



July 11, 2023

Don Powell, DO, FACEP
Chairman
Emergency Department Practice Management Association
1660 International Drive, Suite 600
McLean, VA 22102

Dear Dr. Powell:

Thank you for your letter to the Departments of Health and Human Services, Labor, and the Treasury concerning the No Surprises Act (NSA). I am responding on behalf of the Departments. Your letter expresses concern regarding the 2023 administrative fee set by the Departments to cover the costs for administering the Federal Independent Dispute Resolution (IDR) process established in the NSA.¹ The Departments are committed to establishing a fair, cost-effective, and reasonable IDR payment determination process that is accessible to disputing parties. We value your feedback and appreciate your recommendations.

As noted in your letter, in December 2022, we released amended guidance increasing the administrative fee for the Federal IDR process from \$50 to \$350 per party for disputes initiated beginning January 1, 2023. The Federal IDR process is intended to be self-sustaining, and the administrative fee amount assessed by the Departments is required by statute to be established such that the total amount of fees paid is estimated to be equal to the amount of expenditures estimated to be made by the Departments for the year in carrying out the IDR process.²

The 2023 administrative fee was first set at \$50 based on an initial estimation of costs that assumed a lower volume of disputes than has been submitted.^{3, 4} This estimate did not account for the high volume of ineligible disputes for which administrative fees are not necessarily

¹ Enacted under Title I of Division BB of the Consolidated Appropriations Act, 2021, P.L. 116-260 on December 27, 2020.

² Internal Revenue Code section 9816(c)(8), Employee Retirement Income Security Act section 716(c)(8), and Public Health Service Act section 2799A-1(c)(8).

³ See Federal Independent Dispute Resolution Process Status Update, *available at*: <https://www.cms.gov/files/document/federal-idr-process-status-update-august-2022.pdf>.

⁴ The Departments had originally estimated that approximately 22,000 disputes would be submitted to the Federal IDR process each year. 86 Fed. Reg. 55,980, 56,056 (Oct. 7, 2021). Yet, in just the last quarter of 2022, between October 1 and December 31, 2022, parties initiated more than 110,000 disputes. U.S. Dep't of Health & Human Servs. et al., Partial Report on the Independent Dispute Resolution (IDR) Process, Oct. 1-Dec. 31, 2022, at 8. <https://www.cms.gov/files/document/partial-report-idr-process-octoberdecember-2022.pdf>. The most recent data shows that in the last year (between April 15, 2022, and March 31, 2023), some 334,828 disputes were initiated over *19 times* the number that the Departments had initially estimated would be filed over the course of a year. Ctrs. for Medicare & Medicaid Servs., Federal Independent Dispute Resolution Process—Status Update 1 (Apr. 27, 2023), <https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf>.

collected. Additionally, this estimate also did not include expenditures for pre-eligibility review work taken on by the Departments in late 2022 to address the significant backlog of disputes pending eligibility determinations by certified IDR entities.

During the first several months of the Federal IDR process, data system challenges prevented the Departments from being able to reliably aggregate certain data points that could be used to estimate the administrative fee. As a result, the Departments worked to make systemic improvements. These improvements allowed for the aggregation of data needed to estimate the rate at which disputes are determined eligible for the Federal IDR process and the rate at which one or both parties pay the administrative fee for the purpose of calculating the administrative fee.

Given the new data and increased expenditures, it was necessary to issue the amended fee guidance to ensure that estimated collections cover the estimated costs of administering the process.

In your letter, you also express concerns that the pre-eligibility work performed by the Departments has shifted the burden from certified IDR entities. As noted in the Departments' briefing on the associated case *Texas Medical Association v. United States Department of Health & Human Services* and the Initial Report on the Federal Independent Dispute Resolution (IDR) Process,⁵ the majority of disputes in the Federal IDR process that were closed from April 15, 2022, through September 30, 2022, appear to have been ineligible for the process.

Because the certified IDR entity fee is submitted at the time parties submit their offers—and ineligible disputes do not result in the submission of offers—certified IDR entities have been required to perform vast amounts of work for which they cannot be compensated. While we recognize your concerns, this dynamic threatens the program's viability. If serving as a certified IDR entity becomes financially unviable, certified IDR entities will exit the program, and the backlog of disputes awaiting resolution will grow even larger.⁶ This backlog also harms providers, whose compensation may be delayed while disputed claims remain undecided. To that end, the Departments took immediate steps to begin to address the backlog and resolve disputes sooner by assisting certified IDR entities with pre-eligibility review work.

It is critical that the administrative fee reflects the Departments' expenditures to administer the Federal IDR process. We are working on policy and operational improvements that are intended to improve the accuracy of estimates as well as reduce expenditures. While doing so, we encourage your members to use the open negotiation process, which allows providers and payers to resolve payment disputes without paying a fee.

⁵ See the Initial Report on the Federal Independent Dispute Resolution (IDR) Process, April 15 – September 30, 2022, available at: <https://www.cms.gov/files/document/initial-report-idr-april-15-september-30-2022.pdf>.

⁶ The Departments anticipated that 50 IDR entities would seek certification. However, currently only 13 IDR entities have qualified for certification, which reflects the fact that fewer than anticipated IDR entities have sought certification. See 86 Fed. Reg. at 56,002 n.41 and Centers for Medicare & Medicaid Servs., *List of Certified Independent Dispute Resolution Entities*, <https://www.cms.gov/nosurprises/help-resolve-payment-disputes/certified-idre-list> (May 11, 2023).

Thank you again for your feedback as we continue to implement the provisions of the NSA. We appreciate hearing from you on this important issue. We will continue to work to improve the Federal IDR process through operational updates, regulatory action, education, transparency, and enforcement. Please share this response with the co-signer of your letter.

Sincerely,

A handwritten signature in blue ink that reads "Chiquita Brooks-LaSure". The signature is written in a cursive style with a large initial "C".

Chiquita Brooks-LaSure