February 13, 2023

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

RE: CY 2023 Federal Independent Dispute Resolution (IDR) Administrative Fees

Dear Secretaries Becerra, Walsh, and Yellen:

On behalf of the Emergency Department Practice Management Association (EDPMA) and American College of Emergency Physicians (ACEP), we are writing to express serious concerns about the impact that the increase in the 2023 Federal IDR administrative fee will have on emergency physician practices and the roadblock the Administration has put up, threatening provider access to a payment dispute resolution process that was codified by the U.S. Congress under the *No Surprises Act.* ***EDPMA and ACEP urge the Departments of Health and Human Services, Labor, and Treasury ("the Departments") to reinstate the originally announced $50 Federal IDR administrative fee for calendar year (CY) 2023.*** As the Departments should be aware, because of the mandates of the Emergency Medical Treatment and Active Labor Act (EMTALA), emergency physicians are often called upon to deliver services to patients presenting in the emergency department who have health insurance products under which emergency physicians are not contracted as in-network providers. The policies implemented by the Departments thus have a disproportionate impact on emergency medicine practices, including the $350 Federal IDR roadblock that the Departments swapped out at the end of 2022 for their previously announced amount of $50.

BACKGROUND

The *No Surprises Act* as enacted within the *Consolidated Appropriations Act, 2021*[1] authorizes the Departments to create a Federal IDR administrative fee to represent the costs incurred by the Departments (not the certified IDR entities) in administering the Federal IDR process. The *No Surprises Act* states, in relevant part:

> *ADMINISTRATIVE FEE.—*
> *''(A) IN GENERAL.—Each party to a determination under paragraph (5) to which an entity is selected under paragraph (3) in a year shall pay to the Secretary, at such time and in such manner as specified by the Secretary, a fee for participating in the IDR process with respect to such determination in an amount described in subparagraph (B) for such year.*
> *''(B) AMOUNT OF FEE.—The amount described in this subparagraph for a year is an amount established by the Secretary in a manner such that the total amount of fees paid under this paragraph for such year is estimated to be* ***equal to the amount of expenditures estimated to be made by the Secretary for such year in carrying out the IDR process***[2](emphasis added).

For CY 2022, the Departments set the IDR administrative fee at $50.[3] On October 31, 2022, the Center for Consumer Information and Insurance Oversight (CCIIO) announced that the Federal IDR administrative fee would remain $50 for CY 2023.[4] However, on December 23, 2022, CCIIO suddenly reversed course and released a memorandum stating that the 2023 administrative fee had been revised from $50 to $350.[5] ***This sevenfold increase in the non-refundable fee must be paid by disputing parties to access the Federal IDR process and is a substantial obstacle for physicians' ability to seek redress for unsubstantiated underpayments from health plans for services provided to insured patients seeking emergency care***.

2023 Administrative Fee Increase Rationale

In the December 23, 2022 memorandum, the Departments state that "there is a significant backlog of disputes pending eligibility determinations before certified IDR entities which has continued to grow since the publication of the prior 2023 guidance. To address this issue, the Departments have engaged a contractor and government staff to conduct pre-eligibility reviews, which include outreach and technical assistance in support of the certified IDR entities' eligibility determinations."

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[1] *Pub. L.* 116–260.

[2] 26 U.S.C. §9816(c)(8); 29 U.S.C. §1135e(c)(8); 42 U.S.C. §300gg-111(c)(8)

[3] CCIIO, Memorandum: *Calendar Year 2022 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act* (September 30, 2021) (https://www.hhs.gov/guidance/document/calendar-year-2022-fee-guidance-federal-independent-dispute-resolution-process-under-no).

[4] CCIIO, Memorandum: *Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act* (October 21, 2022) (https://www.cms.gov/cciio/resources/regulations-and-guidance/downloads/cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf)/

[5] CCIIO, Memorandum: *Amendment to the Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act: Change in Administrative Fee* (December 23, 2022) (https://www.cms.gov/cciio/resources/regulations-and-guidance/downloads/amended-cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf).

