NAFEC
National Association of
FREESTANDING
Emergency Centers

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

September 8, 2023

Dear Administrator Brooks La-Sure and Deputy Administrator Montz:

We appreciate the open and productive dialogue the National Association of Freestanding Emergency Centers (NAFEC) have had with the Centers for Medicare and Medicaid Services (CMS) throughout the implementation of the No Surprises Act (NSA). As CMS and the other relevant agencies (referred to as "the Departments") work to modify the independent dispute resolution (IDR) process and other components of the NSA related to the recent court rulings in Texas, NAFEC wishes to highlight four additional issues to be considered in future rulemaking:

1. CMS must immediately reopen the IDR portal and keep claims flowing even as it loses litigation regarding the unlawful implementation of the NSA.

2. CMS should prohibit payers from violating a key patient protection provision in the NSA by reprocessing bills to include the IDR award amount for the provider after losing the IDR process, thus increasing the out-of-pocket (OOP) amount the *patient* owes.

3. Since there is no enforcement regarding payers processing and paying out reward amounts to providers after an IDR entity (IDRE) determination is made in favor of the provider, despite the 30-day timeline requirement. CMS should adopt state law requirements regarding prompt pay.

4. Similarly, there are major delays in IDRE fee refunds for the prevailing party, despite the 30-business day timeline laid out in regulation.

Reopen and Keep Open the IDR Portal After Litigation

We object to CMS's frequent shutdowns of the IDR process that that follow successful litigation from the Texas Medical Association. As you know, this litigation takes months to go through the legal process before reaching a ruling, leaving plenty of time for CMS and the Departments to plan and prepare for their outcome. Yet, CMS has repeatedly shut down the IDR portal for long intervals, paralyzing the dispute resolution process for weeks or even months. It is inexcusable that CMS is closing the portal for IDR claims, which means providers are being punished by not being allowed to submit claims that they have been flagrantly underpaid. Only the insurance industry benefits when the CMS portal is suspended. FECs and other providers who must continue to provide care to patients and pay their staff and vendors are put in an impossible situation. CMS should reopen the IDR portal without further delay and increase staffing of the entire IDR process so that these claims can be properly and promptly processed.

Prohibit Payer Violation of Patient Out-of-Pocket Protections

Payers have been egregiously violating patient protections that were intentionally built into the NSA and subsequent regulations, resulting in illegal and excessive patient out-of-pocket liability. Major payers have been improperly reprocessing claims after the IDRE determination to apply a higher patient OOP copayment by incorporating the reward amount that is owed to the provider by the payer. This occurs after the patient has already received their OOP bill and explanation of benefits for the original bill. Payers are carrying out this practice of intentionally harming patients fully knowing that they are in violation of the law, as explained in CMS' March 2023 IDR guidance for Disputing Parties where it is noted that "*[t]his determination of the OON rate does not change the participant's, beneficiary's, or enrollee's cost sharing, which is based on the recognized amount, or, in the case of air ambulance services, the lower of the QPA or billed charges.*"[1]

This practice by payers is not only harmful to patients, who are once again being put into the middle of patient/provider surprise billing disputes (the entire reason for the NSA law in the first place) but is also a thinly veiled attempt to further drag out the IDR process by further delaying payments owed to providers. When payers attempt to reprocess claims to include the reward amounts in patient OOP expenses, providers are forced to file an appeal to reverse the insurance processing error, which is time consuming and further delays the claim from being paid out properly. As we have noted in previous correspondence with CMS, the burdens for the IDR process already weigh disproportionately on providers, and this new payer tactic is simply another malicious tool in their toolbelt they can use to further encumber providers and the IDR process. There is no enforcement of payment, or any penalties for payers after a final payment determination is made and the claim is not processed correctly.

[1] Centers for Medicare and Medicaid Services. Federal Independent Dispute Resolution Process Guidance for Disputing Parties. March 2023. Page 27

To protect patients from further harm and increased OOP expenses, CMS must take action to ensure that payers are not passing IDRE determination payments for providers onto patients. We recommend CMS issue a warning to payers and if the practice continues, CMS must issue penalties or some type of enforcement mechanism to ensure providers are not solely responsible for correcting these intentional billing inaccuracies.

