# Welcome!
# Team TSI Expert Industry Training
# Revisiting the Independent IDR Process

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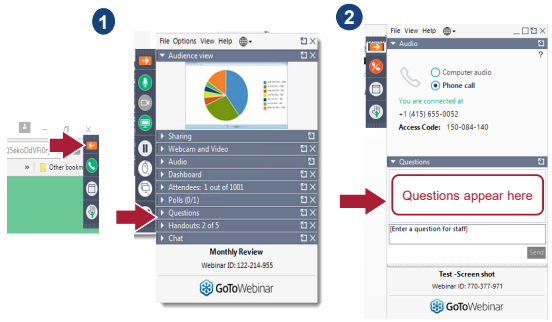
## Go To Webinar – Questions & Handouts

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# Revisiting The Independent IDR Process

And its Impact on COVID-19 Reporting and the New IC Enforcement Actions



## Session Objectives

**Upon completion of this session, you should be able to:**

- **Describe** the Independent IDR (IIDR) Process.
- Discuss the **benefits** of using the Independent IDR Process.
- Discuss the **importance** of understanding the COVID-19 reporting requirements and the **New** Enhanced Infection Control Enforcement Process.
- Discuss the Independent IDR **time frame** requirements.
- Identify and discuss actions that are considered an **invalid use** of the Independent IDR Process.
- Discuss the **types** of Independent IDR review, cost, & legal counsel participation.
- Discuss the **importance** of requesting a **new** Plan of Correction.
- Discuss the **preparation** and **submission** of **relevant** documents.
- Identify **individuals** that **may** be allowed to **attend** an Independent IDR hearing.
- Identify and discuss **reasons not** to proceed with an Independent IDR hearing.

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## Overview

- The Independent Informal Dispute Resolution (IIDR) Process allows the facility to dispute **ONLY** those deficiencies for which a civil money penalty (CMP) has been **imposed** and will be **collected** and placed in escrow.
- Unlike the IDR process which allows facilities an opportunity to challenge deficiency citations, a facility **cannot** seek an Independent IDR unless they receive **notification** from CMS of the facility's **eligibility** to participate in the Independent IDR process.
- The facility's request for an Independent IDR **must** be made **within ten (10) calendar days** of the receipt of the offer from CMS to participate in the IIDR.
- The **time frame** runs **concurrent** with the submission of the Plan of Correction (PoC).
- You must submit a **PoC** within the 10 calendar days time frame for all deficiencies **not** challenged or where **no** IIDR is permitted for a cited deficiency.

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## Overview – cont'd

- The **written** notice from **CMS** should **include** information relative to the Independent IDR Process and **document** submission requirements.
- Another important **reminder** is that of requesting a **hearing** with the Departmental Appeal Board **(DAB)** before an administrative law judge **(ALJ)**.
- This is a **separate** process from the Independent IDR.
- You only have **60-days** from the **date** you receive written notice of the **imposition** of an enforcement action (e.g., CMP, DPNA, etc.) to **file** a Hearing Request.
- The fact that you have **requested,** and/or are **participating** in, an **Independent IDR** does **NOT** suspend the **60-day** time frame for **filing** a hearing request **nor** does it **delay** the imposition of CMPs or other remedy.

 

## Benefits of Using the Independent IDR Process

**The Independent IDR process can benefit the facility by:**

- **Reducing** the impact on the 5-Star Rating;
- **Removing** and/or **decreasing** scope and severity can improve the status of the facility on Nursing Home Compare;
- Deficiencies **removed** will **not** require a PoC or follow-up survey to review correction;
- When survey tags or scope and severity levels are **decreased**, the facility may have **less** exposure or liability for certain claims;
- Individual **licenses** of the administrator and the facility would be better protected, especially when there is a valid reason to dispute the tag;
- The facility has an **opportunity** to review its policy and procedure when analyzing disputed deficiencies and can make a determination as to the **benefit** of modification to prevent further concern in the area;
- **Challenging F884** citations and **other** related **IC** deficiencies to prevent enhanced enforcement actions for IC deficiencies at a **S/S Level of D or above**.

 

## Review of COVID-19 Reporting Requirements

- QSO Letter **20-29 requires** nursing homes to **report** COVID-19 facility data to **CDC** and to **residents**, their **representatives**, and **families** of residents in nursing homes.
- **Failure** to report data can **result** in an **enforcement** action.
- **F884 – COVID-19 Reporting to CDC**.
  - **F884** is conducted **OFFSITE** by **CMS** using the **weekly** data reported to CDC.
  - Facilities **identified** as **not** reporting data timely **will** receive a deficiency citation at an **F Level** and a one-day CMP of **$1,000**. CMP amounts are **increased** by **$500** for each week data is not submitted.
- **F885 – Facility Reporting COVID-19 Information to Residents, Representatives, and Families**:
  - **F885** is conducted **ONSITE during** the Focused Survey Process.
  - If the surveyor finds **noncompliance**, a citation **will** be entered on the 2567 and **enforcement** actions will be **implemented** in accordance with QSO Letter **20-20**.

