

Supplemental Background on Federal Independent Dispute Resolution Public Use Files July 1, 2023 - December 31, 2023

The No Surprises Act (NSA) and its implementing regulations¹ establish a Federal Independent Dispute Resolution (IDR) process that out-of-network (OON) providers, facilities, and providers of air ambulance services, and group health plans, health insurance issuers offering group and individual health insurance coverage, and Federal Employees Health Benefits (FEHB) Program carriers (collectively, the disputing parties) may use to determine the OON rate for qualified IDR items or services after an unsuccessful open negotiation period. The Departments of Health and Human Services, Labor, and the Treasury (the Departments) launched the Federal IDR portal on April 15, 2022, to facilitate this process. The statute requires the Departments to publish on a public website certain information about the Federal IDR process.²

To promote transparency in the implementation of the Federal IDR portal, the Departments provided several status updates as well as initial reports for calendar quarters in 2022.^{3,4} On February 15, 2024, the Departments published the Federal IDR public use file (IDR PUF) and Federal IDR supplemental tables for the first two calendar quarters of 2023. The Departments are now releasing the IDR PUF and supplemental tables for the third and fourth calendar quarters of 2023. The IDR PUF includes detailed information for each payment determination, including payment determination outcomes and offer amounts. In addition to the IDR PUF, the Departments are publishing supplemental tables with summary information including the number of payment disputes initiated, closed, and the reasons for closure. The information in the IDR PUF and supplemental tables is intended to promote Federal IDR process transparency and provide required information to the public.

¹ Requirements Related to Surprise Billing; Part I, 86 FR 36872 (July 13, 2021), <https://www.federalregister.gov/documents/2021/07/13/2021-14379/requirements-related-to-surprise-billing-part-i>; Requirements Related to Surprise Billing; Part II, 86 FR 55980 (October 7, 2021), <https://www.federalregister.gov/documents/2021/10/07/2021-21441/requirements-related-to-surprise-billing-part-ii>; and Requirements Related to Surprise Billing, 87 FR 52618 (August 26, 2022), <https://www.federalregister.gov/documents/2022/08/26/2022-18202/requirements-related-to-surprise-billing>.

² See Code section 9816(c)(7), ERISA section 716(c)(7), and PHS Act section 2799A-1(c)(7).

³ See Federal Independent Dispute Resolution Process Status Update (April 27, 2023), available at <https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf>; Federal Independent Dispute Resolution Process Status Update (Aug. 19, 2022), available at: <https://www.cms.gov/files/document/federal-idr-process-status-update-august-2022.pdf>; and Amendment to the Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act: Change in Administrative Fee (Dec. 23, 2022), available at: <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/amended-cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

⁴ See Initial Report on the Federal Independent Dispute Resolution (IDR) Process, April 15 – September 30, 2022, available at: <https://www.cms.gov/files/document/initial-report-idr-april-15-september-30-2022.pdf>; and Partial Report on the Independent Dispute Resolution (IDR Process, October 1 – December 31, 2022, available at: <https://www.cms.gov/files/document/partial-report-idr-process-octoberdecember-2022.pdf>.

Similar to the first six months of 2023, the last six months of 2023 were characterized by a large volume of disputes submitted through the Federal IDR portal, continuing complexity in determining whether disputes were eligible for the Federal IDR process, and substantial changes to Federal IDR process operations as a result of multiple court orders.⁵ In response to these issues, the Departments made ongoing technical and operational changes to the Federal IDR process to facilitate throughput and comply with court rulings. Additionally, certified IDR entities continued their efforts to scale up their operations to contend with the large volume of disputes, making substantially more payment determinations in the last six months of 2023, compared to the first six months of 2023, despite a temporary suspension of portal operations following the court orders.⁶

High Volume of Disputes

Between July 1, 2023, and December 31, 2023, disputing parties initiated 390,346 disputes through the Federal IDR portal, 35% more than the first six months of 2023 (288,810 disputes). This increase is particularly notable because dispute initiations were temporarily suspended for all dispute types for approximately 9 weeks in response to multiple court orders issued in August 2023.⁷ When the Federal IDR portal was reopened to initiations for all dispute types, parties were able to submit disputes affected by the temporary suspension of the Federal IDR process until March 14, 2024.⁸ Overall, disputing parties initiated 679,156 disputes in 2023, more than 3 times the number of disputes initiated in 2022 (200,112 disputes).

Similar to the first six months of 2023, the majority of disputes were initiated by a small number of initiating parties or their representatives. The top ten initiating parties represented approximately 76% of all disputes initiated in the last six months of 2023. Many of the top initiating parties are (or are represented by) large practice management companies, medical practices, or revenue cycle management companies representing hundreds of individual practices, providers, or facilities. The top three initiating parties (Team Health, SCP Health, and Radiology Partners) represent thousands of clinicians across multiple states and accounted for approximately 58% of all disputes initiated in the last six months of 2023.