Adopt Prompt Pay Requirements to Deter Payer Delays in Reprocessing Provider Rewards After IDRE Determinations

Additionally, we urge CMS and the Departments to expeditiously implement enforcement mechanisms to ensure timely and accurate claim processing after an IDRE determination is made. As previously mentioned, providers carry the burden of initiating IDR disputes on claims paid unfairly by payers, and there is little or no enforcement on the timelines and deadlines for resolving a claims dispute. In order for these claims to be considered for the IDR process, providers must file an open negotiation within 30 days of the EOB, file a dispute within 4 days of the expiration date, pay the invoiced dispute, and submit an offer by the 10-day expiration date, with no extensions being granted unless there is an extenuating circumstance. Meanwhile, payers have no pressure or incentive whatsoever to pay claims owed to providers after the IDRE determination in a timely fashion as required by the law, despite the IDREs telling them they are due within 30 calendar days, as noted in the attached redacted documentation from one of our members. There must be an enforced standardization around IDRE determination payouts or the viability of many providers across the country – and the patients that depend on them for their emergency care -- will be further put at risk, which certainly appears to be the intention of payers who delay these required payouts.

NAFEC recommends that CMS and the Departments use Texas' Prompt Payment law as a model for establishing payment deadlines and penalties to ensure prompt payment claims to providers throughout the IDR process. Under this law, health plans are required to pay, deny, or audit claims within 30-45 days (based on if it is an electric or paper claim) and cannot delay a claim without payment in this timeframe. For claims that are not correctly paid on time, a penalty is issued based on how late the claim is paid and the difference between the amount that the provider bills and the amount that is agreed upon by provider and payer for the service.[2,3] It is worth noting that nearly every state, with the exception of South Carolina, has laws in place around timelines and penalties for health claim payments, so it is puzzling why the Federal government has yet to implement anything similar.[4] We believe this model would be a good starting point for the Federal IDR process and implementation of some sort of enforcement mechanism would help the entire IDR process run more efficiently. It is vital that CMS implements policies that ensure providers remain economically viable as they win IDR disputes and ensuring payment deadlines are adhered to by insurance companies is critical.

Address IDRE Fee Refund Delays

---

[2] Texas Department of Insurance. Prompt Pay FAQ

[3] Texas Medical Association. Summary of SB 418 Prompt Pay Legislation

[4] Anesthesia Business Consults. A Survey of State Prompt Pay Laws, Part I. Fall 2012

Similarly, there are major delays in IDRE fee refunds for the prevailing party in an IDRE determination, despite the 30-business day timeline laid out in regulation. CMS' March 2023 Federal IDR Process Guidance for Disputing Parties states that "*[t]he certified IDR entity fee that was paid by the prevailing party will be returned to the prevailing party by the certified IDR entity within 30 business days of the certified IDR entity's determination.*"[5] However, this has not been the case as members have reported major delays in getting these fees refunded.

While we understand that the IDREs have been overwhelmed by the number of cases, it is important that these fees are refunded during the appropriate timeframe, as they are often a lifeline for providers who continue to be underpaid by insurers for their services. While the major payers, who have million to billion dollar margins to operate under, are able to withstand these cashflow delays, providers face increasing personnel and overhead costs and are in a less stable financial position. We implore CMS to address these delays and ensure that IDREs are issuing timely and accurate fee refunds to the prevailing parties.

Conclusion

CMS' handling of NSA implementation has been frustrating and devastating for providers and continues to threaten patient access to care as providers are being driven out of business due to bureaucratic incompetence and malicious practices by payers. As concern over health care consolidation grows, particularly in the provider space, we implore CMS to implement policies that support small, independent providers and work to counter these consolidation trends. The current IDR process appears to be driving more large health care system and private equity consolidation, as smaller health care entities are less able to weather the massive delays in reimbursement, which typically is hardly adequate, for the care they deliver in good faith. Despite our disappointment in the system and how it has been constructed, we remain eager to work with CMS to resolve the issues raised here.

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

[5] Centers for Medicare and Medicaid Services. Federal Independent Dispute Resolution Process Guidance for Disputing Parties. March 2023. Page 28