

December 18, 2023

Hon. Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9897-P
P.O. Box 8016
Baltimore, MD 21244-8016

Comments submitted electronically.

Dear Administrator Brooks-LaSure:

On behalf of over 39,000 orthopaedic surgeons and residents represented by the American Association of Orthopaedic Surgeons (AAOS), we are pleased to respond to the notice of proposed rulemaking on Federal Independent Dispute Resolution Operations (CMS-9897-P). AAOS has been closely monitoring the implementation of the No Surprises Act since 2021, and we applaud the agency's proposed steps to improve early communication during the open negotiation phase and for Independent Dispute Resolution (IDR) entities to streamline the eligibility process.

However, we are deeply concerned that this proposed rule once again fails to address issues with the batching process, the open negotiation process remains burdensome, and the administrative fee cost remains above a reasonable amount as initially agreed to in the legislation. **Thus, we urge the Departments of Health and Human Services, Labor, and Treasury, along with the Office of Personnel Management (the Departments) to consider reversing the position on limiting batched claims and ensure enforcement of the rule as it relates to payment from insurers to physicians.**

Definition of Bundled Payment Arrangement

AAOS appreciates the Departments' clarification of the definition of a bundled payment arrangement under the Surprise Billing law. By defining it as an arrangement "under which a provider, facility, or provider of ambulance services bills for multiple items or services under a single service code that represents multiple items or services (for example, a DRG code)" and allowing it to be submitted as a single dispute with lower fees than if it were to be considered a batched dispute, the process is simplified for physicians. However, bundled payments are usually created to prevent payments for redundant services which by necessity result in a reduction in reimbursement for the individual included procedures/services/CPT codes. What are the rules which will determine the payment reduction for bundling? In other words, will bundling payments result in discounts on fees being paid to providers?

Early Communication Between Payers and Providers

The proposal to improve early communication between providers and payers to streamline the open negotiation and IDR process is important. The Departments' proposal to do this through the use of claim adjustment reason codes (CARCs) and remittance advice remark codes (RARCs) in order to explain why a claim or service line is paid differently than it was billed may be one solution.

Specifically, these would be used when "the plan or issuer is interacting with an entity to which they do not have a direct or indirect contractual relationship with, when the plan or issuer provides a paper or electronic remittance advice to a provider, facility, or provider of air ambulance services for an initial payment, notice of denial of payment, or total plan or coverage payment required under the No Surprises Act." The Departments' proposal to require that this information be included on the open negotiation notice and require that the notice be submitted to the Departments through the IDR portal is a positive step toward improving communication among the parties and streamlining the process for determining eligibility for the Federal process.

Open Negotiation and Initiation of the Federal IDR Process

While AAOS can appreciate the intent of the proposals to improve the communication between parties during the open negotiation process, we are concerned that the tight deadlines and iterative nature of the proposal does little to substantively improve the efficiency of it. Particularly for the physicians engaging in this process, the onerous nature of this process detracts from patient care and directs the resources of a practice toward additional administrative burden.

Requiring additional statements regarding a provider acting as a nonparticipating provider and copies of the initial payment or denial of payment adds to the complexity of this process. Particularly for physicians in small, private practices, these requirements make it so burdensome to submit a dispute that it may act as a disincentive for initiating a dispute at all.

Federal IDR Process Following Initiation

The Federal IDR portal's proposed capacity to prepopulate information included in the open negotiation notices to limit additional burden is a step in the right direction. Likewise, the proposal to allow the parties to transmit notices and supporting documentation through the portal to streamline the process of distributing documentation to the other party and the Departments at the same time is helpful in reducing the burden of the process. Yet, that does not ameliorate the issues with the numerous deadlines for the submission of documents and responses from the other party.

As exemplified by the proposal to allow the parties to correspond over the selection and potential dispute over the certified IDR Entity with involvement from the Departments over the course of six business days from the date of IDR initiation, the timeline and requirements for objection to a proposed entity, selection and rationale for a proposed alternative entity, the Departments intervening confirmation of whether a party submitted the notice of IDR initiation response with an alternative selected, etc. is unrealistic for even a single FTE hired by a small physician practice to keep track of given that this process is undertaken for more than one dispute at a time.

