

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ASSOCIATION OF AIR MEDICAL SERVICES,

*Plaintiff,*

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

*Defendants.*

Civ. No. 1:21-cv-3031 (RJL)

Consolidated with  
No. 1:21-cv-3231 (RJL)

**PLAINTIFF’S NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiff Association of Air Medical Services (AAMS) respectfully submits this Notice to inform the Court of the new regulatory guidance from the Centers for Medicare & Medicaid Services (CMS) instructing independent dispute resolution (IDR) entities to apply the presumption in favor of the qualified payment amount (QPA) to air ambulance providers only, notwithstanding the decision in *Texas Medical Association v. U.S. Department of Health and Human Services*, No. 6:21-cv-00425 (*TMA*) (Dkt. 53-1) that vacated the offending provisions of 45 C.F.R. § 149.510. The regulatory guidance operationalizes the Government’s litigation position in this case, which arbitrarily singles out air ambulance providers and treats them differently from all other providers under Interim Final Rule (IFR) Part II. The regulatory guidance confirms what is apparent: the Government has no intention of making a legal or policy change that resolves the issues before this Court and stops IFR Part II from harming AAMS members.

CMS introduced the regulatory guidance on April 8, 2022, in a public webinar entitled “An Overview of the Independent Dispute Resolution Process for Disputing Parties.” During the webi-

nar, CMS presented slides that directed IDR entities to apply the QPA presumption to *air ambulance services only*. Specifically, the slides stated: “For *air ambulance qualified IDR services*, the certified IDR entity should consider *credible information* submitted by either party in relation to the offer to the extent that the information *clearly demonstrates* that the QPA is *materially different* from the appropriate OON rate for the qualified air ambulance service, based on the additional circumstances.” (screenshot of excerpt of slides attached at Exhibit 1) (emphasis in original). The slides also stated that the “online IDR portal is planned to launch the week of April 11th,” which means that the IDR entities will begin applying the QPA presumption to AAMS members immediately. *Id.* CMS apparently intends to publish written guidance in addition to the webinar.

The Government is obviously not applying *TMA* to AAMS members as a policy matter. If the Government was considering a policy of applying *TMA* to AAMS members, then it would not have issued contrary regulatory guidance a mere two weeks before the *TMA* appeal deadline of April 25, 2022. For corroboration, counsel for AAMS asked counsel for the Government if CMS would consider reconsider its policy of applying *TMA* to all providers except air ambulance providers. Counsel for the Government responded that CMS considered AAMS’ request but decided that it would adhere to its current policy.<sup>1</sup>

IFR Parts I and II are harming AAMS members. AAMS members will not receive relief through a voluntary legal or policy change; the Government has doubled down on its litigation position by issuing the regulatory guidance and delayed the anticipated publication of a final rule from May 2022 to “early summer of 2022.” AAMS therefore renews its request that the Court remedy this inequity by vacating the offending provisions of IFR Parts I and II now.

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<sup>1</sup> Counsel for the Government stated that the Government takes no position on this filing.

Dated: April 12, 2022

Respectfully submitted,

/s/ Brian Stimson

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# EXHIBIT 1

# Departments Announcements

- On February 23, 2022, the United States District Court for the Eastern District of Texas, in the case of Texas Medical Ass'n, et al. v. United States Department of Health and Human Services, et al., Case No. 6:21-cv-425 (E.D. Tex.), invalidated portions of an interim final rule, Requirements Related to Surprise Billing; Part II, 86 Fed. Reg. 55,980 (Oct. 7, 2021) (the "Rule"), issued by the Departments of Health and Human Services, Labor, and the Treasury (the "Departments") governing aspects of the federal independent dispute resolution (IDR) process under the No Surprises Act.
  - The Departments made an announcement on February 28, 2022 on steps being taken to address the court's decision
- On April 5, 2022 the Departments announced that the online IDR portal is planned to launch the week of April 11th.

# Factors and Information Certified IDR Entities Must Consider

In determining which offer to select, the certified IDR entity must consider:

- The QPA(s) for the applicable year for the qualified IDR item or service, and
- Additional credible information relating to the offers submitted by the parties, including information that was requested by the certified IDR entity, information submitted by the parties that does not contain prohibited factors, and information submitted by the parties that relates to the additional circumstances.

