

The No Surprises Act: A District Court's Decision Results in Federal IDR Outage

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Although the No Surprises Act was signed into law almost three years ago and has been in effect for the past year and a half, there have been numerous delays in implementation and execution due to the complexity of elements of the rules. The Federal Independent Dispute Resolution (IDR) Process is no stranger to ongoing litigation disputes, leaving providers and payors unsure of the process.

The most recent hiccup occurred on August 3, 2023, when United States District Judge Jeremy D. Kernodle issued an [order](#) vacating the IDR administrative fee increase from \$50 to \$350.

As background on the rationale for the administrative fee increase, a recent [CMS update](#) reported that 334,828 IDR disputes were initiated from April 15, 2022 to March 31, 2023 – nearly 14 times higher than the projected estimate. 106,615 disputes have been closed out by certified IDR entities, and approximately 37% were found to be ineligible for the IDR process. In response, the Departments of Health & Human Services (HHS), Labor, and the Treasury (collectively, the Departments) made some significant changes to the process:

1. The form to initiate IDR was updated to include additional data to help reviewers more quickly identify the items and services under dispute;
2. The instructions request that the parties attach additional supporting documentation; and
3. The Departments issued an amendment to increase the nonrefundable administrative fee for IDR from \$50 to \$350.

As a result of the Eastern District of Texas's decision, HHS had to temporarily suspend the Federal IDR process, including the ability to initiate new disputes, until the Departments can provide additional instruction, causing more headaches for providers and payors alike.

Before the court, the Texas Medical Association argued that the Departments “dramatically increased the administrative fee for participating in the arbitration process, rendering the process cost prohibitive for providers with small-value claims” and contended the Department’s actions violated the Administrative Procedure Act because the fee increase was made without notice and comment, and are arbitrary and capricious. The court agreed and vacated the fee increase. As a result, the Departments are back to the drawing board to determine how to reduce the number of IDR disputes.

The lack of access to the IDR process (due to the overwhelming high demand, delays, and temporary closures) impacts payors and providers who are out of network with each other and unable to agree on the cost of out of network care. Payors are expected to pay for services provided to its members that it did not contract for with providers it has not credentialed or approved. In turn, providers are expected to provide care without any guarantee of how much they will be reimbursed or when they will be paid. While legislatures hoped this would encourage payors and providers to contract with each other and go in network, CMS’s update demonstrates that the misalignment here has proven to be much greater than expected and does not appear to be going away any time soon.

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