EDPMA and ACEP believe that the Departments have shifted the burden of certified IDR entity duties as articulated in Federal regulation onto disputing parties, by charging disputing parties for functions that certified IDR entities attested to provide as part of their certification. In the second interim final rule that the Departments issued to implement the *No Surprises Act*, the Departments explicitly lay out the functions that IDR entities must provide to the Departments in order to receive certification. Among other requirements, the Departments stated,

> *In order to be certified, an IDR entity must possess (directly or through contracts or other arrangements) and demonstrate sufficient arbitration and claims administration of health care services, managed care, billing, coding, medical, and legal expertise. With regard to medical expertise, where the payment determination depends on the patient acuity or the complexity of furnishing the qualified IDR item or service, or the level of training, experience, and quality and outcome measurements of the provider or facility that furnished the qualified IDR item or service, the IDR entity should have available medical expertise with the appropriate training and experience in the field of medicine involved in the qualified IDR item or service. Additionally,* ***the IDR entity must employ (directly or through contracts or other arrangements) sufficient personnel to make determinations within the 30 business days allowed for such determinations. To satisfy this standard, the written documentation the IDR entity submits must include a description of its organizational structure and capabilities, including an organizational chart and the credentials, responsibilities, and number of personnel employed to make determinations*** (emphasis added).[6]

Further, in the second interim final rule, the Departments explicitly state that considerations related to the ability of and resources needed by IDRs to make payment determinations is the province of certified IDR entity fees, *not* the administrative fee:

> *The Departments will also consider the anticipated time and resources needed for certified IDR entities to meet the requirements of these interim final rules, such as the time and resources needed to obtain certification, making payment determinations (****including determining whether the dispute belongs in the Federal IDR process****), data reporting, and audits. The Departments will also consider factors such as the anticipated volume of payment determinations under the Federal IDR process and adequacy of the Federal IDR process capacity to efficiently handle the volume of IDR initiations and payment determinations. The Departments will review and update the allowable fee range annually based on these factors and the impact of inflation and other cost increases. The Departments seek comment on these factors and any additional factors that should be considered* ***when determining the range for allowable certified IDR entity fees****.*[7]

[6] 86 *Fed. Reg*. 56002 (October 7, 2021).
[7] 86 *Fed. Reg*. 56005 (October 7, 2021).

The Departments have directly contradicted themselves. Below, we discuss several solutions that we provide to the Departments as a means to alleviate what we believe were foreseeable pressures on the Federal IDR system. As a foundational matter, ***the Departments have already expressly stated that the costs it cites as a rationale for increasing the 2023 administrative fee should be carried by the certified IDR entities and, if appropriate, reflected in the certified IDR entity fees***. If the costs of making a payment determination are indeed higher, it makes perfect sense to reflect those costs in the certified IDR entity fee, where the prevailing party does not carry the costs that have been placed on the system by obfuscation of required disclosures, unsubstantiated challenges to Federal IDR eligibility, and an incentive to pay as little as possible in the hope that the provider gives up. Higher certified IDR entity fees will of course affect whether providers initiate Federal IDR for eligible claims under their existing cost-benefit analyses. However, ***it is wholly inappropriate for the Departments to erect a major obstacle to accessing Federal IDR, particularly when the Departments published in the Federal Register the expectations for certified IDR entities' abilities and the factors that go into calculating the range of allowable certified IDR entity fees***.

Ramifications of the $350 Federal IDR 2023 Administrative Fee

In emergency medicine, physicians deliver specific services in the emergency department setting that correspond to CPT codes describing emergency care evaluation and management (E/M) services. Physician practice reimbursement for these services varies by contract, ***we emphasize to the Departments that the total payment rate for an emergency E/M visit, even the highest level visit, is generally less than the $350 administrative fee***. This means that the amount-in-dispute for an emergency E/M visit will be ***even less*** than $350 administrative fee.

The *No Surprises Act* includes a mechanism called "batching" that, functioning properly, would allow providers to achieve economies-of-scale relative to the administrative fee by moving multiple claims through Federal IDR simultaneously as part of one payment determination request. However, the batching requirements have been implemented in a manner that has made it unnecessarily difficult to "batch" claims and achieve these economies-of-scale envisioned by the statute. For instance, while this was not discussed in the issuance of the federal regulations related to "batching," the Departments have issued guidance that states:

> For batched items or services, the certified IDR entity may select different offers, from either or both parties, when the QPAs for the qualified IDR items or services within the batch are different. For example, if a dispute batched multiple claims for Service A furnished by Provider B to individuals covered by Issuer C, with some individuals covered by plans in the individual market and others covered by plans in the large group market, there likely would be two different QPAs for the certified IDR entity to consider – one QPA for the services furnished to individuals enrolled in individual market coverage, and one QPA for individuals with large group market coverage. In these instances, the parties must provide the relevant information for each QPA, and the certified IDR entity must consider each QPA for each qualified IDR item or service separately. ***Note that items or services paid for by different self-insured group health plans are not allowed to be batched***[8] (emphasis added).