 

## The New Enhanced Enforcement Process for Infection Control Deficiencies

**QSO Letter 20-31 implemented NEW enhanced enforcement guidelines for Infection Control Deficiencies. Substantial non-compliance (D or above) with any deficiency associated with IC requirements will lead to the following enforcement remedies:**

- **Non-compliance** for an Infection Control deficiency when **NONE** have been cited in the **last year** (or on the **last** standard survey):
  - Nursing homes cited for **current** non-compliance that is **not** widespread **(Level D & E) - Directed Plan of Correction.**
  - Nursing homes cited for **current** non-compliance with infection control requirements that is **widespread (Level F) - Directed Plan of Correction**, **Discretionary Denial of Payment for New Admissions** with **45-days** to demonstrate compliance with Infection Control deficiencies.

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## The New Enhanced Enforcement Process for Infection Control Deficiencies – cont'd

**Non-compliance** for an Infection Control deficiency cited **ONCE** in the **last year** (or on the **last** standard survey):

- Nursing Homes cited for **current** non-compliance with infection control requirements that is **not** widespread **(Level D & E)-Directed Plan of Correction, Discretionary Denial of Payment for New Admissions** with **45-days** to demonstrate compliance with Infection Control deficiencies, Per Instance Civil Monetary Penalty (**CMP**) up to **$5000** (at State/CMS discretion)**.**
- Nursing Homes cited for **current** non-compliance with infection control requirements that is **widespread (Level F)-Directed Plan of Correction, Discretionary Denial of Payment for New Admissions** with **45-days** to demonstrate compliance with Infection Control deficiencies; **$10,000** Per Instance CMP.

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## The New Enhanced Enforcement Process for Infection Control Deficiencies – cont'd

**Non-compliance** that has been cited for Infection Control Deficiencies **TWICE** or MORE **in the last two years** (or **twice** since **second** to **last** standard survey)

- Nursing homes cited for **current** non-compliance with Infection Control requirements that is **not** widespread **(Level D & E)-Directed Plan of Correction, Discretionary Denial of Payment for New Admissions**, **30-days** to demonstrate compliance with Infection Control deficiencies; **$15,000** Per Instance CMP (**or** per day CMP may be imposed, as long as the total amount **exceeds** $15,000)
- Nursing homes cited for **current** non-compliance with Infection Control requirements that is **widespread (Level F)-Directed Plan of Correction, Discretionary Denial of Payment for New Admissions**, **30-days** to demonstrate compliance with Infection Control deficiencies; **$20,000** Per Instance CMP (**or** per day CMP may be imposed, as long as the total amount **exceeds** $20,000).

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## The New Enhanced Enforcement Process for Infection Control Deficiencies – cont'd

- Nursing Homes cited for **current** non-compliance with Infection Control Deficiencies at the **Harm Level (Level G, H, I), regardless** of **past history-Directed Plan of Correction, Discretionary Denial of Payment for New Admissions** with **30 days** to demonstrate compliance with Infection Control deficiencies. **Enforcement imposed** by CMS Location per current policy, but **CMP** imposed at **highest** amount option within the appropriate (non-Immediate Jeopardy) range in the CMP analytic tool.
- Nursing Homes cited for **current** non-compliance with Infection Control Deficiencies at the **Immediate Jeopardy Level (Level J, K, L), regardless** of **past history** – In **addition** to the **mandatory remedies** of **Temporary Manager or Termination, imposition of Directed Plan of Correction, Discretionary Denial of Payment for New Admissions**, **15-days** to demonstrate compliance with Infection Control deficiencies. **Enforcement imposed** by CMS Location per current policy, but **CMP** imposed at **highest** amount option within the appropriate (IJ) range in the CMP analytic tool.

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## Time Frame for SUBMITTING an Independent IDR Request

- A facility **may** request an Independent IDR for **each** survey that **cites deficiencies** for which a civil money penalty (**CMP**) has been **imposed** and **will** be collected and placed in escrow.
- The Independent IDR is conducted **only** upon the facility's **timely** request.
- The facility **must** submit its **request** for an Independent IDR **within 10 calendar days of receipt of the offer from CMS**.
- The facility **must** submit its request in **writing** to the State survey agency, or the approved Independent IDR entity or person, as appropriate. If the request is mailed, the **POSTMARK** must **verify** that the request was mailed **within** the **10-day** time period.
- The request should **also include documents**, such as facility policies and procedures, resident medical record information that are redacted to protect confidentiality and all patient identifiable information, or other information on which it relies in disputing the survey findings, in **accordance** with your State's Independent IDR process.

