August 8, 2024

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

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

RE: Delayed Release of the Independent Dispute Resolution Operations Final Rule (CMS-9897)

Dear Secretaries Becerra, Su, and Yellen:

We are writing on behalf of the memberships of the American College of Emergency Physicians (ACEP), the American College of Radiology (ACR), and the American Society of Anesthesiologists (ASA) to express our significant concern that the release of Independent Dispute Resolution (IDR) Operations Final Rule (CMS-9897) has been delayed from what was initially anticipated. We commend the Department for their work on this rule. We believe that there are vital reforms included in this regulation that will help improve some of the current deficiencies in the Federal IDR process. **Therefore, we strongly urge the Departments of Health and Human Services, Labor, and Treasury (the Departments) to release the final rule as soon as possible (but no later than September 1, 2024), with all the policies becoming effective no later than 30 to 60 days from the date of publication in the Federal Register.**

The IDR Operations Proposed Rule was published in the Federal Register on November 3, 2023, with public comments initially due on January 2, 2024. However, the Departments reopened the comment period from January 22, 2024 to February 5, 2024. In the proposed rule, some of the policies—described in more detail below—had proposed effective dates beginning on or after the later of August 15, 2024, or 90 days after the effective date of the final rule. Other policies were supposed to become effective on January 1, 2025. Given these proposed effective dates, there was a strong expectation that the final rule would be released in the early-to-mid summer, 2024. Thus,

it came as a great surprise and disappointment to our organizations when we saw in the Spring 2024 Unified Agenda that the Departments now plan to release the final rule in November 2024 (which is only an estimate and could still be modified). Based on the timeline the Departments had articulated in the proposed rule of when policies would become effective, a release date of November 2024 could result in most policies not becoming effective until the middle of calendar year 2025 or even later.

ACEP, ASA, and ACR appreciate that the Departments are doing their due diligence reviewing the comments they received on the proposed rule in order to help craft the final policies. Each of our organizations submitted detailed comments[1] with recommendations of how to improve upon the proposed policies, and we urge the Departments to take these under full consideration and adopt them in the final rule. However, we did all unequivocally state that many of the policies in the proposed rule, if finalized as proposed, would address some of the significant issues our members continue to experience with the Federal IDR process.

The Federal IDR process is currently in an extremely unstable period, with many insurers not following requirements, certified IDR entities (IDREs) not universally abiding by the prescribed regulations and using incorrect information to make payment determinations, and numerous reported delays and general confusion about different aspects of the process. This instability is putting in jeopardy our collective ability to meet the core objective of the *No Surprises Act*: to protect patients and keep them out of the middle of billing disputes. **We need some stability in the Federal IDR process, and this final rule could not come soon enough.**

The regulation, while not resolving all of our issues with the federal IDR process, represents a good start. In the proposed rule, the Departments identify several areas of great confusion that our organizations have repeatedly reported:

1. Whether the consumer protections against balance billing and out-of-network cost sharing under the No Surprises Act apply to a particular service;
2. How cost-sharing and the out-of-network rates are determined;
3. How and with whom to initiate Open Negotiation; and
4. Which items or services eligible for the Federal IDR process can be batched into a single dispute.

Determining IDR Eligibility and Correct Cost-Sharing Amounts

To address issues 1 and 2, the Departments proposed new disclosure requirements that group health insurers must include along with the initial payment or notice of denial of payment for services subject to the protections in the *No Surprises Act*, including the business name of the plan, the business name of plan sponsor, and the registration identification number that is assigned to the health plan when it registers in the IDR Registry. The proposed rule would also require insurers to

[1] ACEP's comments are available here; ACR's comments are available here; and ASA's comments are available here.

communicate information by using claim adjustment reason codes (CARCs) and remittance advice remark codes (RARCs), as specified in guidance, when providing any paper or electronic remittance advice to an entity that does not have a contractual relationship with the insurer.

We have all expressed to the Departments numerous times our concern that in some cases, the qualifying payment amount (QPA) for service billed is not being clearly identified and a certifying statement on the QPA is missing that would affirm the QPA was calculated properly and that it serves as the recognized amount for the purposes of calculating patient cost-sharing. This missing information makes it difficult for providers and eventually for certified IDR entities to determine whether a claim is even eligible for the Federal IDR process**. Therefore, we all strongly believe that requiring the use of the RARCs and CARCs for all claims will give providers the necessary information to assess patient cost-sharing amounts, keep patients out of the middle of the process, and reduce the need to initiate payment disputes for services furnished out-of-network**. In addition, we believe that the additional disclosure requirements will be important to distinguish between plans, particularly self-insured plans. Knowing the business name of the plan sponsor, for example, may help providers know who the employer is when trying to batch among self-insured plans.

Open Negotiations

All our organizations have previously commented on the lack of insurer participation in the Open Negotiation process, with our members reporting that health plans are sometimes not even acknowledging receipt of the Notice of Open Negotiation and/or are not actively engaging in negotiations at any point during the 30-business-day period. This runs counter to the overall intent of the *No Surprises Act* to use the IDR process as a last resort. Thus, we were all supportive of the Departments' proposals to enhance the content of the Notice of Open Negotiation and to require use of the Federal IDR portal for providing Notice of Open Negotiation. Under the current email-based initiation process, our members have reported challenges managing and tracking a high volume of email traffic. **Requiring the Open Negotiation process to be initiated via the portal will significantly reduce administrative burden and confusion for all parties involved. We support fully integrating the proposed rule's IDR Registry requirements into the Open Negotiation (and IDR) initiation processes. Moving these steps and their documentation into the portal will also provide valuable transparency on the level of engagement and compliance of the parties involved.**