[8] Federal Independent Dispute Resolution (IDR) Process Guidance for Certified IDR Entities, p. 19 (October 2022) (https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Federal-Independent-Dispute-Resolution-Process-Guidance-for-Certified-IDR-Entities.pdf)

Due to the inability to batch claims together by a health plan (e.g., *all* Blue Cross claims or *all* Aetna claims), non-contracted physicians are required to sort, for example, Blue Cross claims or Aetna claims by the employer that has contracted with those insurers to administer their health plan, even though this information is not readily available to physicians. This has divided up disputes that otherwise would be "batchable" into single payment determination requests – each of which now carries a $350 administrative fee, more than the likely amount in dispute for a single emergency E/M visit.

Through surveying its members, EDPMA found that, while the *No Surprises Act* is silent on a benchmark for the initial payment that health plans must make to providers for out-of-network services covered by the statute, health plans are, by and large, dispersing initial payments that are set at the Qualifying Payment Amount (QPA) reported by the health plan for that item or service. EDPMA and ACEP continue to believe that there are flaws in the QPA methodology and health plan compliance with that methodology. However, even if the QPA methodology were perfected and the health plans executed the calculations as precisely as possible, a $350 administrative fee has blessed the health plans with even more freedom to financially squeeze providers without consequence, given that the Departments have now made it economically irrational for providers to pursue dispute resolution. ***EDPMA and ACEP urge the Departments to immediately correct this flaw by rescinding the December 23, 2022 memorandum.***

Solutions

The *No Surprises Act* has brought needed financial security to patients by taking them out of the middle of disputes arising out of scenarios where the patient's insurance plan fails to fairly reimburse for services. This is particularly important for patients seeking emergency care given their inability to assess a provider's network status prior to seeking care. EDPMA and ACEP are appreciative that patients have this added security and understands that a statute of this magnitude and importance is complicated to implement. However, the pressures that have been placed on the Federal IDR system were not unknowable – and have been thoroughly documented for the Departments throughout the last year. EDPMA, ACEP, and other stakeholders have provided feedback to the Departments, alerting policymakers to the consequences of:

- Lack of provider access to insurance information (including whether it is a self-insured plan and whether it is employer-sponsored or who the employer is)
- Failure of health plans to disclose required information (e.g. the QPA or contact information)
- Lack of immediate clarity over whether state or federal law applies to a dispute
- Inordinate stress placed on IDR if below-market rate QPAs are generated (either by design by the Departments or by non-compliance by the health plans)
- Inordinate stress placed on IDR due to arduous batching rules and lack of information needed to appropriately batch under those rules.

We continue to offer ourselves as partners in implementing the *No Surprises Act* because this is an important statute for patient protection, and we are striving to get this right. However, ***the Departments cannot shift the burden of this enormous undertaking onto providers by way of an inordinate IDR administrative fee***. It is inappropriate even as articulated under the Departments' own language, it will lead to even more unduly consolidated health plan market control, and it will further destabilize safety net, emergency medicine practices. In order to address the issues cited by the Departments in the December 23, 2022 memorandum, ***EDPMA and ACEP urge the Departments to*** **rescind the December 23, 2022 memorandum, thus restoring the CY 2023 Federal IDR administrative fee of $50.** While we understand that there are certified IDR entity costs to administer these payment determinations, these costs are not the responsibility of providers. Rather, these should be accounted for in what the certified IDR entities communicated regarding their capacity as part of the certification process, the Departments' contracts with the certified IDR entities, and perhaps in setting the CY 2024 certified IDR entity fees (which are borne only by the non-prevailing IDR party), after increased Departmental transparency regarding the actual costs that led to the recalculation and an opportunity for public comment. We also refer the Departments to our January 23, 2023 letter in which ACEP and EDPMA provided in-depth recommendations that would address the issues cited by the Departments in the December 23, 2022 memorandum as prompting the need for a fee increase including mandating plan type disclosure and use of RARCs, modifying the QPA methodology to reflect market rates, moving open negotiation into the IDR portal, and modifying the batching rules to encourage fewer, larger batches.

We appreciate the opportunity to provide feedback. If you have any questions, please do not hesitate to contact the EDPMA Executive Director, Cathey Wise, at cathey.wise@edpma.org or Laura Wooster, ACEP's Senior Vice President of Advocacy and Practice Affairs at lwooster@acep.org.

Sincerely,

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