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## Time Frame for COMPLETING an Independent IDR Request

- Regulations at §488.431(a)(1) **requires** that Independent IDR be completed within **60 days** of the facility's request.
- Every effort must be made to comply with this time frame, however, **failure** to timely complete the Independent IDR process does **not invalidate** deficiencies or delay any remedies imposed.
- The Independent IDR process is considered **completed** if a facility does **not** timely request **or** chooses **not** to participate in the Independent IDR process **or** when a **final decision** has been made, a **written** record has been generated, AND the State survey agency has sent **written notice** of this **final** decision to the facility.
- An **unchallenged** deficiency is deemed final. Substantial noncompliance with only **one** participation requirement **can** support the imposition of a penalty.

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## Invalid Use of the Independent IDR Process

The facility may **NOT** use the Independent IDR Process to **challenge** the following:

- Remedy(ies) **imposed** against the facility;
- Questions or issues from a **previous** survey;
- Cited deficiencies when a **CMP** is **not** imposed;
- **S/S** classifications, **except** citations that constitute **SQC** or **IJ**:
- Survey findings that have **already** been the subject of an **IDR unless** the IDR was completed **PRIOR** to the imposition of the CMP;
- **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 facilities;
- Alleged **inadequacy** or **inaccuracy** of the Independent IDR process; or
- **Surveyor** behavior/conduct.

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## Types of Review

The facility's **notice** of their opportunity to **participate** in an Independent IDR **should** include **HOW** the process will be conducted, which may include:

- A Written/Desk Review;
- A Telephone Review; or
- A Face-to-Face Meeting.
- Federal Independent IDR Process.
  - In the case where a **Federal** survey, conducted **solely** by Federal surveyors, or its contractors, **results** in the implementation of a CMP, the **Regional Office** will provide the **Independent IDR** notice and process.
  - The **Federal** Independent IDR process is **paper-review** only.

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## Cost to the Facility

- States may **not** charge facilities for the Independent IDR process required under 42 C.F.R. §488.431.
- For deficiencies that are the **basis** for a civil money penalty which is **not** collected and placed in escrow under §488.431(b), **or** for **deficiencies** that lead to the **imposition** of **another remedy** that is **not** a civil money penalty, a State is **not** required to provide Independent IDR.
- In situations where the Independent IDR process is **not** required but is **provided** by the State directly at its option, the State **may** choose to **charge** a facility a user fee for those processes.

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## Participation of Legal Counsel

- The **attendance** of the facility's legal counsel, or his/her representatives, at an Independent IDR review is an **individual** State **decision**.
- **Should** the State **permit** the facility's legal counsel to participate in the Independent IDR, the facility must **notify** the State of their legal counsel's participation to **ensure** that the State's legal counsel is **present**.
- The **cost** of the State's legal counsel's attendance is the responsibility of the State.
- The **cost** of the facility's legal counsel's attendance is the responsibility of the facility.

 

## Notifying Involved Resident/Ombudsman

- Once a facility **requests** an Independent IDR, the State must **notify** the **involved** resident or resident representative, as well as the State's long-term care **Ombudsman**, that they have an opportunity to submit **written comment** concerning the facility's Independent IDR request.
- The State is **encouraged** to **request** from the Ombudsman **specific** information based on **direct** involvement or **knowledge** about the **issues** being **disputed** by the facility.
- **Information** about the facility or provider in **general**, but **not related** to the deficiency(ies) at issue, are **not** relevant to the Independent IDR and should **not** be **considered** by the State or the Independent IDR process.

 

## Plan of Correction (PoC)

- Based on a **final** Independent IDR recommendation and **final** State and CMS action, if **one** or **more** deficiencies on the Form CMS-2567 have been **changed**, **deleted** or **altered**, the facility has the **option** to **request** a clean (**new**) copy of the Form CMS-2567.
- The clean (**new**) copy will be the **releasable** copy **only** when a clean (**new**) plan of correction is **both provided** and **signed** by the facility. The **original** Form CMS-2567 is **disclosable** when a clean (**new**) plan of correction is **not submitted** and **signed** by the facility.
- **Any** Form CMS-2567 and/or plan of correction that is **revised** or **changed** as a **result** of Independent IDR **must** be **disclosed** to the State long-term care **ombudsman** in accordance with §7904.

