

Navigating Oversight In The ICF – Part 1

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Authorities

- Centers for Medicare & Medicaid Services (CMS)
- Ohio Department of Health (ODH)
- Ohio Department of Medicaid (ODM)
- Ohio Department of Developmental Disabilities (ODODD)
- Disability Rights Ohio (DRO)
- Ohio Auditor of State
- Occupational Safety and Health Administration (OSHA)

CMS

- Sections 1905 (c) and (d) of the Social Security Act - gives the Secretary of Health and Human Services authority to prescribe regulations for intermediate care facilities (ICF/IID).
 - CONDITIONS OF PARTICIPATION: ICF/IID (483.400-480)
 - § 483.420 Client protections
 - § 483.430 Facility staffing
 - § 483.440 Active treatment services
 - § 483.450 Client behavior and facility practices
 - § 483.460 Health care services (including policies/procedures for COVID vaccine)
 - § 483.470 Physical environment
 - § 483.475 Emergency preparedness
 - § 483.480 Dietetic service

CMS State Operations Manual – Appendix J (Guidance to Surveyors: ICFs/IID)

General Guidance:

- Principal focus of the ICF/IID survey process is on the “outcome” of the facility’s provision of “active treatment”
- Surveyors to use observation as the primary method of information gathering
 - Conduct interviews and record reviews after completion of observations to confirm specific issues
 - Verify that the facility develops interventions and supports that address the clients’ needs, and
 - Provides required client protections and health services
 - Not to conduct in-depth reviews of assessments, progress notes or historical data unless outcomes fails to occur for clients

Survey Levels

- Survey Levels:
 - Focused Fundamental Survey
 - Extended Survey
 - Full Survey

Focused Fundamental Survey

- **Focused Fundamental Survey**
 - May be utilized for all ICF/IID recertification surveys
 - Primary method of information gathering is observation
 - Interviews and record reviews are conducted to confirm and/or provide additional information on any concerns identified during observations
 - Beyond the IPP and the comprehensive functional assessment (CFA), in-depth review of progress notes or historical data is not performed unless there is suspected non-compliance of a key standard (CoPs)
 - All record reviews are to focus on obtaining additional information to clarify or completely document areas of question or concern identified during observation

Extended Survey

- **Extended Survey**
 - During a focused fundamental survey, if a key standard of a CoP is found out of compliance surveyor will review all corresponding standards under that key standard to determine compliance with that standard
 - If review of the key standard and corresponding standards could result in a condition-level non-compliance finding, the SA can decide to survey all the standards within that CoP = *extended survey*
 - If review of the key standard and corresponding standards results in a CoP noncompliance finding, the team will convert the extended survey to a full survey

Full Survey

- **Full Survey** – review of all standards within all 8 ICF/IID CoPs
 - Is conducted when any one or more of the following criteria are met:
 - An initial survey;
 - An immediate jeopardy is called;
 - The survey team determines from the extended survey that condition-level deficiencies exist at one or more of the specific CoPs at 42 CFR 483.420, 42 CFR 483.450 or CFR 483.460; or
 - At the discretion of the SA

Survey Entrance

- **Sample Selection (Phase 1):** SA requests complete and accurate list of all clients that currently reside in the facility and selects core number of clients
 - The surveyor will request a copy of each selected client's Individual Program Plan (IPP)
 - A full review (observation, record review and interview) will be conducted on all clients core sample
 - For any specific injury noted during observations (regardless of whether the client is in the sample or not), the surveyor will request the documentation associated with the injury

Survey Entrance

- **Phase 2:** If the surveyor determines during Phase 1 that there is insufficient evidence to find that the facility is in compliance with the CoP for client protections (42 CFR 483.420), a more global review is indicated:
 - Request the facility log of client incidents and reports and select a sample of 5 percent of the incidents from the last 3 months (a minimum of 10 if available)
 - Request the investigative reports for these incidents

