NAFEC
National Association of
FREESTANDING
Emergency Centers

The Honorable Chiquita Brooks La-Sure
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Dr. Ellen Montz
Deputy Administrator and Director
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201

Re: "Cooling-Off Period" Enforcement in the IDR Process

July 11, 2024

Dear Administrator Brooks La-Sure and Deputy Administrator Montz:

On behalf of our members, the National Association of Freestanding Emergency Centers (NAFEC) wishes to bring attention to an issue that has recently arisen regarding enforcement of the "cooling-off period" within the No Surprises Act (NSA) independent dispute resolution (IDR) process. Several of our members emailed the Centers for Medicare and Medicaid Services (CMS) back in March and April with concerns and have yet to receive a response. We are hopeful we can work with your team to resolve outstanding questions and receive clarity around the cooling-off periods.

As you know, the "cooling-off period" was included in the Interim Final Rule Part 2 of the NSA implementing regulations. A 90-day "cooling-off period" occurs when a certified independent dispute resolution (IDR) entity makes a determination, and the initiating party may not submit a subsequent IDR process claim involving the same payer and same or similar item or service. A subsequent submission is permitted for the same or similar items or services if the end of the open negotiation period occurs during the 90-calendar-day cooling-off period. For these items

or services, either party must submit the Notice of IDR Initiation within 30 business days following the end of the cooling off period, as opposed to the standard 4-business-day period following the end of the open negotiation period. [1]

Our understanding of this complex process is that the disputing party, which is typically the provider due to the nature of the process, cannot initiate a dispute within the 90-day period from the determination letter. Open negotiations must continue to be filed within the 30-day period of the initial payment, and after the 90-day period ends, there is a deadline of 30 business days instead of the original 4-day period. However, a provider can batch disputes that fall within the 30 business days after the cooling-off period instead of the initial payment date. **We are eager to receive feedback from CMS to confirm if this is an accurate understanding of the process.**

The reason we raise this issue is that our members have begun to receive IDR closures and additional information requests, citing the 90-day cooling-off period. During a previous webinar in November of last year, CMS staff stated that they were not enforcing the cooling-off periods during the backlog that had occurred, and no other information has been given since. **Has CMS begun enforcement? Was there an announcement providing guidance on the process for providers and payers?**

We also wish to receive clarity on the following questions:

- What constitutes "same or similar service? FECs bill for emergency services and submit disputes by individual CPT codes when they are not paid on a bundled payment arrangement and continue to do so after the updated guidance after TMA IV's batching guidelines. FECs mainly utilize several E&M codes for billing emergency room visits (99281-99285). Emergency room visits are unique to each patient, and there are multiple providers under the facility National Provider Identifier (NPI). How will these criteria affect our billable codes?
- CMS defines "bundled items or services" very clearly in the IDR Guidance for Disputing Parties.[2] However, our members have tried to bundle claims recently by tying the bundled payment to the E&M code and adding the additional codes on the claim line by line then received a notice from the CIDRE to resubmit as it was not

[1] Centers for Medicare and Medicaid Services. "Requirements Related to Surprise Billing; Part II." October 7, 2021.
[2] Centers for Medicare and Medicaid Services. "IDR Guidance for Disputing Parties" March 2023. -"Bundled Items or Services In the case of qualified IDR items or services that are billed by a provider, facility, or provider of air ambulance services as part of a bundled payment arrangement, or where a plan makes an initial payment as a bundled payment (or specifies that a notice of denial of payment is made on a bundled payment basis), those qualified items or services may be submitted and considered as part of one payment determination by a certified IDR entity. A bundled arrangement is an arrangement under which a provider, facility, or provider of air ambulance services bills for multiple items or services under a single service code; or a plan makes an initial payment or notice of denial of payment to a provider, facility, or provider of air ambulance services under a single service code that represents multiple items or services (e.g., a DRG). Bundled payment arrangements are subject to the certified IDR entity fee and administrative fee for single determinations."

bundled properly and indicates that "bundled" applies to certain health plans that choose a DRG-based reimbursement policy.[3] It appears one of the CIDRES only accepts bundled payments if they are submitted as a DRG, which is not the guidance or definition around bundled payments.

  - DRG-based reimbursement is inappropriate for FECs, as our providers exclusively provide outpatient services and DRGs are used for inpatient services. This reimbursement policy is based on the principal diagnosis, whereas emergency providers must treat and diagnose the patient based on symptoms, and there is no primary diagnosis in place when the patient arrives for emergency care. The outcome of the treatment and principal diagnosis do not accurately reflect the presenting symptoms and clinical concerns/differential diagnosis that were evaluated during the visit. Also, DRG codes have hundreds of grouped diagnoses under one broad main diagnosis code. For example: **DRG 154: Other ear, nose, mouth and throat diagnoses with mcc** encompasses Swimmer's ear, bilateral, benign neoplasm of tonsil, mastoiditis in infectious and parasitic diseases, and conductive hearing loss among hundreds of others under this DRG code. How are broad diagnosis under the same DRG code considered the same or similar service as it relates to the cooling off period? This means if the patients came in with any of these four reasons, they would be considered same or similar service because they would be grouped under the same DRG code, and we would have to wait to file a dispute if we had a determination under that DRG code.

- Initiations sit with the certified IDR entities (CIDREs) for a prolonged period, and providers continue to receive payment determinations for disputes filed over a year ago. Does the cooling-off period reset with every determination coming in daily? If the cooling-off period does reset on each new determination, there is likely not a date in the foreseeable future that some of our members can continue to initiate new disputes.
- Are the departments willing to give initiating parties any leniency for initiations during the cooling-off period, given the number of disputes filed during the portal reopening? Certain high-volume payers and the CIDREs' pending determination backlog will tremendously affect the ability of providers to initiate the Federal IDR process and not allow providers prompt and fair reimbursement.
- Can payers contest final payment determinations or refuse payment, citing the cooling-off period? Are the determinations binding and the cooling-off period not valid if it was not brought up prior to the determination?

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[3] Response from CIDRE (FHAS): *"The dispute line items were determined to be not eligible for review for the following reason: The service(s) provided were bundled incorrectly for one of the following reasons: • All items and/ or services being disputed were not submitted within CMS as component items; • The non-initiating party only processes bundled disputes for inpatient claims (i.e. DRGs). If you are unable to identify the reason for this dispute being incorrectly bundled, you may reach out to IDRE@fhas.com and provide proof of correct bundling, if applicable."*

- Due to the portal closure and initiation backlog, some payers do not submit payments and offers within the deadline, resulting in default determinations. Are these “default determinations” also part of the cooling-off period?
- If the CIDRE deems an initiation ineligible and closes it, citing the cooling-off period, are any fees acquired by the initiation? Can providers refile once the cooling-off period has ended?
- What constitutes “same parties” the plan’s group numbers, different self-insured plans, or by the third-party administrator?”

We want to thank CMS for its work on implementing the NSA and appreciate the ongoing dialogue we have had with your team to address this complicated process. We would welcome the opportunity to meet with CMS to further discuss the issue we’ve highlighted regarding the NSA cooling-off period at your earliest convenience.

We hope to continue to be a resource to your team. If you have any questions, please reach out to aconnell@nafeconline.org or 512.569.4405.

Sincerely,

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