NAFEC
National Association of
FREESTANDING
Emergency Centers

December 5, 2022

The Honorable Chiquita Brooks La-Sure
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Dr. Ellen Montz
Deputy Administrator and Director
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201

Dear Administrator Brooks La-Sure and Deputy Administrator and Director Montz:

On behalf of our members, the National Association of Freestanding Emergency Centers (NAFEC) wishes to thank the Centers for Medicare and Medicaid Services (CMS) for meeting with our leadership on November 21, 2022, to discuss our concerns and recommendations as outlined in our November 8 letter regarding implementation of the No Surprises Act (NSA). As we discussed, freestanding emergency centers (FECs) provide critical emergency care to patients across Texas and several other states. Unfortunately, FECs are in a precarious position due to the abusive practices insurance companies take under the pretext of NSA implementation.

We are following up to underscore a fundamental problem of the process: payers are significantly undercutting out-of-network emergency providers and offering initial payments and qualified payment amounts (QPA) that are pennies on the dollar. These payments are not representative of historical usual and customary payments made for services provided to their enrollees. This practice is unsustainable and threatens patients' access to care as providers are forced to go out of business.

Low initial payment amounts to providers, force them to enter into a long, drawn-out IDR process. This practice completely defies the intention of the No Surprises Act and floods the system with claims that take months to process. As a result, providers are left to subsist on the scant initial payments they receive from the payers. In the July 2021 interim final rule titled "Requirements Related to Surprise Billing; Part I," CMS asserted that an initial payment should

be an amount that the plan or issuer reasonably intends to be a payment in full.[1] This has not been the case as the initial payments to providers have been far from reasonable. Plans are clear about their intention of forcing claims to go through the IDR process if providers want to receive an amount even close to the qualifying payment amount (QPA). CMS implied in the rule that the administrative costs associated with an open negotiation period and the IDR process would deter plans from offering low rates that providers are unlikely to accept. Unfortunately, this assumption is far from reality. The Health and Human Services Department saw over 90,000 claims in the first five and a half months that the IDR portal was active. The number of claims was significantly more than the Departments anticipated in the entire first year.[2] It is evident that plans are not incentivized to offer adequate and appropriate initial payment amounts and are abusing the IDR process to delay fair and full payment to providers, which forces them into a financially untenable position and threatens their ability to provide vital emergency care.

CMS stated in an August 2022 frequently asked questions document that the initial payment is not required to be equivalent to the QPA (or the QPA minus the patient's cost-sharing amount)[3] but did not sufficiently explain the justification for this position. It seems logical that payers should be required to offer the QPA as an initial payment amount (with exceptions in cases where the initial payment is calculated based on an amount determined by an All-Payer Model Agreement or specified state law) since the QPA is used as a factor when IDR entities make a ruling. Requiring payers to use the QPA as a baseline for initial payments will likely reduce the number of claim disputes and ensure that low payment amounts are not used as a tool to drive more out-of-network providers out of business.

The few plans that do reimburse using a cited QPA amount, do not do so based on historical payments and often times offer payments rates at or below Medicare. Despite multiple requests, providers are not given any reasonable explanation as to the source of the QPA amount. Providers are expected to accept the amount the plan pays as adequate, without question. There does not appear to be an audit mechanism in place to validate that plans are reimbursing QPA amounts that meet the definition in the final rule.

We appreciate the hard work and dedication CMS has demonstrated in its implementation efforts for the No Surprises Act. However, we emphasize once again how dire the situation is for providers, as some FECs have been forced out of business and others are on the brink of financial collapse. We request that CMS require payers to offer the QPA as a minimum for the initial payment amount and also explore recommendations made in our November 8 letter.

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[1] Centers for Medicare and Medicaid Services, “Requirements Related to Surprise Billing; Part I (86 FR 36872).” July 13, 2021, https://www.federalregister.gov/documents/2021/07/13/2021-14379/requirements-related-to-surprise-billing-part-i

[2] Allie Reed, “Surprise Medical Billing Disputes Pile up as Lawsuit Unfolds” (Bloomberg Law, November 28, 2022), https://news.bloomberglaw.com/health-law-and-business/surprise-medical-billing-disputes-pile-up-as-lawsuit-unfolds.

[3] Centers for Medicare and Medicaid Services, “FAQs About Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 55.” August 19, 2022, https://www.cms.gov/files/document/faqs-part-55.pdf.

This will assist in stabilizing the flow of claims going through the IDR process and help ensure providers stay financially viable.

We look forward to continued conversations regarding our recommendations and other ways that the IDR process can be improved, with the goal of a fair and efficient way to address surprise billing issues, as it was intended in the No Surprises Act.

We hope to continue to be a resource to your team and if you have any questions or comments, please contact me at brad2@bradshields.com.

Sincerely,

Brad Shields
Executive Director
National Association of Freestanding Emergency Centers