



July 29, 2024

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

The Honorable Julie A. Su
Acting 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: ONGOING QUALIFYING PAYMENT AMOUNT (QPA) RELIABILITY CONCERNS

Dear Secretary Becerra, Acting Secretary Su, and Secretary Yellen:

On behalf of the American College of Emergency Physicians (ACEP) and the Emergency Department Practice Management Association (EDPMA), we are writing the Departments of Health and Human Services, Labor, and Treasury (the Departments) to highlight an important issue regarding the Federal Independent Dispute Resolution (IDR) process, established by the *No Surprises Act*. Specifically, our organizations and members have significant concerns about the reliability of Qualifying Payment Amounts (QPAs) that are used in the Federal IDR process given recent Court rulings and the Departments' responses to those rulings.

As background, ACEP is the national medical society representing emergency medicine. Through continuing education, research, public education and advocacy, ACEP advances emergency care on behalf of its 40,000 emergency physician members, and the nearly 150 million Americans we treat on an annual basis. EDPMA is the nation's only professional trade association focused on the delivery of high-quality, cost-effective care in the emergency department. EDPMA's membership includes emergency medicine physician groups of all sizes, billing, coding, and other professional support organizations that assist healthcare clinicians in our nation's emergency departments. Together, EDPMA members see or support 60% of all annual emergency department visits in the country. Together, ACEP and EDPMA members provide a large majority of emergency care in our country, including rural and urban settings, in all fifty states and the District of Columbia.

The QPA is supposed to represent the median contracted rate for all plans offered by an issuer in the same insurance market for the same or similar service that is provided by a provider in the same or similar specialty and provided in the geographic region in which the service is delivered. It is used both to determine individual cost sharing for services covered by the balance billing protections in the *No Surprises Act* and as a factor that certified IDR entities (IDREs) must consider when making a payment determination during the Federal IDR process. Due to the specific reasons described below, ACEP and EDPMA are extremely concerned with IDREs' reliance on QPAs calculated and communicated by health plans issuers. Since IDREs are required to consider QPAs when making payment determinations, it is essential that QPAs are accurate -- and, if they are not, that IDREs take that fact into account during the arbitration process. ***Thus, ACEP and EDPMA request that the Departments issue guidance as soon as possible that instructs IDREs to assess the validity of the QPA when rendering payment determinations and to consider whether submitted QPAs have been calculated appropriately and accurately.***

We believe that there is a strong possibility that QPAs calculated by insurers are unreliable and should be considered as such by IDREs for the following reasons:

1. The Departments Failed to Appeal Elements of QPA Calculation Struck Down by Federal Court

In the Texas Medical Association III case,¹ the Federal District Court vacated the following provisions relevant to the methodology for calculation of QPAs that were NOT included as part of the Departments' appeal of TMA III:

- ***“Provider in the same or similar specialty*** means the practice specialty of a provider, ~~as identified by the plan or issuer consistent with the plan's or issuer's usual business practice~~, except that, with respect to air ambulance services, all providers of air ambulance services are considered to be a single provider specialty.”²
- “In the case of a self-insured group health plan, all self-insured group health plans (other than account-based plans, as defined in § 147.126(d)(6)(i) of this subchapter, and plans that consist solely of excepted benefits) of the same plan sponsor, ~~or at the option of the plan sponsor, all self-insured group health plans administered by the same entity (including a third-party administrator contracted by the plan), to the extent otherwise permitted by law, that is responsible for calculating the qualifying payment amount on behalf of the plan.~~”³

Since the rulings on these specific provisions were never appealed, the outcome of the TMA III appeal will not reinstate these provisions. They have been and will remain struck from the regulation, regardless of the outcome of the appeal in TMA III. Yet currently, IDREs have no means of verifying whether a QPA submitted during the IDR process utilized these stricken QPA regulations, and providers have no way to verify the same.

¹ *Tex. Med. Ass'n, et al. v. U.S. Dep't of Health and Human Servs*, No. 6:22-cv-00450-JDK (E.D. Tex. August 24, 2023).

² 45 C.F.R. §149.140(a)(12), 26 C.F.R. §54.9816-6T(a)(12), and 29 C.F.R. §2590.716-6(a)(12).

³ 45 C.F.R. §149.140(a)(8)(iv), 26 C.F.R. §54.9816-6T(a)(8)(iv), and 29 C.F.R. §2590.716-6(a)(8)(iv).

