits from the attending physician, the medical director, the consulting pharmacist, or other professionals, as applicable.
- ▶ Know and use information regarding the current standard of care that can support the facility's assertion that the care rendered met the requirements and the current standard of care.

Many Benefits

Being successful in the IDR process can have a multi-year impact on the facility's future fines and sanctions and on the public presence of citations on Nursing Home Compare, and it can culminate in a reduction in points added to the Inspection portion of the Five-Star Rating. Consider all outcomes for the facility when citations are issued and determine if the use of the IDR process can benefit your facility. Advocate for your facility if the citation is incorrect as unwarranted citations can have negative effects on the facility's ability to be included on provider panels. Be proactive and consider using the IDR process to your facility's benefit. 

This column is not to be substituted for legal advice. Ms. FELDKAMP practices in various aspects of health care, including long-term care survey and certification, certificate of need, health care acquisitions, physician and nurse practice, managed care and nursing related issues, and fraud and abuse. She is affiliated with Benesch Friedlander Coplan & Aronoff LLP of Columbus, OH. Read this and other columns at www.caringfortheages.com under "Columns."

Senate Hears From Alzheimer's Advocates

WASHINGTON — *Caring* went to Capitol Hill in April for the Alzheimer's Association's annual Day at the Hill, a day of advocacy to draw attention to the disease, lobby for more funding, and visit with state lawmakers.

Caring attended the Senate's Special Committee on Aging hearing "Finding a Cure: Assessing Progress Toward the Goal of Ending Alzheimer's by 2025." Ronald Petersen, MD, PhD, director and chair, Mayo Clinic Alzheimer's Disease Research Center and the Mayo Clinic

Study of Aging and Advisory Council on Alzheimer's Research, Care, and Services, told Senate committee members that although the "almost \$1 billion in research currently being allocated by the federal government for Alzheimer's disease and related dementias is commendable, the Advisory Council believes that this number, based on input from the scientific community, should be \$2 billion or more."

He noted that Alzheimer's disease is "the costliest of all chronic diseases

facing this country today," and he laid out a dire picture for the committee, stressing that "Alzheimer's disease and related dementias may very well be the single disease to bankrupt the health care system going forward."

Committee chair Sen. Susan Collins (R-ME) concluded by noting the many senators who attended to ask questions, and reiterated the Committee's commitment to researching more funding in the future. 



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