October 26, 2023

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

The Honorable Martin J. Walsh
Secretary of Labor
Office of the Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

The Honorable Janet Yellen
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Re: 88 FR 65888 - Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges

Dear Secretaries Becerra, Walsh, and Yellen:

On behalf of our members, the National Association of Freestanding Emergency Centers ("NAFEC") has prepared the following comments regarding the Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges Proposed Rule.

Executive Summary:

- The high administrative fees associated with the IDR process are cost-prohibitive for lower cost claims and continue to disproportionately impact providers.
- The temporarily IDR portal closure has resulted in a backlog of claims that will cost providers thousands of dollars up front to process. An extension should be granted for submitting these claims.
- The tiered fee structure for batched claims is problematic and creates a higher burden on already struggling providers.

- Implementing annual changes to the fee methodology will greatly impact providers who need reliable and consistent fees in order to calculate which claims they are submitting to the IDR process.

Background of Freestanding Emergency Centers (FECs)

Freestanding emergency centers (FECs) are fully licensed emergency departments staffed by both emergency medicine-trained physicians and registered nurses. FECs operate 24 hours a day, seven days a week, with licensed pharmacies, clinical labs, and advanced imaging services on-site. These state licensed facilities adhere to the same standards and provide the same level of care as Hospital Based Emergency Rooms (HBERs), including state EMTALA regulations on treating all patients.

FECs are a relatively new provider model; the first FEC was licensed in 2010, and more than 200 are located in Texas. The primary difference between an FEC and a hospital off-campus emergency department is ownership, not capability. As you know, to expand provider capacity due to the COVID-19 pandemic, CMS deemed FECs eligible to be Medicare providers by enrolling temporarily as a Medicare-certified hospital.[1] This helped improve access to high-quality and convenient emergency services at a value to the Medicare program.[2] FECs are a major access point for emergency care and handle all types of emergency cases, including stroke, heart attacks, traumatic accidents, and COVID diagnosis and treatment.

The Administrative Fees are Cost-Prohibitive for Lower Cost Claims

NAFEC thanks the Departments for the opportunity to comment on the administrative fee adjustments put forth but wishes to raise concern about the steep prices and how they disproportionately impact providers. While the $150 administrative fee rate is much more reasonable than the previous $350 rate that was unlawfully levied at the end of 2022, our FECs will still struggle to front this money as they continue to be underpaid for hundreds or even thousands of claims that force them to enter a substantial portion of them into the IDR process. Once the administrative fees are paid up front, providers are out thousands of dollars and then must wait months without being paid for their services until the IDR process concludes. For independent providers, such as freestanding emergency centers (FECs) these fees have been extremely detrimental, as many of our members already struggle to stay afloat while insurers continue to underpay for services and drag out the IDR process. However, for the major insurers, such as UnitedHealth Group who saw $20.6 billion in profit in 2022[3] or Cigna who brought in $6.7 billion in profit for the same year[4], the administration fees are inconsequential and simply another means by which to deter providers from appealing objective

[1] Center for Medicaid & Medicare Services (2020). Guidance for Licensed Independent Freestanding Emergency Departments (EDs) to Participate in Medicare and Medicaid During the COVID-19 Public Health Emergency.
[2] An actuarial analysis of emergency care Medicare claims by Dobson Davanzo found that FECs delivered emergency care 21.8% lower cost on a severity level standardized basis than hospitals.
[3] United Health Group. United Health Group Reports 2022 Results. January 13, 2023
[4] Modern Healthcare. Cigna Profits Grew 24% to $6.7B in 2022. February 3, 2023

underpayments and with the goal of ultimately driving providers who will not accept the insurers' inadequate payment rates out of business.

Additionally, payors will continue to intentionally underpay or even outright completely refuse to pay claims below $150 (and many claims modestly above that level) because they know providers won't seek recoupment since the administrative fees to enter the IDR process make pursuit of these lost reimbursements futile. FECs who are important access points of ER care for patients, should be able to seek fair reimbursement for ALL their services, and high administrative fees for the IDR process should not be used to deter them from doing so. These small claims that they are unable to be paid for add up and contribute to the financial instability of providers.

NAFEC has previously offered solutions to the administrative fee issues, which we wish to reiterate here. The Departments could make the $150 administrative fee refundable, much like the IDR entity (IDRE) fees, for the prevailing party in the dispute. If the fee is not able to be fully refunded, the victor could be refunded at least a portion of it. This approach would still hold both parties accountable for making justified and legitimate claims and deter frivolous disputes. To make implementation of either of these solutions feasible, and to address the cash-flow issue for providers, CMS should also make the administration fees payable at the end of the IDR process. These changes would help to make the IDR process more just for both providers and payors, as was Congressional intent for the NSA in the first place.

While we understand the purpose and intent of administrative fees in the IDR process, we want to note that increasing the administrative fees for the IDR process does nothing to address the underlying issue of insurers abusing the IDR process as the expense of patients, who's access to care is threatened.