Following this process, the selected certified IDR entity may then provide a notice of conflict of interest. At that point, the proposal states that the Departments would move to a random selection process for selecting an alternative entity. If the process ultimately leads to random selection by the Departments, in what percentage of cases do the Departments estimate this will occur? Certainly, it would be unreasonable to have physician practices assume the responsibility for engaging in the back and forth to select a mutually agreed upon entity if in a significant proportion of cases the IDR entity has a conflict, and the process moves to random selection.

We are also disturbed that the IDR entities deny approximately 20% of all cases by stating they are ineligible for the IDR process, and 80% of all cases marked as ineligible by the IDR is in fact eligible.¹ Beyond the need for improving the quality of the IDR entities to ensure that the process is carried out in earnest, there are no enforcement requirements or penalties for these entities that wrongfully deny cases from the process.

Treatment of Batched Items and Services and Bundled Payment Arrangements

AAOS is dismayed to see the Departments propose to limit batched determinations to 25-line items in a single dispute or a 50-line-item-limit for items and services furnished to one or more patients under the same service code. The Departments purport that this will make it easier for IDR entities to resolve payment determinations. Yet, it will make it much more time consuming for physicians to engage in the process.

Moreover, the recent Texas Medical Association lawsuit successfully challenged the claim that the Departments could enforce a requirement that limited batching to the same service code. Thus, we are troubled to see the Departments once again propose this. The goal of batching is to ensure efficiency in the process, not to parse it to a claim level in cases where a patient has only one in a single 30-day period.

Establishment of the Administrative Fee Amount

The proposed administrative fee of \$150 per party per dispute, the proposed administrative fee for both parties in low-dollar disputes of \$75 per party per dispute, and the proposed reduced administrative fee for non-initiating parties in ineligible disputes of \$30 are based on the Departments' projected estimates of what the total annual expenditures for operating the IDR process will be. If the process continues to be utilized with greater volume and efficiency, as the Departments' claim these proposed rules are intended to facilitate, the cost of the program will escalate annually. It is unrealistic for physician practices to have to budget for annually increasing IDR Administrative Fees year-over-year at a time when the Medicare program does not account for inflation in the Medicare Physician Fee Schedule. We urge the Departments to consider an alternative methodology for determining the Administrative Fee cost that is passed onto the physician parties to the disputes.

Payment Determination and Notification Deadline

¹ <https://www.cms.gov/files/document/initial-report-idr-april-15-september-30-2022.pdf>

AAOS is concerned that the payment determination and notification deadline process does not include an enforcement mechanism to ensure that the payment determined through the IDR process is relayed to the recipient. 87% of health plans do not pay in accordance with the IDR entity and there is no punitive action for failing to pay, such as interest or other penalty.² The proposed rule establishes in detail the methodology for participants from the moment they become party to the open negotiation and subsequent IDR process. Yet, once the parties reach the payment phase, there is little to be said regarding the actual payment to resolve a dispute. We urge the Departments to draft clear, enforceable rules surrounding the payment process in any final rule that is published.

Transparency Regarding In-Network and Out-of-Network Deductibles and Out-of-Pocket Limitation

We applaud the Departments for proposing to require plans and insurers to include information about whether the individual's plan or coverage is subject to the Federal or State surprise billing protections. This would greatly assist in the efficiency of the IDR process.

Thank you for your time and attention to the feedback of the American Association of Orthopaedic Surgeons (AAOS) on the important proposals made in the Federal Independent Dispute Resolution Operations (CMS-9897-P) proposed rule. Should you have questions on any of the above comments, please do not hesitate to contact Shreyasi Deb, PhD, MBA, AAOS Office of Government Relations at deb@aaos.org.

Sincerely,



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AAOS President

cc: Paul Tornetta III, MD, PhD, FAAOS, First Vice-President, AAOS
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² <https://edpma.org/wp-content/uploads/2023/03/EDPMA-Data-Analysis-No-Surprises-Act-Independent-Dispute-Resolution-Effectiveness-1.pdf>