



COLLEGE of AMERICAN PATHOLOGISTS

October 24, 2023

Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services (HHS)
Attention: CMS-9890-P
P.O. Box 8016
Baltimore, MD 21244-8016
Subject: Federal Independent Dispute Resolution (IDR) Process Administrative Fee and
Certified IDR Entity Fee Ranges

Dear Administrator Brooks-LaSure:

The College of American Pathologists (CAP) appreciates the opportunity to comment on the proposed rule related to the fees established by the No Surprises Act for the federal IDR process. As the world's largest organization of board-certified pathologists and leading provider of laboratory accreditation and proficiency testing programs, the CAP serves patients, pathologists, and the public by fostering and advocating excellence in the practice of pathology and laboratory medicine worldwide.

As is explained in the proposed rule, the No Surprises Act provides that each party to a determination under the federal IDR process shall pay an administrative fee for participating in the federal IDR process. The administrative fee is not refunded to either party regardless of the outcome of the IDR determination. Each party must also pay the certified IDR entity fee at the time that certified IDR entity is selected, though only the non-prevailing party is responsible for the payment (within 30 business days of making the determination, the certified IDR entity will refund to the prevailing party the amount the party submitted for the certified IDR entity fee). Both the administrative fee and certified IDR entity fee range were originally set in October 2021 guidance.¹ However, in December 2022² the Departments increased the administrative fee from \$50 per party to \$350 per party – a 600 percent increase – just one week prior to taking effect. The guidance also increased the certified IDR entity fees by up to 40 percent for individual claims and up to 82 percent for batched claims.

As we wrote in April 2023, this kind of drastic increase in the administrative fee posed a significant barrier for small/rural providers/practices, and for most of pathology, in accessing the IDR process at all. Thus, we were relieved when the Texas District Court vacated the portion of the December 2022 guidance that increased the administrative fee for the federal IDR process to \$350 per party. The CAP supports the resulting move to set the administrative fee amount and the ranges for certified IDR entity fees through notice and comment rulemaking, rather than in guidance published annually. The ability for stakeholders to provide input is critically important in ensuring an equitable and balanced system for resolving payment disputes and an IDR process that is accessible

¹ <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Technical-Guidance-CY2022-Fee-Guidance-Federal-Independent-Dispute-Resolution-Process-NSA.pdf>

² <https://www.cms.gov/cciio/resources/regulations-and-guidance/downloads/amended-cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>



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to all physicians. Thus, we appreciate the opportunity to provide comments on this proposed rule related to the administrative fee and certified IDR entity fee ranges.

Administrative Fee Amount and Methodology

In this proposed rule, the Departments solicit comments on both the methodology used to calculate the administrative fee amount and the proposed administrative fee amount for disputes initiated on or after the later of the effective date of these rules or on January 1, 2024. For disputes initiated on or after the later of the effective date of these rules or January 1, 2024, the proposed administrative fee amount would be \$150 per party per dispute, which would remain in effect until changed by subsequent rulemaking. The Departments also solicit comments on any potential effects on interested parties as a result of increasing the administrative fee from \$50 to \$150 per party.

Especially with the administrative fee, as it is non-refundable, ANY increase in the fee amount imposes added burdens and potentially a complete barrier for physicians in accessing the federal IDR process. In fact, the Departments acknowledge that the administrative fee could be cost prohibitive for certain parties disputing low-dollar items and services. This includes much of pathology, as the median payment amount per claim using 2021 Medicare carrier file is \$53.08, and 85.4% of pathology claims are less than \$150. **By precluding the overwhelming majority of pathology claims from the IDR process (along with all other low-dollar claims), this administrative fee amount also injects a serious inequity into the process and undercuts the critical balance the legislation sought to achieve.** Indeed, as long as it is cost prohibitive to a practice to appeal a small number of small amounts, there is clearly an incentive for insurers to systematically underpay many of those small amounts. Without an IDR backstop, there nothing physicians can do to prevent this.