 

## Document Preparation

**When submitting supporting documentation to Independent IDR, you should include the following:**

- ✓ The **tag** number(s) you are disputing (e.g., F600);
- ✓ The reason(s) **why** the **deficiency** is disputed;
- ✓ The reason(s) **why** the **scope and severity** should be reduced (if **SQC** or **IJ** level);
- ✓ The **desired** outcome;
- ✓ **Documentation** that **directly** demonstrates that the deficiency is **not sustainable**;
- ✓ The **type** of Independent IDR format **desired** (e.g., written review, telephone, face-to-face meeting);
- ✓ **If** legal counsel is **attending** (as permitted by the Independent IDR plan);
- ✓ Other data as may be required by the Independent IDR plan.

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## Submitting Relevant Documents

**Documentation should be relevant to the disputed survey findings. Examples include:**

- ✓ A **facility** form that is **specific** to the **disputed** findings. **Blank** forms should **only** be submitted to **prove** that a form **existed** at the time of the survey;
- ✓ **Documents** from appropriate facility **records** (i.e., if the dispute regards a care plan that a surveyor found deficient, submit that care plan).
- ✓ Nurse's notes, physician's notes, medication orders, assessments, etc.;
- ✓ **Applicable** policies and procedures;
- ✓ **Inservice** training records (e.g., curriculum summary, signature lists, etc., to indicate the training context and attendance at the training session.)

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## Submitting Relevant Documents –cont'd

- ✓ The Minimum Data Set (MDS);
- ✓ **Signed** and **dated testimonials** from resident family members or facility staff.

- You **may** be required to **submit** a copy of the Statement of Deficiencies (2567) (**without** a plan of correction), and/or resident/staff **identifier lists** as used in the **disputed** survey process and other State specific materials.
- You may **also** be asked to **explain why** the submitted material was **not shown** to the survey team **during** the discussion of survey findings (e.g., at the exit conference).

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## Submitting Relevant Documents –cont'd

- Documents should be in its **original** form and content as of the survey date. Do **not** submit documentation that was prepared **after** the survey date (i.e., revised policies and procedures, care plans, in-service training records, etc.).
- The **wording** on the documents must be **legible**. If the document or portions are **illegible**, provide a **typed** version or a neatly **written** transcript of the section of the document. **Illegible** documentation will **not** be reviewed.
- Follow your State's process for **redacting** resident identification information.

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## Determining Relevant Information

**Evidence which is almost never relevant includes such items as:**

- ✓ Time, event, or person **other** than identified on the Statement of Deficiencies (SOD);
- ✓ Events occurring **after** the date of the SOD;
- ✓ **Subsequent** remedial measures (e.g., policy change **after** the alleged deficiency);
- ✓ **Offers** to pay medical expenses;
- ✓ **Past** determinations of deficiencies (e.g., presenting an exhibit which shows a **previous** survey from **another** facility in which the **same** deficiency was **removed** during an Independent IDR.);
- ✓ Evidence **relating** to the SOD which are **not** disputed.

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## Burden of Proof

- The **standard** of **proof** is the **level** of **proof** required.
- Because the **purpose** of the Independent IDR is to **provide** the facility with an **opportunity** to **refute** certain cited deficiencies, **it is the facility** that **has** the **burden** of **proof** of presenting **evidence** which can **persuade** the Independent IDR entity that the **necessary elements** of the regulations **were met**.

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## Attendance at Independent IDR

**Attendance at an Independent IDR is determined by each State. Normally, the following individuals may attend**:

- ✓ Facility representatives and staff;
- ✓ Survey team members;
- ✓ State Long-Term Care Ombudsman;
- ✓ Involved Resident, individual or agency who is a legal guardian or has a medical power of attorney;
- ✓ Facility legal counsel and/or their representatives (if permitted by the IIDR Process);
- ✓ Others as permitted by the State's Independent IDR plan.

**All** persons attending the Independent IDR are **responsible** for **protecting** the **confidentiality** of resident information.

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## Reasons NOT to Proceed with an Independent IDR

**Questions that <u>may</u> arise concerning whether or not you should submit an Independent IDR request include:**

- ✓ Do I have an argument that is supportable and appropriate?
- ✓ Are the time and financial resources needed to proceed with Independent IDR worth it?
- ✓ Are their future hearing or litigation consequences?
- ✓ What are the consequences of the cited deficiency?
- ✓ What is the scope and severity of the cited deficiency?
- ✓ Will Independent IDR create the potential for new tag citations?
- ✓ Will Independent IDR create suspect with regard to the evidence submitted?

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## Question and Answer Session

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