Providers Should Be Given an Extension for Submitting Claims from During the Portal Closure

Following the ruling on the Texas Medical Association IV lawsuit in August, the IDR portal was closed for new disputes for over two months. During this time, providers received underpayments for thousands of claims that will be contested through the IDR process, creating an expansive backlog of claims. While the portal has recently reopened for single and batched claims during this time period, providers will now be forced to pay hundreds of thousands of dollars in administrative and IDR entity fees all at once in order to get their claims reviewed in the hopes of receiving appropriate payment amounts. The frequent and prolonged closing of the IDR portal has thus put providers at further financial risk and continues to threaten patient access to care. While CMS has offered a 20-day extension for providers to submit claims during this time period, a much longer timeline is needed.

Health care providers depend on the entire IDR process, which commences with the 30-day open negotiation period, followed by dispute submission, entity selection, payment of fees, offer submission, and payment determinations. This entire process can take months to complete. Providers recoup their initial fees once the health plan makes a payment along with

IDRE's reimbursements, and they rely on this cashflow to cover future expenses. Requiring small providers to pay the upfront months long delay of underpaid claims is particularly challenging for those seeking to utilize the IDR and receive accurate reimbursement.

In the most recent FAQ released by the Departments in response to the Texas Medical Association III lawsuit, payors were granted a nearly year-long extension for making changes to their current qualified payment amount (QPA) calculations.[5] This means that payments will not reflect the new, legal QPAs until Q3 or Q4 of 2024. Since payors have been accommodated with an extension that benefits them, at the cost of providers who will continue to be underpaid at inappropriate QPA levels, providers should be given an extension for at least a year to allow them time to spread out the fee payment for claims that occurred during the portal shutdown.

Tiered Fee Structure for IDREs for Batched Claims is Not Appropriate

NAFEC has concerns with the proposed tiered fee structure that will allow IDREs to charge a fixed tiered fee within the range of $25 to $250 for every additional 25-line item within a batched dispute. The purpose of batching claims is to allow multiple claims between the same two parties to be put into a single arbitration dispute if they occurred within a 30-day period and are related to the treatment of a similar condition. Therefore, by definition, there will be multiple claims in a batched claim. Typically, FEC visit claims range from 8-to-28-line items per claim, so combining multiple claims will result in well over the 25-claim limit and result in many tiered fee charges for these claims. The batching process was established to constrain administrative costs, but this tiered fee structure will add additional costs in addition to making batching ineffective. Implementing this change would essentially mimic the qualifications for a bundled dispute, where providers are able to submit a whole claim if the health plan paid the claim under a single service code, without the bundled payment stipulation that is required for bundled claims. The new batching rules and tiered fees will add up quickly within one or two claims only adding fee, upon fee, upon fee not making it efficiently to batch claims or offering much relief in fees for providers.

Administrative Fee Amount Should Be Set Less Frequently Than Annually

NAFEC disagrees with the Departments consideration of keeping the current policy of setting the administrative fee amount annually and believes it should be set less frequently than annually. Due to the extreme underpaying of payors for claims and the high fee rates associated with the IDR process, providers have been forced to develop a strategy around which claims they do and do not submit for arbitration. Though we feel providers should be able to submit all claims that they are inadequately paid for, that is not feasible under the current IDR system and instead providers have developed algorithms to calculate whether it is worthwhile to seek recoupment for a claim. These formulas include the administrative and IDRE fees, and if these

[5] FAQS About Consolidated Appropriations Act, 2021, Implementation Part 62. October 6, 202

were to constantly be changing every year, it would make the IDR process even more burdensome for providers who would have to rework formulas for thousands of claims.

Rather than allowing for administrative and IDRE fees to be adjusted annually through notice, NAFEC feels that an annual adjustment based on inflation would be more appropriate and ensures that further economic and administrative burden is not placed on providers. However, the Departments should also ensure that the inflation rate is being considered by the IDREs and should be reflected in the final payment determinations that they issue. While we understand that the Departments have certain administrative costs that play into resolving these claim disputes, we feel there needs to be a standard administrative fee rate so that providers can plan accordingly. Additionally, we feel that rather than focusing on ensuring the Departments are setting fees that allow them to handle the volume of claims going through the IDR process, they should instead focus on ensuring that payers are properly reimbursing claims to reduce the number of claims entering the IDR process overall, thus reducing the administrative costs for the Departments. We continue to urge the Departments to implement proper enforcement mechanisms to ensure the IDR process is a balanced system that allows providers to be adequately reimbursed for their services, as was the intent of Congress when the law passed.

Conclusion

We appreciate the opportunity to submit our comments regarding the Federal IDR Process Administrative Fee and Certified IDRE Fee Ranges. We look forward to continuing to work with the Departments to ensure that the surprise billing IDR process is a fair and effective process. We hope to continue to be a resource to the Departments and if you have any questions, please do not hesitate to contact the undersigned at brad2@bradshields.com.

Sincerely,

Brad Shields
Executive Director
National Association of Freestanding Emergency Centers