



COLLEGE of AMERICAN PATHOLOGISTS

April 10, 2023

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

Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services (CMS)
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Becerra and Administrator Brooks-LaSure:

The College of American Pathologists (CAP) appreciates the work done so far, including with the Department of Labor (DOL) and the Department of the Treasury (“the Departments”), to implement provisions of the *No Surprises Act*. 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 you know, the CAP worked closely with Congress and other stakeholders in the development of the *No Surprises Act*, and we have repeatedly called for protections that keep patients out of the middle of billing disputes. The CAP provided initial recommendations on the *No Surprises Act* implementation in June 2021¹ and submitted comments on the Part I IFR in September 2021² and on the Part II IFR in December 2021³. We have also engaged with CMS staff on issues related to the *No Surprises Act*’s good faith estimate requirements, which remain a major concern and source of confusion for our members.

Specific to the implementation of the federal independent dispute resolution (IDR) process, we strongly believe that regulations must support an accessible and equitable system for resolving payment disputes, so as to ensure fair reimbursement for out-of-network services. To that point, we appreciate the Departments’ recent guidance related to the factors and information certified IDR entities must consider in determining which of the disputing parties’ offers to select. However, we have a number of concerns about our members’ ability to even access and appropriately navigate the current system. We understand many of these issues – including the open negotiation process, the volume of IDR cases, specifics around batching, and the increased administrative fee – may not be new to the Departments, but to the extent that we can offer insights from our

¹ <https://documents.cap.org/documents/CAP-Recommendations-No-Surprises-Act-Regulations.pdf>

² <https://documents.cap.org/documents/september-2021-surprise-bill-comments.pdf>

³ <https://documents.cap.org/documents/cap-comments-on-surprise-billing-part-ii.pdf>



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members' experiences with the federal IDR process or provide additional feedback/solutions moving forward, we encourage the Departments to consider us a resource and hope you will seriously consider the below concerns.

Further, as a general matter, we urge the Departments to strengthen enforcement of *No Surprises Act* dispute resolution requirements and to improve the process of submitting a formal complaint against an insurer. We have heard directly from members who were named the prevailing party by a certified IDR entity but who have not received that payment from insurers within the 30-day statutorily required timeframe. We echo the American Medical Association's (AMA) suggestion from their January 2023 letter⁴ to implement financial penalties in the case of nonpayment. We also emphasize the AMA's concern that the Departments should improve their handling of non-compliance issues. With regard to the submission process, our members have faced confusion and contradictions in the agency's complaint submission process around various requirements for – and at the same time, prohibitions on – provision of protected health information (PHI). An evaluation by the Departments of the complaint submission process, improvement around submission and PHI, and enforcement of non-compliance issues would help ensure the equitable system we have called for.

Open Negotiation Process

As you know, before either party may initiate the federal IDR process, the disputing parties must exhaust the 30-business-day open negotiation period. Ideally, the open negotiation period provides an opportunity for the disputing parties to reach an agreement and avoid the federal IDR process altogether. However, it is the experience of our members that instead of using it as an opportunity to engage in good faith negotiations, insurers are making the open negotiations period difficult to initiate and ineffective to navigate, using this requirement as a delay/deter tactic or other hurdle for the physicians who are trying to receive appropriate payment for their services. While CMS has provided some clarity on the prohibition of requiring use of an insurer's own online portal, for example, further formalizing and/or centralizing the open negotiation period would be helpful in ensuring notice is properly/easily provided and the timeline requirements are successfully met. Additionally, we echo the AMA's January request that the Departments collect information about parties that “regularly question claim eligibility with a frequency and manner that suggests bad faith and urge the Departments to immediately address the actions of these parties through corrective action and penalties when necessary.” A successful open negotiations period benefits all disputing parties and will increase efficiencies later in the IDR process.

Batching

As we have previously stated, the ability for physicians and other providers to batch together claims (allowing “multiple qualified IDR dispute items and services” to be “considered jointly as part of a single determination by an entity”) was an important provision included in the *No Surprises Act*. Batching ensures an equitable and accessible IDR system, while also encouraging efficiency and minimizing costs.

Especially for pathology services, which often have lower reimbursement rates, additional flexibility that facilitates broader batching of qualified IDR items and

⁴ <https://searchf.ama-assn.org/letter/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2Fifr.zip%2F2023-1-23-Letter-to-Becerra-Walsh-Yellen-re-No-Surprises-Act-v2.pdf>



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services will ease access to the IDR process and further the statute’s goals of encouraging “procedural efficiency” and minimizing administrative costs. For example, the Departments could increase flexibility by allowing all claims related to the same patient encounter or under the same category of service codes to be batched together. Further, as the AMA argues, the Departments could also allow claims to be batched together “when they are paid through the same third-party administrator, regardless of whether it is the same employer or payer.”⁵ Finally, the batching timeframe could be extended beyond 30 days to allow more claims to be batched together. Each of these measures would support efficiency – addressing the high volume of IDR cases discussed further below – and better ensure the IDR process is available to pathologists and other providers, as well as small/rural providers/practices.

