AMERICAN PSYCHIATRIC ASSOCIATION

800 Maine Avenue, S.W.
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December 6, 2021

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

The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Re: Concerns with Interim Final Rule Requirements Related to Surprise Billing: Part II implementing the No Surprises Act (NSA)

Dear Secretaries Yellen, Walsh and Becerra:

The American Psychiatric Association (APA), the national medical specialty society representing over 37,400 psychiatric physicians who treat mental health and substance use disorders (MH/SUD), would like to take the opportunity to urge you to reconsider the requirements in the Interim Final Rule (IFR), entitled "Requirements Related to Surprise Billing; Part II," 86 Fed. Reg. 55,980 (Oct. 7, 2021), implementing the No Surprises Act (NSA) so that it conforms to the NSA's statutory language and provides a balanced approach for resolving payment disputes. While APA commends efforts to protect consumers from surprise billing, taking them out of the middle of payment disputes between payors and providers, we are concerned that the IFR's process for resolving disputed claims directs Independent Dispute Resolution (IDR) entities to consider the qualifying payment amount (QPA) a rebuttable presumptive reasonable payment for out-of-network physicians engaging in the IDR process, and in turn, places a thumb on the scale in favor of health insurers in contract negotiations. We are concerned that this skewed IDR process will restrict psychiatric physicians' ability to

make their case for a reasonable out of network payment, remove a remaining incentive for insurers to negotiate fair contracts with physicians and further constrict access to MH/SUD care, at a time when demand for psychiatric inpatient services is rising and there is a growing shortage of psychiatrists.

To mitigate these impacts, we urge you to revise the most recent IFR to conform with the NSA's statutory language to allow an IDR entity the discretion to consider all the factors enumerated in the No Surprises Act to determine a fair out-of-network payment to physicians, without creating a rebuttable presumption that directs an IDR entity to consider the offer closest to the QPA as the appropriate payment amount.

The COVID-19 pandemic has further exacerbated mental health conditions, including substance use disorders. Earlier this year, the Centers for Disease Control and Prevention reported a record-breaking 81,230 drug overdoses during the previous 12-month period ending in May 2020. This represents an eighteen percent increase in drug overdose deaths over the previous 12-month period. The Kaiser Family Foundation has reported that during the pandemic, about four in ten adults in the United States have reported experiencing anxiety or depression -- an increase from one in ten individuals during the previous year. Suicide is the 10th leading cause of death. In 2019, 12 million Americans had serious thoughts of suicide and 1.379 million Americans attempted suicide. Despite progress in the distribution of COVID-19 vaccines and the inoculation of increasing numbers of individuals, social isolation and the economic repercussions caused by the pandemic will continue to compound the mental health challenges for individuals across the country.

Many communities across the United States lack a comprehensive continuum of care that includes treatment services shown to improve outcomes for diverse populations. Reduced access is reflected in emergency department overcrowding, waiting lists for acute care, and patients not being admitted or being discharged too early. In addition, a persistent shortage of psychiatrists and other mental health professionals contributes to the access problem, particularly in rural areas. According to the Health Resources and Services Administration[1] by 2030 the supply of adult psychiatrists is expected to decrease by 20% and the demand for their services is expected to increase by 3% and possibly more, given recent trends as a result of the pandemic. Simply replacing psychiatrists with other healthcare professionals such as nurse practitioners or physician assistants cannot provide the expertise and level of care provided by a psychiatric doctor, particularly for patients suffering serious mental illness.

The statutory language of the No Surprises Act establishes an IDR process to determine out-of-network rates for specified services following an initial payment and an open negotiation period.[2] By statute, an IDR entity is required to choose between the offer submitted by the provider/facility and the one submitted by the plan/issuer.[3] The statute mandates that, in making its payment determination, the IDR entity "shall consider":

- Median in-network rates
- Provider training and quality of outcomes

- Market share of parties
- Patient acuity or complexity of services
- In the case that a provider is a facility: teaching status, case mix, and scope of services
- Demonstrations of previous good faith efforts to negotiate in-network rates
- Prior contract history between the two parties over the previous four years.

The process laid out in the law expressly directs the certified IDR entity to consider each of these listed factors should they be submitted, capturing the unique circumstance of each billing dispute without causing any single piece of information to be the default one considered.

Unfortunately, the IDR process in the IFR does not reflect the way the law was written. The IFR directs IDR entities to begin with the assumption that the median in-network rate is the appropriate payment amount prior to considering other factors. This directive establishes a de-facto benchmark rate, making the median in-network rate the default factor considered in the IDR process. This approach is contrary to statute, restricts physicians' ability to make their case for a reasonable out-of-network payment and removes a critical remaining incentive for insurers to negotiate fair contracts with physicians and ultimately, will incentivize insurance companies to set artificially low payment rates, narrow provider networks and jeopardize patient access to care – the exact opposite of the goal of the law.

This is of particular concern to APA and its members because psychiatrists are already paid 24% less than medical/surgical physicians for the same unit of work, a reality that discourages many psychiatrists from joining or remaining in networks.[4] Reimbursement for psychiatric inpatient services typically covers only half of the total cost of care.[5] Consequently, the number of acute psychiatric inpatient beds has decreased steadily over the past decade.[6] Providing psychiatric inpatient care to patients with acute psychiatric symptoms proves challenging given the workforce needs, the shrinking number of hospital beds and the limited availability of community services which has only worsened during the COVID pandemic. If reimbursement rates for psychiatric hospitalizations, including payments to psychiatrists for clinical care, do not cover the cost of delivered care, this treatment option may cease to be available, and less appropriate settings, such as correctional facilities, may become the alternative "treatment setting" for individuals with severe mental illness.

Our concerns regarding a skewed IDR process undermining physicians' negotiating power and incentivizing payers to drive down reimbursement rates is not without foundation. We understand from our colleagues in the medical community that payors have begun to notify physicians that due to the NSA rule, they will be cutting median in network rates and are inquiring whether physicians' practices are willing to take a cut from their contract rates currently in effect.

We urge you to revise the most recent IFR to conform with the NSA's statutory language to allow an IDR entity the discretion to consider all the factors enumerated in the No Surprises Act to determine a fair

out-of-network payment to physicians, without creating a rebuttable presumption that directs an IDR entity to consider the offer closest to the QPA as the appropriate payment amount.

Thank you for your consideration. If you have any questions, please contact Maureen Maguire, (MMaguire@psych.org), Associate Director.

Sincerely,

Saul M. Levin, M.D., M.P.A., FRCP-E, FRCPsych
CEO and Medical Director