January 2, 2024

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

Julie A. Su
Acting 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: CMS-9897-P Federal Independent Dispute Resolution Operations

Dear Secretaries Becerra, Yellen, and Su:

On behalf of our members, the National Association of Freestanding Emergency Centers (NAFEC) has prepared the following comments regarding the Federal Independent Dispute Resolution Operations Proposed Rule.

Executive Summary

- The arbitrary 25-line-item cap on batched claims is not practical for emergency care claims and would continue to place administrative burdens and increased costs on providers. In fact, a 25-line item cap to batching would essentially prohibit emergency room providers from the ability to participate in batching.
- NAFEC is supportive of the new requirement of plans to use Claim Adjustment Reason Codes (CARCs) and Remittance Advice Remark Codes (RARCs), but further guidance on a compliance timeline and oversight of the provision is needed.
- Plans lack of participation in the open negotiation period forces providers to submit claims in the IDR portal that could have otherwise been resolved.

- The administrative fee changes continue to favor insurers who are financially unaffected by the fees associated with the federal independent dispute resolution (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) and comply with EMTALA regulations for treating all patients. FECs are a relatively new provider model; the first FEC was licensed in 2010, and more than 200 operate in Texas. Our membership also includes several specialty emergency hospitals. 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] More than 125 FECs enrolled in Medicare and provided critical emergent care at a value to the Medicare program, saving more than 21% in lower costs. 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.

Requirements for Batching Claims

While NAFEC is supportive of the expanded use of batching claims outlined in the Proposed Rule, we are concerned about the 25-line-item cap for disputes. 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 meet the specified requirements. Therefore, by definition, there will be multiple claims in a batched dispute. Typically, FEC visit claims range from 8 to 28-line items per claim, so combining multiple claims will result in well over the 25-line-item limit thus significantly limiting the ability of providers to batch claims. The 25-line-item limit appears arbitrary, there is no logical explanation for capping claims at 25-line items and it does not follow current billing methodologies. In prior comments submitted in response to the Federal IDR Process Administrative Fee and Certified IDR Entity Fee Ranges Proposed Rule (CMS-9890-P), NAFEC noted that the batching process was established to constrain administrative costs, but this tiered fee structure, and arbitrary 25-line-item cap, will add costs in addition to making batching ineffective. Implementing this change would essentially mimic the qualifications for a bundled dispute, where providers can 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 and add fee upon fee, making it inefficient to batch claims and offering negligible relief for providers.

NAFEC requests that providers not be charged additional fees for the number of line items that are included in batched claims. The burden of going through thousands of claims to determine which ones are appropriate to batch and complying with tight deadlines already rests solely on the provider. Additional fees will significantly limit the number of underpaid claims that providers can submit to the IDR process and continue to threaten patient access to emergency care.

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[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.

However, if limitations must be placed on batched claims to run the process more effectively, then an alternative to the 25-line-item cap would be to limit the number of claims allowed to be included in a batched claim. For example, the Departments could instead only allow up to five claims per batched dispute. This alternative would still allow providers to effectively batch claims but would also help reduce the amount of time the CIDREs spend on batched disputes, so they aren't reviewing hundreds of individual claims in a single batched dispute.

Use of Claim Adjustment Reason Codes (CARCs) and Remittance Advice Remark Codes (RARCs)

NAFEC supports the new requirement of plans to use CARCs and RARCs with the initial payment or notice of payment denial to show which claims for an item or service are subject to the No Surprises Act (NSA) and therefore eligible for the Federal IDR process. However, further measures must be taken by the Departments to ensure plans are not misusing these codes by improperly labeling eligible items and services. To successfully and effectively implement this provision, the Departments must issue further guidance regarding the proper use of CARCs and RARCs, delineate an explicit timeline for compliance, and establish oversight and enforcement mechanisms to ensure the rule is being properly executed. Additionally, the Departments should require plans to explicitly state whether the claim is eligible for the state or federal IDR process. This can be communicated using the CARCs and RARCs. This would be instrumental in getting claims submitted through the appropriate IDR process and help ensure deadlines are more consistently met. Currently, the inconsistencies between the patient's ID card and the explanation of benefit are a common reason providers miss deadlines. If executed properly, the use of CARCs and RARCs will likely help clarify which claims are eligible for the IDR process and reduce some of the unreasonable administrative burdens placed on providers.