Additionally, as the American Medical Association (AMA) expressed in September, “there will be even less incentive by health plans to offer these physician practices a fair contract, or keep contracted physicians in their networks, because their ability to underpay these physicians while out-of-network is now even easier.”³ In fact, recent years have already shown that health insurance companies will increasingly flex their market power to impose rate cuts and other unworkable new payment terms on pathologists.⁴ Recent data from a CAP-conducted survey shows that in 2023, 19% of practice leaders reported their practice had been denied continued participation in a commercial health plan or insurer network in which it was previously a participating provider, up from 9% in 2021.⁵ 17% reported their practice attempted to join a commercial health plan or insurer network but was denied participating provider status or were unable to reach agreement, up from 12% in 2021. And these kinds of problems will only worsen if insurers continue to face no adverse consequences for non-compliance with the payment determinations. **The CAP believes it is therefore vital that any fee requirements take into consideration low-dollar claims and ensure an even and fair playing field for all IDR parties.**

³ <https://searchlf.ama-assn.org/letter/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2FIfntsa.zip%2F2023-9-19-AMA-STATEMENT-NSA-to-Ways-and-Means-re-Reduced-Care-for-Patients.pdf>

⁴ <https://documents.cap.org/documents/final-wm-letter-on-private-sector-issues-071322.pdf>

⁵ CAP 2023 Practice Leader Survey (forthcoming)



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Further, increased upfront fees are particularly difficult for small/rural physicians and practices as they may have less resources and/or the financial stability to take on any additional risk. As we have previously argued, it is insurers – not small/rural providers/practices – who have the sophistication and financial resources to benefit from added costs or complexity to the IDR process. The additional burden for these physicians/practices in particular will only increase access to care issues and further exacerbate health care disparities.

As is suggested in the proposed rule, the CAP supports changes to reduce the administrative fee amount for disputes that involve low-dollar claims. **Importantly, the CAP urges CMS to finalize changes now that would waive the administrative fee for low-dollar claims, defined as \$250 or under.** Alternatively, the CAP would support a tiered fee based on the amount of the claim, which would ensure accessibility for low-dollar claims while still providing that the total administrative fees paid for a year are estimated to be equal to the amount of expenditures needed to carry out the federal IDR process for that year. It is our strong belief that all physicians must be able to access the federal IDR process regardless of the dollar amount of their services, their financial stability or sophistication, or the patient populations they serve. Changes to the administrative fee for low-dollar disputes will support that IDR backstop and better ensure an equitable and balanced system for resolving out-of-network payment disputes, which also supports stronger in-network adequacy and patient access to care.

Finally, it is also important that there is predictability in accessing the federal IDR process. **Thus, we would urge the Departments to maintain the requirement to set the administrative fee amount annually.** While we appreciate the interest in increasing flexibility to ensure the administrative fee amount covers the costs of carrying out the federal IDR process, we believe there are more efficient ways to address volume/cost in the IDR process during the course of a year.⁶

Certified IDR Entity Fee Ranges

As mentioned above, the CAP supports the proposal to set the ranges for certified IDR entity fees in notice and comment rulemaking, with the certified IDR entities providing their fees on an annual basis. To maintain predictability and consistency with the administrative fee, we would also suggest that the Departments address the certified IDR entity fee ranges annually. Further, while the IDR entity fee is returned to the prevailing party, we urge the Departments to consider the upfront financial burden when setting the certified IDR entity fee ranges.

Summary

The CAP appreciates the work put forward to address these important issues, as well as the opportunities to provide comments on this and future proposed rules. Again, we strongly urge the Departments to reconsider increasing the administrative fee from \$50 to \$150 per party, **as any increase in the administrative fee amount imposes added burdens and potentially a complete barrier for physicians in accessing the federal IDR process, especially for pathologists.** Instead, **the CAP urges CMS to finalize changes now that would waive the administrative fee for low-dollar claims,**

⁶ Ensuring good faith utilization of the open negotiations period, flexible batching, and proper enforcement, for example. See <https://documents.cap.org/documents/CAP-surprise-billing-statement-for-record-WM-FINAL.pdf>



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defined as \$250 or under, or implement a tiered fee based on the amount of the claim. We also urge the Departments to set the administrative fee amount annually and urge consideration of our concerns related to the certified IDR entity fee ranges.

Please contact Elizabeth Fassbender, JD, CAP Assistant Director, Economic and Regulatory Affairs at efassbe@cap.org if you have any questions on these comments.