Survey Entrance (cont'd)

- If facility has a system in place to prevent abuse, neglect and mistreatment and to resolve complaints and takes appropriate corrective measures = Task 2 complete
- If the 5% sample review is not determinative as to compliance with the CoP for client protections; surveyor identifies any patterns of possible abuse, mistreatment or neglect; or incident report logs for past 3 months indicate extremely high incident rate = Surveyor will proceed to full review of total number of incidents and reports for past 3 months

ODH – Bureau of Survey and Certification

- ODH the state survey and certification agency for CMS
- The Bureau of Survey and Certification ensures individuals are receiving needed active treatment services by conducting on-site inspections/surveys for compliance with state and federal rules and regulations
 - Each ICF/IID facility receives at least one unannounced inspection/survey every 9-15 months survey cycle
 - Also investigates complaints r/t individual's rights, quality of care, quality of life, staffing, abuse, dietary and environmental concerns

ICF Survey Guidance for COVID-19

- Surveyors were guided to focus on the vaccination status and ICF/IID policies to address vaccination for staff that regularly work in the ICF/IID (e.g., weekly), using a phased-in 30/60/90 days approach
- Survey Process – compliance assessed through observation, interview, record review
 - Entrance Conference – Surveyors will ask ICF to provide vaccination policies and procedures
 - List of all staff and their vaccine status
 - Will review any contingency plan developed to mitigate spread of COVID-19

ICF Survey Guidance for COVID-19 (cont'd)

- For each individual identified by the ICF/IID as unvaccinated, surveyors will:
 - Review ICF/IID records
 - Determine if they have been educated and offered vaccination
 - Interview staff and ask if they plan to get vaccinated, if they have declined to get vaccinated, and if they have a medical contraindication or religious exemption
 - Request and review documentation of the medical contraindication
 - Request to see employee record of the staff education of the ICF/IID policy and procedure regarding unvaccinated individuals

ICF Survey Guidance for COVID-19 (cont'd)

- For each individual identified by the ICF/IID as unvaccinated due to a medical contraindication surveyors will:
 - Review and verify all required documentation
 - Signed and dated by physician or advanced practice provider
 - States the specific vaccine that is contraindicated
 - The recognized clinical reason for the contraindication with a statement recommending exemption

ODM

- ODM the single state agency responsible to the federal government for the administration of the state's Medicaid program
- The ICF/IID benefit is optional
 - Social Security Act created this benefit to fund “institutions” (4 or more beds) for individuals with intellectual disabilities, and specifies that these institutions must provide “active treatment”
 - To qualify for Medicaid reimbursement, ICFs/IID must be certified and comply with the Federal CoPs (42 CFR Part 483, Subpart I, Sections 483.400-483.480)

ODM/ODODD

- Chapter 5124 of the Ohio Revised Code
 - Requires ODM to enter into a contract with the ODODD under ORC § 5162.35 that provides for ODODD to assume the powers and duties of ODM with regard to the Medicaid program's coverage of ICF/IID services

ODODD – Licensing and Reviews

- OAC Chapter 5123:2-3 – Licensing of Residential Facilities
 - Sets forth requirements for administration and operation of licensed facilities
 - Includes compliance process/procedures: ODODD must conduct a compliance review of a residential facility at least once during the term of the license and may conduct additional compliance reviews as determined by ODODD
 - Three types of compliance reviews:
 - Routine
 - Abbreviated
 - Special

ODODD Compliance Reviews (cont'd)

- Compliance Review Procedures
 - Operator must give Department access to the residential facility – all records, accounts, and any other documents related to operation of the residential facility; the operator; the individuals residing in the facility; and all persons acting on behalf of, under control of, or in connection with the operator
 - Series of observations, interviews, and review of records to determine if the interactions, activities, practices, and conditions within the facility are consistent with Chapters 5123 and 5124 of the ORC (and rules adopted under those chapters)

