

January 2, 2024

The Honorable 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

Re: CMS-9897-P: Federal Independent Dispute Resolution Operations

Submitted electronically via: <https://www.regulations.gov>.

We, the undersigned organizations representing patients, consumers, and workers appreciate the opportunity to provide comments on the proposed Federal Independent Dispute Resolution Operations (CMS-9897-P) rule as released by the Centers for Medicare & Medicaid Services (CMS). We thank the Biden Administration for its work on this proposed rule, which builds upon the landmark passage of the No Surprises Act (NSA) to protect consumers from the harmful and unfair practice of out-of-network balance billing and rising health care costs.

No one should go bankrupt from seeking health care. Before passage of the No Surprises Act, that was happening all too often to hardworking families who were covered by health insurance but hit by unexpected out-of-network bills. Now, consumers have critical protections from corporate price gouging that take the form of egregious surprise out-of-network bills. Since its inception in 2020, the NSA has prevented more than one million surprise bills per month from reaching consumers¹. The law has undoubtedly helped millions of families who, even before factoring in high and rising health care costs, have been struggling to pay for groceries, gas, and rent. Now, because of this law, Americans will not face the added stress of being saddled with out-of-network surprise medical bills when they seek care at an emergency facility or hospital.

In particular, No Surprises Act protections play a crucial role in preventing the accumulation of medical debt from surprise medical bills. Evidence shows that medical debt impacts 100 million people in the United States, and discourages them -- or in some cases prevents, them -- from seeking and receiving future medical care.² Medical debt may force families to work longer hours, use up all their savings, cut spending on food or other basic needs, or force a change in living situations.³ People of color are disproportionately at risk of being saddled with medical debt and are more vulnerable to the resultant negative impacts; these inequities perpetuate racial wealth gaps and disparities in health and health

¹ AHIP and BCBSA, *No Surprises Act Prevents More than 9 Million Surprise Bills Since January 2022*. (AHIP, November 16, 2022, <https://www.ahip.org/resources/no-surprises-act-prevents-more-than-9-million-surprise-bills-since-january-2022>

² Noam, Levy "100 Million People in America are Saddled With Health Care Debt," KFF Health News, June 16, 2022, <https://kffhealthnews.org/news/article/diagnosis-debt-investigation-100-million-americans-hidden-medical-debt/>

³ Ibid.

outcomes.⁴ Additionally, the law has the potential to help reduce rising premiums that were driven by market failure of out-of-network balance billing.⁵

However, since the No Surprises Act went into effect, provider organizations like the Texas Medical Association (TMA) and their allies have filed more than 20 lawsuits attempting to undermine the law and important regulatory guardrails intended to limit consumer exposure to rising health care costs. The litigation and resulting court decisions have already required changes to rulemaking that have caused disruptions to the IDR process and have weakened protections from rising health care costs compared to what the administration originally put forward.

Additionally, we are concerned that corporate entities might be abusing the IDR system by intentionally submitting high volumes of claims in an attempt to overwhelm the system. From April 2022 to March 2023, the IDR portal saw nearly fourteen times as many cases as the administration initially anticipated for a full calendar year.⁶ While some of this volume can be explained by a learning curve, the administration's own reporting on usage of the IDR process points to extensive use by a small number of staffing companies, financial management firms, and private-equity backed provider practices where it is unlikely to be generating that level of increased claims volume.⁷ While many of these financial management firms and private equity backed provider practices claim the administration's design of the IDR process is flawed and results in inadequate payments for providers⁸, reports show that most providers are actually winning the IDR disputes and receiving their preferred payment amount. For example, a recent report shows that initiating parties in the IDR process - which most often are providers - won an estimated 71% of the disputes.⁹ It is clear that these corporate provider entities are engaging in a concerted effort to undermine the existing law and regulations in order to revert back to a time when it was legal to profit by price gouging the American people through surprise medical bills. We strongly support the administration's effort to implement the No Surprises Act as was intended by Congress and encourage the administration to continue to work to defend against any threats to the law or the existing regulations. We, the undersigned consumer organizations, appreciate and the administration's overall efforts in this proposed rule to improve the IDR process's efficiency and reduce ineligible claims, while also ensuring the consumer experience remains centered. Specifically, our comments focus on the following sections of the proposed rule:

II.D. Open Negotiation and Initiation of Federal IDR Process

II.G. Transparency Regarding In-Network and Out-of-Network Deductibles and Out-of-Pocket Limitation

II.H. 2. Applicability of Surprise Billing Protections to Ground Ambulance Services

⁴ Miranda Santillo, et al, "Communities of Color Disproportionally Suffer from Medical Debt," Urban Institute, October 14, 2022, <https://www.urban.org/urban-wire/communities-color-disproportionally-suffer-medical-debt>