Additionally, as is noted in the Departments’ recent report on the IDR process, information about health plan type helps initiating parties accurately batch items or services together. Thus, we reiterate our earlier request that as much information as possible be required to be shared upfront at the initial payment or notice of denial of payment, without having to first request that information, in order to ensure the provider/facility has the necessary insurer-held information to make a decision about negotiation and to successfully initiate IDR – including batching – if needed.

Increased Administrative Fee

Regarding costs of the federal IDR process and payment, the Departments’ regulations specify that each party must pay to the certified IDR entity (1) the administrative fee due to the Departments and (2) the entire certified IDR entity fee. On December 23, 2022, the Departments increased both fees, including raising the administrative fee from \$50 to \$350 per party⁶. The drastic increase in the administrative fee, which is not refunded to either party regardless of the outcome of the IDR determination, represents a significant barrier for small/rural providers/practices, and for most of pathology, in accessing the IDR process at all. **As we have previously argued, insurers – not small/rural providers/practices – will generally benefit from any added costs or complexity (which could contribute to increased gaming/underpayment), and it is vital that these requirements provide an even and fair playing field for all IDR parties.** The AMA agrees, noting in their January letter that without an IDR backstop, physicians “have no resolution process available to them when they are consistently underpaid by health plans and the underpayment will, therefore, persist.” Additionally, the network adequacy that is an increasing problem will only get worse, as “there will be even less incentive by health plans to offer these physician practices a fair contract, or keep contracted physicians in their network, because their ability to underpay these physicians while out-of-network is now even easier.”

This change is harmful for pathology in particular, whose claims will likely be under the \$350 and thus will find the \$350 threshold cost prohibitive. This is especially true without any of the flexibility in batching outlined above. Therefore, we urge the Departments to rescind the 2023 administrative fee increase immediately.

⁵ <https://searchf.ama-assn.org/letter/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2Ffr.zip%2F2023-1-23-Letter-to-Becerra-Walsh-Yellen-re-No-Surprises-Act-v2.pdf>

⁶ <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/Amended-CY2023-Fee-Guidance-Federal-Independent-Dispute-Resolution-Process-NSA.pdf>



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Volume of IDR Cases

As is stated in the Departments' December fee guidance amendment, between April 15, 2022 and December 5, 2022, disputing parties initiated over 164,000 disputes through the federal IDR portal, which is "nearly ten times greater than the Departments initially estimated it would be over the course of a full calendar year."⁷ Understanding that some of these disputes have been found ineligible for the federal IDR process, certified IDR entities have still only rendered payment determinations for about 11,000 disputes – or about 7 percent of the 164,000 cases filed. **Based on the experiences shared by our members, we conclude that the great number of cases is a direct result of inappropriately and unfeasibly low initial payments received from out-of-network insurers, including reimbursement significantly below Medicare published rates.** We share the Departments' concern over the volume of cases, as the delay in receiving a payment determination puts physicians and practices in financial limbo as they wait for fair reimbursement for their services. To this point, we continue to believe it would be helpful in minimizing insurer manipulation/underpayment and in reducing utilization of the IDR process if the initial payment rate provided by the insurer is required to also be the insurer's offer in IDR for instances where the dispute is not resolved during the open negotiation period.

Additionally, we continue to stress that inadequate insurer networks are the root cause of out-of-network payments that then need to be resolved through the use of the federal IDR process. Simply put, if there are more in-network providers to begin with, there will be fewer out-of-network bills to arbitrate. The above-described barriers favor the insurers and result in disparities in health care access for patients. The CAP appreciates that there is a required GAO study on network adequacy, but we urge the Departments to consider additional proposals to address this issue in the future, especially as we are now better able to evaluate the implementation of the *No Surprises Act*.

Summary

Again, the CAP appreciates the hard work put forward to implement the *No Surprises Act*, but we urge the Departments to consider the concerns – and solutions – outlined above. By (1) addressing enforcement and non-compliance issues, (2) further formalizing and/or centralizing the open negotiations period, (3) providing additional flexibility that facilitates broader batching, (4) immediately rescinding the 2023 administrative fee increase, and (5) bringing down the need for IDR disputes through appropriate reimbursement and network adequacy, the Departments can help ensure a more equitable, accessible, and efficient system to fairly resolve payment disputes between providers and health plans.

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

⁷ <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/amended-cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>