DRO

- Disability Rights Ohio
 - Designated by the Governor as the system to protect and advocate the rights of people with disabilities in Ohio
 - Has state and federal authority to monitor any facility or service provider in the State providing care or treatment to individuals with disabilities, or to investigate incidents of abuse and neglect of individuals with disabilities

DRO – Authorities

- **42 U.S.C. § 15043** – requires state to have in effect a system to protect and advocate the rights of individuals with developmental disabilities
- **45 CFR § 1326.25** (records) – Access to (whether written or in another medium, draft, preliminary or final, including handwritten notes, electronic files, photographs or video or audiotape records) shall include, but not be limited to:
 - Individual records prepared or received in the course of providing intake, assessment, evaluation, education, training and other services; supports or assistance, including medical records, financial records, and monitoring and other reports prepared or received by a service provider
 - Includes records stored or maintained at sites other than that of the service provider, as well as records that were not prepared by the service provider, but received by the service provider from other service providers

DRO – Authorities (cont'd)

- Reports prepared by a Federal, State or local governmental agency, or a private organization charged with investigating incidents of abuse or neglect, injury or death, which include any or all of the following:
 - The incidents of abuse, neglect, injury, and/or death;
 - The steps taken to investigate the incidents;
 - Reports and records, including personnel records, prepared or maintained by the service provider in connection with such reports of incidents; or
 - Supporting information that was relied upon in creating a report including all information and records that describe persons who were interviewed, physical and documentary evidence that was reviewed, and the related investigative findings.

DRO – Authorities (cont'd)

- Discharge planning records; and
- Information in professional, performance, building or other safety standards, and demographic and statistical information relating to a service provider
 - Permitted to inspect and copy information and records, subject to a reasonable charge to offset duplicating costs
 - may not charge an amount that would exceed the amount customarily charged to other non-profit or State government agencies for reproducing documents
 - HIPPA Privacy Rule permits disclosure of PHI without the authorization of the individual to the extent that such disclosure is required by law and the disclosure complies with the requirements of that law

DRO – Authorities (cont'd)

- **45 C.F.R. § 1326.27**
(Access to service providers and individuals with developmental disabilities)
- **45 CFR § 1326.28**
(Confidentiality of DRO records)
- **Ohio Revised Code § 5123.601**
(Access to information by staff and attorneys)

ODM

- As the single state Medicaid agency, ODM is required to have a system in place to ensure appropriate audits of Medicaid payments if they are cost based
 - Bureau of Program Integrity (BPI) – has the ability to perform onsite provider reviews and audits
 - Pre-Payment Reviews and Post-Payment Reviews
 - Records, documentation and information must be available regarding any services for which payment has been or will be claimed
 - If ODM identifies waste or abuse, takes action to ensure compliance and recoup inappropriate payments through audits and reviews (in accordance with ORC 5160:1-27 or OAC 5160:26-06)
 - Where fraud is suspected, ODM refers the case to the Ohio Attorney General's Medicaid Fraud Control for further investigation

ICF MEDICAID AUDITS



Medicaid Audits Generally



- Pandemic reprieve is over.
- Government, typically SURS (ODM), makes request for records (may be single request or involve supplemental requests).
- SURS (ODM) has been contracting out the audit function to Auditor of State (AOS) via an inter-agency agreement.

Medicaid Audits Process Generally

- Government has audit priorities – AOS target is now BH and IDD.
- AOS is still doing audits remotely.
- Post-payment review.
- Can be done via a sampling methodology.
- Five year lookback for Ohio Medicaid.



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Medicaid Audits Process Generally (cont'd)

- Government reviews records for compliance with Medicaid and ODODD documentation requirements.
- If payment errors found, government usually issues preliminary findings and may allow provider to review and respond.
- This is your opportunity to try to “undo” the auditor’s misperceptions or inaccurate reading of IDD system rules.
- Response usually needs to be done very quickly.