⁵ Congressional Budget Office and Joint Committee on Taxation, "H.R. 5826, the Consumer Protections Against Surprise Medical Bills Act of 2020, as Introduced on February 10, 2020, Estimated Budgetary Effects" (February 11, 2020) <https://www.cbo.gov/publication/56122>

⁶ CMS, "Federal Independent Dispute Resolution Process – Status Update," April 27, 2023, <https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf>

⁷ DHHS, DOL, and Dept of Treasury, Partial Report on the Independent Dispute Resolution Process, October 1-December 31, 2022, <https://www.cms.gov/files/document/partial-report-idr-process-octoberdecember-2022.pdf>,

⁸ SCP Health, "The No Surprises Act...Full of Surprises," September 2022, <https://www.scpehealth.com/wp-content/uploads/2022/09/SCP-Health-Market-Environment-No-Surprises-Act-Final.pdf>

⁹ CMS, "Federal Independent Dispute Resolution Process – Status Update," April 27, 2023, <https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf>

II. D. Open Negotiation and Initiation of Federal IDR Process 1. Open Negotiation

CMS is proposing new requirements regarding the open negotiation between providers and insurers prior to initiation of the Federal IDR Process. These include:

- Requiring parties to submit open negotiation notices to the Federal IDR portal
- Requiring a negotiation response notice within 15 days (also submitted to IDR portal)
- Requiring the party initiating open negotiations to include qualifying payment amount (QPA) and amount of cost sharing (if the initiating party is an issuer/plan) for the item or service that is the subject of the negotiation if it has not been provided on the initial payment

The undersigned see these as helpful changes aimed at reducing the administrative burden posed by the current IDR process. Thus far, one of the major roadblocks to the IDR process has been the high number of ineligible cases submitted and the time-consuming process of dispute eligibility determination¹⁰, which will be quickened by the requirement for submitting proper documentation regarding the open negotiation process. This should speed up the process significantly by making eligibility determination much easier for providers, insurers, and IDR entities.

The proposed rules, which require initiating parties to include the QPA and the amount of patient cost sharing, will help to center the impact of costs on consumers within the negotiation process and reduce some obfuscation and confusion surrounding the QPA, which is crucial in protecting consumers from being subjected to high prices for the medical services they receive¹¹. **The undersigned strongly support swift implementation of these improvements to the open negotiation process and urge CMS to keep the consumer experience centered within payment negotiations and in IDR.**

II. G. Transparency Regarding In-Network and Out-of-Network Deductibles and Out-of-Pocket Limitation

CMS is considering a requirement for plans to include information about whether the individual's plan or coverage is subject to federal or state surprise billing protections on insurance cards. This information establishes clarity for consumers as to where they might receive support or enforcement on surprise billing protections. Because current enforcement procedures still depend on consumers knowing their rights and complaining if they are wrongfully billed, it is crucial that this information be readily accessible to those who need it. Information on insurance cards will help when a plan, provider, assistance program, or help desk asks an individual to look on their card for information in order to file a complaint, for example.

The undersigned strongly support CMS' approach to include information on insurance cards about whether an individual's plan or coverage is subject to federal or state surprise billing protections. Ensuring that consumers have knowledge about their surprise billing rights, including how and where to submit complaints, is vital to No Surprises Act enforcement. **Additionally, we encourage CMS to further consider additional mediums to deliver this information to consumers, including but not limited to periodic mailings and in the explanation of benefits (EOB).**

¹⁰ Jack Hoadley and Kevin Lucia, "Surprise Billing: Volume of Cases Using Independent Dispute Resolution Continues Higher Than Anticipated," Georgetown Center on Health Insurance Reforms, August 18, 2023, <https://chirblog.org/surprise-billing-volume-of-cases-using-independent-dispute-resolution-continues-higher-than-anticipated/>

¹¹ Brief of Nine Patient and Consumer Advocacy Organizations as Amici Curiae Supporting Defendants, Texas Medical Association et al v. US Department of Health and Human Services et al, filed November 16, 2022 in Eastern District of Texas, https://affordablecareactlitigation.files.wordpress.com/2022/11/merged_40128_-1-1668644707.pdf

Furthermore, consumers are supposed to receive notices of their rights to in-network rates and sign consent forms for out-of-network care in some cases, but in most states, there is no systemic inspection to determine if they are receiving this information¹². While the NSA Help Desk provides federal support for patients submitting complaints, consumer advocacy programs are doing the on-the-ground work and providing essential services like outreach, assistance, and education for consumers on surprise billing rights¹³. But many states lack dedicated consumer advocacy programs, leaving gaps in patient support.¹⁴

The undersigned encourage CMS to provide or pursue funding for consumer assistance programs, including non-profits, that educate and assist consumers in asserting their rights under the NSA.