2. The Departments Acknowledge Health Plan Non-Compliance with QPA Calculation Methodology Via Its Non-Enforcement Announcements

On May 1, 2024, the Departments released *FAQ About Consolidated Appropriations Act, 2021 Implementation Part 67*, in which they decided to exercise enforcement discretion with respect to the QPA calculation methodology rules until November 1, 2024, at the earliest:

*. . . the Departments and OPM will exercise their enforcement discretion under the relevant No Surprises Act provisions for any plan or issuer, or party to a payment dispute in the Federal IDR process, that uses a QPA calculated in accordance with the methodology under the July 2021 interim final rules and guidance in effect immediately before the decision in TMA III, for items and services furnished before November 1, 2024.*⁴

In our view, the Departments are essentially acknowledging that some QPAs going forward may not be calculated according to the correct methodology. Therefore, it seems reasonable for IDREs to at least consider the strong possibility that QPAs entering into Federal IDR disputes are inaccurate. If IDREs do believe that QPAs are inaccurate, it may also be inappropriate to give undue weight to this amount when considering which offer “best represents the value of the qualified IDR item or service.” It seems incongruent to acknowledge that the accuracy of the QPA will not be enforced without issuing parallel guidance to the IDREs that there may be an issue with QPA accuracy.

3. The Departments Have Not Introduced Revised Guidance to Repair the QPA Calculation Methodology Stuck Down by a Federal Court

After the TMA III decision was released, the Departments issued *FAQs About Consolidated Appropriations Act, 2021 Implementation Part 62* on October 6, 2023, which included the following:

Q1: How should plans and issuers calculate a QPA for purposes of patient cost sharing, disclosures with an initial payment or notice of denial of payment, and disclosures and submissions required under the Federal IDR process following the decision in TMA III?

The decision in TMA III requires certain changes to the methodology that is used to calculate a QPA. The Departments and OPM disagree with this decision and the Department of Justice intends to appeal. However, the district court’s decision is currently in effect. Therefore, plans and issuers are required to calculate QPAs in a manner consistent with the statutes and regulations that remain in effect after the TMA III vacatur. The Departments and OPM [Office of Personnel Management] generally do not intend to issue interim guidance (other than as outlined in these FAQs) addressing the QPA methodology in response to TMA III. Accordingly, plans and issuers are expected to calculate QPAs using a good faith, reasonable interpretation of the applicable statutes and regulations that remain in effect after the TMA III decision.⁵ (Emphasis added).

⁴ <https://www.cms.gov/files/document/faqs-part-67.pdf> (May 1, 2024).

⁵ <https://www.cms.gov/files/document/faqs-part-62.pdf>

While Q4 also states, “Certified IDR entities may request, and disputing parties may provide, additional information relevant to the submitted QPA,” given the Departments’ lack of guidance on how to re-calculate QPAs in accordance with the statute and remaining regulations and the Departments’ decision not to enforce the QPA calculation methodology, there is no reasonable basis for believing that issuers have entered accurately calculated QPAs into the IDR process for dispute.

Overall, ACEP and EDPMA recognize the Departments’ right to appeal the ongoing TMA III case, but also note the lack of additional guidance about calculating QPAs under the remaining regulations, the failure to appeal certain elements of the court decisions, and general Departmental non-enforcement of QPA calculations. **Therefore, given the current legal and regulatory landscape around QPA calculations, we firmly believe that the Departments should provide IDREs guidance as soon as possible that:**

- **Lays out the reasons why QPAs could possibly be inaccurate.**
- **Requires IDREs to consider the strong possibility that QPAs are inaccurate when rendering payment determinations.**

Thank you for your consideration and please reach out to Cathey Wise at cathey.wise@edpma.org, EDPMA’s Executive Director, or Erin Grossmann, ACEP’s Manager of Regulatory and External Affairs, at egrossmann@acep.org for questions.

Sincerely,



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



Aisha T. Terry, MD, MPH, FACEP
President
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Cc: The Honorable Bernie Sanders
The Honorable Bill Cassidy, MD
The Honorable Jason Smith
The Honorable Richard Neal
The Honorable Cathy McMorris Rodgers
The Honorable Frank Pallone
The Honorable Virginia Foxx
The Honorable Bobby Scott