We were also supportive of the other improvements the Departments proposed to the Open Negotiations Process, including requiring: a response to a Notice of Open Negotiation within 15 business days of initiating the process; additional information to be submitted along with Open Negotiation Response Notice, including the requirement that insurers provide the plan type; the provision of a counter offer as part of the response to the Notice of Open Negotiation; and that the insurer affirm the accuracy of the QPA. With respect to the last requirement regarding the QPA, **the inconsistency of QPA calculations remains a significant issue, with insurers repeatedly**

miscalculating the QPA. Therefore, it is absolutely essential that the Departments institute additional safeguards and requirements to ensure that the QPA is calculated correctly. We also believe that the Departments should require insurers to display the methodology used to calculate QPA. Thus, while we are in support of the Departments' proposals and urge the Departments to finalize them as proposed, we also encourage the Departments to require plans to "show their work" and disclose their QPA calculations upon the request of the provider or certified IDRE.

Batching

The *No Surprises Act* included batching criteria within the IDR process with the primary goal of efficiency of dispute resolution. However, the Departments acknowledge in the proposed rule that several factors have led to batched disputes having the opposite effect: slowing the resolution process and creating significant administrative burdens for certified IDREs. While our organizations submitted extensive comments on the proposed changes to batching in our respective comment letters, several of the changes as proposed would dramatically improve batched submission efficiency, allowing certified IDREs to resolve large numbers of similar disputes quickly. Currently, certified IDREs have full discretion in terms of determining what services can be batched.[2] This flexibility is causing there to be inconsistent determinations of what constitutes a proper batch. **The policies in this rule would add some more direction to certified IDREs to help them determine whether claims can be batched into a single dispute-- such as batching by anesthesia conversion factor -- which would hopefully lead to less confusion about the batching rules.,. We also support the Departments suggestion in the rule to shorten the "cooling off" period for batched to one business day, as we see no need for there to be a 90-day waiting period between submitting certain disputes.**

Enforcement

Beyond these changes, our organizations believe that other reforms proposed in the rule will help improve the IDR process, including the proposals to simplify the process for determining claim eligibility for the IDR process and to establish an IDR Registry, as well as some of the changes to the administrative fee and its collection. However, one area that the final rule must go further in is ***enforcement.*** While we understand that the Departments are conducting QPA audits and investigating complaints from all parties, our members strongly feel that the Departments need to increase their enforcement of critical *No Surprises Act* requirements. The Departments do periodically refer to enforcement and compliance in the proposed rule, but there is no comprehensive strategy or plan to ensure that all stakeholders adhere to the new requirements. Further, there are no overarching instructions for how disputing parties or certified IDREs should handle instances of non-compliance or specific penalties or consequences of non-compliance

[2] The Department's Frequently Asked Questions Part 63, released on November 28, 2023, includes Q2, which states in part "Certified IDR entities have the sole responsibility for determining whether the items and services submitted as part of a batched dispute meet the statutory and remaining regulatory standards for a batched dispute."

mentioned. We understand that enforcement is done both at the State and Federal level depending on the type of plan and the state in which the service was delivered, but we still believe that it is essential for the Departments to articulate a well-thought-out enforcement strategy and that disputing parties fully understand the consequences of noncompliance.

For each of the policies in the rule, the Departments need to create stronger incentive and enforcement mechanisms. We also strongly encourage the Departments to use their existing authorities to issue civil monetary penalties when appropriate. For example, we continue to hear from our members that even when they win a dispute, insurers are not paying what they owe within the required 30-calendar-day period—if at all. In those cases, and others where there are clear violations of regulatory or statutory requirements from either party, the Departments must levy civil monetary penalties to ensure proper compliance.

Final Rule Release Date and Effective Dates of Policies

It is abundantly clear why these important reforms must be implemented as soon as possible. **We urge the Departments to issue the IDR Operations rule no later than September 1, 2024.** The instability in the federal IDR process referred to above has been in place for a long time, and we cannot wait until well into next year for these reforms to become effective.

We also strongly believe that the Departments should revise their timeline from the proposed rule for making the policies effective. Under the proposed rule, the proposed modifications to the batching and IDR processes would apply to disputes with Open Negotiation periods beginning on or after the later of August 15, 2024 *(which now is practically infeasible)*, or 90 days after the effective date of the final rule. Further, the requirement for health plans to register on the IDR portal would take effect immediately upon publication of the final rule, and the changes to IDR fees would apply to disputes initiated on or after January 1, 2025. The Departments also sought comment on whether the new disclosure requirements would be effective six months or a year after additional sub-regulatory guidance is provided (*this guidance has not yet been released*).

The proposed effective dates in the rule provide too much of a gap between current policies and what we believe to be much needed improvements in the IDR process. Therefore, we urge the Departments to change the effective dates in the following ways:

- **The batching provisions should be effective no more than 30-60 days after the rule is finalized— as is the standard implementation timeline for regulations.**
- **The new disclosure requirements should be effective immediately once the rule is finalized.**

The Departments must also put out guidance related to the disclosure requirements, including the use of RARC and CARC codes *as soon as possible*. Health plans already have experience using the RARC/CARC formatting, and we do not believe it would take much time for those plans that are not using them to start doing so. **The future success of the IDR process depends on these operational improvements being implemented expeditiously.**

Thank you for your time and consideration of these comments and recommendations. Should you have any questions, please do not hesitate to contact Laura Wooster at lwooster@acep.org, Joshua Cooper at JCooper@acr.org, or Manuel Bonilla at M.Bonilla@asahq.org.

Sincerely,

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