II. H. 2. Applicability of Surprise Billing Protections to Ground Ambulance Services

CMS has indicated it has received many questions about how the NSA applies to ground ambulance services, although the law currently does not contain surprise billing protections at the federal level for ground ambulance services. As of now, 15 states have passed surprise billing protections for ground ambulance services in some form^{15,16}, though these laws do not protect consumers with insurance coverage through self-funded plans offered by their employer¹⁷. In total, ground ambulances serve more than 3 million privately insured people annually, and 51% of emergency rides and 39% of non-emergency ground ambulance rides resulted in out-of-network charges that could put patients at risk of receiving surprise bills.¹⁸ This exemption of ground ambulance services from surprise billing protections continues to put patients across the United States at risk of receiving surprise bills, even in states which have passed state laws addressing this gap.

The undersigned applaud CMS for taking a strong leadership role in convening the Ground Ambulance Patient Billing Committee to work toward federal consumer protections for surprise bills for ground ambulance services. Additionally, we hope that CMS and the Secretaries of Labor, Treasury and HHS work to ensure that ambulance providers receive fair payment directly from insurers on a reasonable timeline¹⁹. In some states, patients are billed initially and are responsible for passing this bill to their insurer²⁰. **We also urge CMS to improve upon cost containment recommendations from the Ground Ambulance Patient Billing Committee to prevent establishment of a system that would overpay out-of-network ground ambulance services.** The current proposal relies on more than 19,000 municipalities to set accurate and fair local rates, leaving too many avenues for opportunistic actors to influence local

¹² CAA Enforcement Letters - Consolidated Appropriations Act, 2021 (CAA). CMS.gov.

<https://www.cms.gov/marketplace/about/oversight/other-insurance-protections/consolidated-appropriations-act-2021-cao>

¹³ Karen Pollitz, *No surprises act implementation: What to expect in 2022*, December 10, 2021, KFF. <https://www.kff.org/health-reform/issue-brief/no-surprises-act-implementation-what-to-expect-in-2022/>

¹⁴ *Consumer Assistance Program*. CMS.gov. (n.d.-b). <https://www.cms.gov/CCIIO/Resources/Consumer-Assistance-Grants>

¹⁵ Patricia Kelmar, "Emergency: the high cost of ambulance surprise bills," US PIRG Education Fund, updated October 26, 2023, <https://pirg.org/edfund/resources/emergency-the-high-cost-of-ambulance-surprise-bills/>

¹⁶ Health Access California. "CA Governor Gavin Newsom Signs Bill to End Surprise Ambulance Billing for Californians, October 8, 2023.

<https://health-access.org/ca-governor-gavin-newsom-signs-bill-to-end-surprise-ambulance-billing-for-californians/>

¹⁷ See CA AB716, for example, <https://health-access.org/state-senate-passes-ab-716-to-end-surprise-ambulance-billing-for-californians/>

¹⁸ Krutik Amin, et al, "Ground ambulance rides and potential for surprise billing," Peterson-KFF Health System Tracker, June 24, 2021, <https://www.healthsystemtracker.org/brief/ground-ambulance-rides-and-potential-for-surprise-billing/>

¹⁹ <https://www.cms.gov/files/document/october-31-november-1-2023-meeting-summary.pdf>

²⁰ This issue was raised in discussions among the Advisory Committee on Ground Ambulance and Patient Billing (GAPB) throughout 2023. Meeting materials accessible: <https://www.cms.gov/medicare/regulations-guidance/advisory-committees/advisory-committee-ground-ambulance-and-patient-billing-gapb>

rates²¹. Without strong cost containment guardrails, such as keeping local rates tied to a percentage of Medicare prices, consumers and insurers might end up paying significantly higher prices than anticipated or warranted.

As the agencies continue to implement and refine No Surprises Act rulemaking, we urge you to keep the consumer experience centered – both in the direct protections from out-of-network balance bills and corporate price-gouging and the potential of the law to help rein in rising premiums and health care costs. Thank you again for considering the above recommendations and your continued efforts to keep the No Surprises Act strong and working for consumers. Please contact Jane Sheehan, Deputy Senior Director of Federal Relations at jsheehan@familiesusa.org for further information.

Sincerely,

Families USA Action
Appleseed Foundation
Colorado Consumer Health Initiative
Consumer Reports
MomsRising
National Consumer Law Center, on behalf of our low-income clients
New Jersey Citizen Action
South Carolina Appleseed Legal Justice Center
Tennessee Health Care Campaign
Texas Parent to Parent
U.S. PIRG

²¹ <https://www.cms.gov/files/document/october-31-november-1-2023-meeting-summary.pdf>