⁵ On August 3, 2023, the U.S. District Court for the Eastern District of Texas (district court) issued an opinion and order in *Tex. Med. Ass'n, et al. v. U.S. Dep't of Health and Human Servs.*, Case No. 6:23-cv-59-JDK (*TMA IV*). This opinion and order vacated the batching provisions of 45 CFR 149.510(c)(3)(i)(C), 26 CFR 54.9816-8T(c)(3)(i)(C), and 29 CFR 2590.716-8(c)(3)(i)(C) and vacated the \$350 per party administrative fee established by guidance issued on December 23, 2022. Subsequently, on August 24, 2023, the district court issued an opinion and order in *Tex. Med. Ass'n, et al. v. U.S. Dep't of Health and Human Servs.*, Case No. 6:22-cv-450-JDK (*TMA III*), vacating certain portions of 45 CFR 149.130 and 149.140, 26 CFR 54.9816-6T and 54.9817-1T, and 29 CFR 2590.716-6 and 2590.717-1. The district court also vacated 5 CFR 890.114(a), insofar as it requires compliance with the vacated regulations and guidance.

⁶ See No Surprises Act Independent Dispute Resolution (IDR) Batching and Air Ambulance Policy Frequently Asked Questions (Nov. 2023), available at: <https://www.cms.gov/files/document/faqs-batching-air-ambulance.pdf>; FAQs about Affordable Care Act and Consolidated Appropriations Act, 2023 Implementation Part 63 (Nov. 2023), available at: <https://www.cms.gov/files/document/faqs-part-63.pdf>; FAQs about Consolidated Appropriations Act, 2021 Implementation Part 62 (Oct. 2023), available at: <https://www.cms.gov/files/document/faqs-part-62.pdf>; and the August 2023 IDR Administrative Fees FAQs (Aug. 2023), available at: <https://www.cms.gov/files/document/idr-admin-fees-faqs-081123-508.pdf-0>.

⁷ Centers for Medicare & Medicaid Services No Surprises Act Notices, available at: <https://www.cms.gov/nosurprises/notices>.

⁸ *Id.*

Certified IDR entities have scaled up their operations to address the high volume of disputes. Certified IDR entities rendered 125,478 payment determinations in the last six months of 2023, a 50% increase from the first six months of 2023 (83,868 determinations). This substantial increase in payment determinations made in the last six months of 2023 is significant because certified IDR entities were directed by the Departments to temporarily suspend certain Federal IDR process operations, including issuing payment determinations, from August 3, 2023 to September 21, 2023, in response to multiple court rulings.⁹ Despite the temporary suspension, certified IDR entities were able to increase their operations and continue to address the high volume of disputes. Overall, certified IDR entities rendered 209,346 payment determinations in 2023, more than 12 times the number of payment determinations made in 2022 (16,238 determinations). Certified IDR entities closed 311,863 disputes in 2023, more than 5 times the number of disputes closed in 2022 (54,821 disputes). Disputes were closed for several reasons, including: a payment determination was made, the dispute was determined ineligible for the Federal IDR process, the dispute was withdrawn, parties reached a settlement, or the dispute was closed for administrative reasons, such as unpaid fees.

Despite the increase in the number of payment determinations, due to the high volume of disputes initiated, there are disputing parties who are still awaiting payment determinations. The Departments' objective is to help certified IDR entities and disputing parties obtain resolution on disputes as expeditiously as possible.

Dispute Eligibility

The primary cause of delays in processing disputes continues to be the complexity of determining whether disputes are eligible for the Federal IDR process. Similar to the first six months of 2023, during the last six months of 2023, non-initiating parties challenged the eligibility of 37% of disputes initiated (143,827 of 390,346). Even when the non-initiating party does not challenge the eligibility of a dispute, the certified IDR entity must still review the dispute and confirm that it is eligible before the dispute can proceed in the Federal IDR process. These reviews involve complex eligibility determinations that require certified IDR entities to expend considerable time and resources.

Eligibility reviews conducted by certified IDR entities are processed more quickly when both parties provide all the required information at initiation. To that end, the Departments added required data elements to the dispute initiation form and directed the parties to attach documents supporting or contesting eligibility during dispute initiation, to ensure certified IDR entities have all necessary information to determine eligibility earlier in the process. The Departments have also published technical assistance to help disputing parties and certified IDR entities better determine eligibility and resolve disputes more expeditiously.^{10,11,12}

As a result of process improvements and greater familiarity among disputing parties of eligibility requirements, the percent of disputes found ineligible declined significantly between 2022 and the first six months of 2023. Following that initial decline, the proportion of closed disputes that were determined ineligible remained stable throughout 2023. In both the first and second halves of 2023,

⁹ See *supra* note 5.

¹⁰ Federal Independent Dispute Resolution Process Guidance for Certified IDR Entities (October 2022), available at: <https://www.cms.gov/files/document/federal-independent-dispute-resolution-guidance-disputing-parties.pdf>.