Participation in the Open Negotiation Period

There are significant issues related to the open negotiation period that will continue to overwhelm the IDR process unless addressed by the Departments. More often than not, plans refuse to participate during the open negotiation period. Prior to initiating a dispute in the IDR portal, providers submit the laborious paperwork required to begin negotiations. Provider efforts are frequently ignored by plans or met with an autogenerated response indicating there will be no negotiation. Providers struggle to gather even basic information to determine reasonable payment amounts for services rendered. This is due to plans completely ignoring provider's communication efforts. Unfortunately, plans face no consequences for their unwillingness to enter the process in good faith. NAFEC encourages the Departments to take steps to promote collaboration and accountability in this area, thus increasing the likelihood of payment differences being settled prior to entering the formal dispute process.

Administrative Fee Changes

NAFEC has several concerns regarding the administrative fee changes outlined in the Proposed Rule. The initiating party, which is typically the provider, would be required to pay the administrative fee within two days of the preliminary CIDRE selection and the non-initiating party (typically the plan) would be required to pay the fee within two days of receiving the notice of eligibility. The two-day provider deadline is extremely concerning. Mechanically it would be very challenging, if not impossible, for providers to submit payments within the two-day deadline because most CIDREs only allow invoice/hard copy check systems. Providers cannot consistently receive, review, approve, and submit an invoice for payment within two days. This is an unreasonable timeframe.

Additionally, as NAFEC has commented previously, cash flow is a major problem for providers who are already facing severe underpayment. With this proposed change, the administrative fee and the CIDRE fee must be paid at the beginning of the IDR process. This leaves providers out of pocket thousands of dollars as they wait months until the IDR process concludes.

NAFEC would like to remind the Departments that the fee adjustments associated with the IDR process do not have nearly the same impact on plans as it does on providers. Plans are able to pass through these costs to enrollees through increased premiums, whereas providers do not have a way to increase revenue to cover the expenses. Plans are also in a stronger financial position to outlast providers during the lengthy, ongoing IDR process. This results in plans having little incentive to work with providers to ensure fair payment because the fees associated with the IDR process have very little impact on their business model. For this reason, plans often do not submit offers during the open negotiation process, as mentioned previously. Due to these significant financial considerations, NAFEC believes parties should not be required to pay the IDR fees upfront. Instead, the Departments should develop a process that requires payment of IDR fees after IDR determination.

The Proposed Rule suggests reducing the administrative fee from $150 to $75 for low-dollar disputes. Although a step in the right direction, providers and plans must also pay CIDRE fees, ranging from $200 to $840 for single disputes and $268 to $1,173 for batched disputes. These fees are relatively insignificant for large health plans. Conversely, this is a huge expense for providers. While requiring fees from both parties might seem to encourage fair play, we underscore our point that this approach will do little to impact plan behavior. It is our assertion that plans will continue to underpay providers because there are not adequate rules or consequences in place to deter such behavior. As a result, plans will continue forcing an excessive number of claims to be filed through the costly IDR process. This behavior directly impacts the financial health and viability of providers and ultimately impedes patient access to care. Although appreciated, changes to the administrative fee will do little to address the root cause of an overwhelmed IDR process caused by plans purposefully underpaying providers for emergency care rendered to patients.

Conclusion

We appreciate the opportunity to submit our comments regarding the Federal Independent Dispute Resolution Operations. We look forward to continuing to work with the Departments to ensure that the surprise billing IDR process is fair and effective. If you have any questions, please do not hesitate to contact Lawren Geer at lgeer@mcmanusgrp.com.

Sincerely,

Robert Morris
President
National Association of Freestanding Emergency Centers