Emergency Department EDPMA Practice Management Association

August 11, 2023

Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services Department of Health and Human Services
Attention: CMS-0057-P
P.O. Box 8016
Baltimore, MD 21244-8016

Dear Administrator Brooks- LaSure,

We are very concerned by CMS' decision to close the *No Surprises Act's* (NSA) provider/payer Independent Dispute Resolution (IDR) process. While we understand the Agency's desire to provide Independent Dispute Resolution Entities (IDREs) with appropriate instructions regarding the batching and fee process for IDR, **we urge CMS to immediately issue updated instructions for the provider/payer IDR process and reopen the IDR process as quickly as possible.**

Even more worrying, CMS inexplicably decided to temporarily freeze access to the patient-initiated dispute resolution process. This process is completely separate from the IDR process designed to resolve disputes between payers and clinicians and is in no way impacted by the court's decision on TMA IV. The NSA is built around the premise of protecting patients from unnecessary and inappropriate costs. While we are happy to see the patient portal has been reopened, even a temporary suspension of a patient's rights creates real and tangible risks for their financial and medical wellbeing.

On August 3, 2023, The U.S. District Court for the Eastern District of Texas granted-in-part summary judgement in favor of the plaintiffs in *Texas Medical Association, et al., v. United States Department of Health and Human Services, et. al.,* (TMA IV). Through its decision, the court ordered vacatur and remand of the following:

(1) The [No Surprises Act] Fee Guidance's $350 administrative fee;
(2) 45 C.F.R. § 149.510(c)(3)(i)(C);
(3) 26 C.F.R. § 54.9816-8T(c)(3)(i)(C); and
(4) 29 C.F.R. § 2590.716-8(c)(3)(i)(C).

This means the court struck down the regulatory requirement to batch services eligible for the IDR process **by service code (e.g., by CPT code)**. We believe the remaining regulatory

guidance and underlying statute[1] provide sufficient guidance for providers, payer, and IDREs to continue submitting, reviewing, and deciding existing and new disputes and that a pause of the process is unnecessary. However, if CMS believes that new interim guidance is required, **we ask that CMS act as quickly as possible to issue any instructions it deems necessary to reopen the process without delay.**

Our concern over a potentially lengthy delay is not unfounded. In February 2023, CMS closed the provider/payer IDR process following a similar court order vacating a portion of the NSA rules. It took over three weeks for CMS to issue updated guidance and reopen the process. **CMS must reopen the IDR portal much more quickly than it did in February.**

Since its inception, the IDR process has been plagued by a persistent backlog and significant delays, often reaching five months or more. This harms clinician groups by extending the length of time for which a service is underpaid, which creates significant cash-flow challenges for those providing care. Conversely, delays in dispute resolution benefit health insurers by allowing them to retain and earn a return on amounts eventually identified as owed to clinicians. This built-in reward for underpayment is a core driver of the unmanageable volume of disputes facing the IDR process.

In April, CMS reported that 334,828 disputes had been initiated through the federal IDR portal since March 2022 and that 106,615 had been resolved. While temporary pauses to the IDR process are not the root cause of the backlog, unnecessarily slowing the system serves to exacerbate this continuing concern.

The purpose of the *No Surprises Act* was to protect patients from unexpected healthcare costs. It should not jeopardize or undermine our country's healthcare safety net and timely care provided by emergency medicine clinicians. **To reduce IDR backlogs and to support timely emergency care, CMS must act with urgency to reopen the IDR process for providers.**

Sincerely,

Andrea Brault

Andrea Brault MD, MMM, FACEP
Chair
Emergency Department Practice Management Association

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[1] *(i) such items and services to be included in such determination are furnished by the same provider or facility;*
(ii) payment for such items and services is required to be made by the same group health plan or health insurance issuer;
(iii) such items and services are related to the treatment of a similar condition; and
(iv) such items and services were furnished during the 30 day period following the date on which the first item or service included with respect to such determination was furnished or an alternative period as determined by the Secretary, for use in limited situations, such as by the consent of the parties or in the case of low-volume items and services, to encourage procedural efficiency and minimize health plan and provider administrative costs.