¹¹ Federal Independent Dispute Resolution Process Guidance for Disputing Parties (October 2022), available at: <https://www.cms.gov/files/document/federal-independent-dispute-resolution-guidance-disputing-parties.pdf>.

¹² Technical Assistance for Certified Independent Dispute Resolution Entities (August 2022), available at: <https://www.cms.gov/files/document/ta-certified-independent-dispute-resolution-entities-august-2022.pdf>.

22% of all closed disputes were determined ineligible for the Federal IDR process. The high volume of disputes and the complexity of making eligibility determinations remained a challenge throughout 2023.

The Departments have proposed additional policy and operational improvements through proposed rulemaking to improve the process for determining the eligibility of disputes and ultimately increase the speed with which certified IDR entities render payment determinations.¹³

Results of Payment Determinations

Certified IDR entities rendered payment determinations in 125,478 disputes from July 1, 2023 - December 31, 2023. Emergency department services made up the majority (59%) of payment determinations and radiology services made up 14% of payment determinations, similar to the first six months of 2023. Providers, facilities, or air ambulance providers were the prevailing party in approximately 82% of payment determinations. Health plans and issuers were the prevailing parties in approximately 18% of payment determinations. There were fewer default decisions in the last six months of 2023 (15%) compared to the first six months of 2023 (21%), as both disputing parties submitted their offers and fees on time more frequently.¹⁴ As providers, facilities, and air ambulance service providers lost fewer decisions by default and also won a slightly higher proportion of their non-default determinations, their win rate was slightly higher in the last six months of 2023 (82%), compared to the first six months of 2023 (77%).

The prevailing offer was higher than the qualifying payment amount (QPA)¹⁵ in approximately 88% of payment determinations.¹⁶ The amount of the prevailing offers relative to the QPA varied by specialty and by the cost of the service. The supplemental tables released with this report detail the median prevailing offer amount relative to the QPA, stratified by specialty and cost band of service. The Departments note that smaller-dollar items and services had higher prevailing offers expressed as a percent of the QPA, partly because a small dollar difference translates into a large percentage difference.

Given that providers, facilities, or provider of air ambulance service providers prevailed in the majority (82%) of payment determinations during this period, the median prevailing offer is often the offer from the provider, facility, or provider of air ambulance services. While health plans and issuers often

¹³ Federal Independent Dispute Resolution Operations, 88 FR 75744 (November 3, 2023), <https://www.federalregister.gov/documents/2023/11/03/2023-23716/federal-independent-dispute-resolution-operations>.

¹⁴ If one party failed to submit an offer or pay their fees, and the other party submitted an offer and paid their fees, the certified IDR entity must rule in favor of the party that submitted an offer and paid their fees. Please refer to Section 5.4 of Federal IDR Process Guidance for Certified IDR Entities, available at: <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/federal-independent-dispute-resolution-process-guidance-for-certified-idr-entities.pdf>.

¹⁵ On August 24, 2023, the U.S. District Court for the Eastern District of Texas (district court) issued an opinion and order in *Tex. Med. Ass'n, et al. v. U.S. Dep't of Health and Human Servs.*, Case No. 6:22-cv-450-JDK (*TMA III*), vacating certain portions of 45 CFR 149.130 and 149.140, 26 CFR 54.9816-6T and 54.9817-1T, 29 CFR 2590.716-6 and 2590.717-1. The district court also vacated 5 CFR 890.114(a), insofar as it requires compliance with the vacated regulations and guidance. Please refer to FAQs about Consolidated Appropriations Act, 2021 Implementation Part 62, available at <https://www.cms.gov/files/document/faqs-part-62.pdf> and FAQs about Consolidated Appropriations Act, 2021 Implementation Part 67, available at <https://www.cms.gov/files/document/faqs-part-67.pdf>.

¹⁶ This figure was calculated by dividing the number of payment determinations made in the last six months of 2023 where the prevailing offer was greater than the QPA by the number of payment determinations made in the last six months of 2023 where both the prevailing offer and QPA were reported.

benchmarked their offers to the QPA, providers, facilities, and air ambulance service providers often benchmarked their offers to past OON payment amounts with the disputing plan or issuers and past in-network rates with either the disputing plan or issuer, or with a different plan or issuer in the same state.

Conclusion

Although 2023 was characterized by a large volume of disputes and substantial complexity in determining whether disputes were eligible for the Federal IDR process, 2023 is also characterized by changes made by the Departments and IDREs to account for the large volume and the Departments anticipate that the ongoing technical and operational improvements to the Federal IDR process, along with the increasing capacity of certified IDR entities, will continue to increase efficiency of the Federal IDR process. In addition to the short-term improvements, the Departments have proposed additional policy and operational improvements that, if finalized, would further improve the process for determining the eligibility of disputes and ultimately increase the speed with which certified IDR entities render payment determinations. The Departments are committed to helping certified IDR entities and disputing parties obtain resolution on disputes as expeditiously as possible and to promoting efficiency and transparency in the Federal IDR process.



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