Medicaid Audits

Process Generally (cont'd)

- Any remaining findings, State issues a written proposed decision (proposed adjudication order), which typically involves an overpayment demand (results may be referred for fraud review).
- Overpayment demand may be significantly greater than amounts paid for claims tied to documentation request due to extrapolation/statistical sampling.
- A sample of claims can become multi-million dollar overpayment demand. See Auditor of State Medicaid web page for recent findings.

Response to Proposed Finding of Overpayment

- Agree – issue repayment (lump sum, or alternative – sometimes over time, but not guaranteed)
 - Utilize opportunity to challenge
- Request a hearing on a timely basis or can forfeit right to hearing
 - Review the notice carefully
 - Quick turn around – 30 days
- Explore settlement



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Strategic Considerations When Dealing with an Audit

(both before hearing notice is issued and in preparation for hearing)

- Educate trusted provider staff as needed.
- Consider overall appeals strategy (every denied claim v. deemed “winners”).
- Introduce evidence as early as possible (opportunity to undo findings).
- Respond completely to requests (or explain why not).
- Follow up telephone conversations with regulators/investigators with written correspondence confirming discussion.



Strategic Considerations (cont'd)

- Send documents electronically or with some proof of mailing, but always as requested.
- Present well-organized submission (bates stamp records, etc.) – make review as easy as possible.
- Keep copies of everything.



Strategic Considerations (cont'd)

- Make substantive arguments.
 - Review relevant medical records – engage experts as needed. Tell story of the medical records – “connect the dots” for reviewer.
 - NEVER alter/clarify records without consulting with legal counsel.
 - Include supporting authorities – medical literature, clinical practice guidelines, State guidance, etc.
- When extrapolation is used, understand that refuting any one claim in the sample can mean big dollars in savings (e.g., one claim represents many claims in universe under review).
- Be proactive – consider internal corrective action.
 - Often issue of poor documentation and failure to fully understand coverage and payment criteria.
 - Consider necessary corrective action even if not required by the government.
- Consult experienced health care legal counsel.

Examples of Areas of Focus for ICF Audits

- Cost Report Accuracy
 - Allocation of administrative costs – using county auditor record of square footage.
 - Medical Director contracts – paying for availability versus paying for transactions.
 - Can look nit picky but could implicate rates longer term.
 - May influence whether to appeal or not.

OSHA

Three Topics:

1. COVID-19 Update
2. How to prepare for an OSHA inspection
3. How to respond to an OSHA request for information

Preparing for the OSHA Inspection

- Have all required OSHA notices been posted?
- Has the OSHA 300A form been posted each year?
- Has the OSHA 300 log been checked for accuracy?
 - Who is responsible for recording injuries and illnesses?
 - Who is responsible for maintaining the log?
 - What training does the OSHA recordkeeper have?
- Who maintains and completes the OSHA 301's?

Preparing for the OSHA Inspection (cont'd)

Do You Have:

- A written safety program;
- A written hazard communication program;
- An evacuation program;
- A bloodborne pathogens program;
- A written exposure control program;
- A personal protective equipment assessment program;
- A respiratory protection program;
- A firefighting program;
- A confined spaces program;
- A program of periodic safety and health audits or inspections; and
- A program for maintaining medical records for occupational exposure?

What documentation do you have regarding training your employees on these programs?

Preparing for the OSHA Inspection (cont'd)

- No notice
- The right to demand a warrant
 - Will you demand a warrant?

OSHA Inspection Protocols

- Greeting/Credentials
- Contact Management/Counsel
- Opening Conference
 - Document Requests
- Inspection
 - Notes/Photographs
- Employee Interviews
- Closing Conference

OSHA Documents Requests

- Always request in writing.
- Distinguish between records that are required to be maintained by OSHA and everything else.
- Unique processes for Confidential Information and for Medical Records.
- Keep a copy of all documents produced.

QUESTIONS?



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