# Selection of Offer: Factors and Information Certified IDR Entities Must Consider

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**It is not the role of the certified IDR entity** to determine whether the QPA has been calculated correctly by the plan, make determinations of medical necessity, or to review denials of coverage.

**NOTE:** If the certified IDR entity or a party believes that the QPA has not been calculated correctly, the certified IDR entity or party is encouraged to notify the Departments through the Federal IDR portal, and the Departments may take action regarding the QPA's calculation.

# Additional Information that Relates to Certain Circumstances

Parties may submit additional information regarding any of these circumstances and any information that relates to the offer of either party or that is requested by the certified IDR entity (that is not otherwise prohibited).

## Non-Air Ambulance:

1. **The level of training, experience, and quality and outcomes measurements** of the provider or facility that furnished the qualified IDR item or service.
2. **The market share** held by the provider or facility or that of the plan in the geographic region in which the qualified IDR item or service was provided.
3. **The acuity of the participant, beneficiary, or enrollee** receiving the qualified IDR item or service, **or the complexity of furnishing** the qualified IDR item or service to the participant, beneficiary, or enrollee.
4. **The teaching status, case mix, and scope of services** of the facility that furnished the qualified IDR item or service, if applicable.
5. **Demonstration of good faith efforts (or lack thereof) made by the provider or facility or the plan to enter into network agreements** with each other, and, if applicable, **contracted rates** between the provider or facility, as applicable, and the plan during the previous 4 plan years.

## Air Ambulance:

1. **The quality and outcomes measurements** of the provider of air ambulance services that furnished the services.
2. **The acuity of the condition of the participant, beneficiary, or enrollee** receiving the services, **or the complexity of providing services** to the participant, beneficiary, or enrollee.
3. **The level of training, experience, and quality of medical personnel** that furnished the air ambulance services.
4. **The air ambulance vehicle type, including the clinical capability level of such vehicle.**
5. **The population density of the point of pick-up** for the air ambulance of the participant, beneficiary, or enrollee (such as urban, suburban, rural, or frontier).
6. **Demonstrations of good faith efforts (or lack of thereof) made by the OON provider of air ambulance services or the plan to enter into network agreements, as well as contracted rates** between the provider and the plan during the previous 4 plan years.

When making a payment determination, the certified IDR entity must not consider the following factors:

- Usual and customary charges;
- The amount that would have been billed by the provider, facility, or provider of air ambulance services with respect to the qualified IDR item or service had the balance billing provisions of applicable regulations not applied; or
- The payment or reimbursement rate for items and services furnished by the provider, facility, or provider of air ambulance services payable by a public payor.

# Consideration of Information Requested by the Certified IDR Entity or Provided by Either Party for Non-Air Ambulance Qualified IDR Items and Services

The certified IDR entity must consider credible information submitted by the parties. Three general rules govern the consideration of additional information:

- **First**, the certified IDR entity must consider only information that it considers credible. Information is considered credible if, upon critical analysis, the information is worthy of belief and is trustworthy.
- **Second**, the certified IDR entity must consider only information that relates to an offer of either party.
- **Third**, the certified IDR entity must not consider information on prohibited factors.

# Consideration of Information Requested by the Certified IDR Entity or Provided by Either Party for Air Ambulance Qualified IDR Services

For **air ambulance qualified IDR services**, the certified IDR entity should consider **credible information** submitted by either party in relation to the offer to the extent that the information **clearly demonstrates** that the QPA is **materially different** from the appropriate OON rate for the qualified air ambulance service, based on the additional circumstances.

# Where to go for Help

- Federal IDR Help Desk: [FederalIDRQuestions@cms.hhs.gov](mailto:FederalIDRQuestions@cms.hhs.gov)
- Payment Help: Additional information about making payments on pay.gov can be found at <https://www.pay.gov/WebHelp/HTML/payment.html>
- For pay.gov customer service, concerns, or technical issues, contact pay.gov by telephone at 1-800-624-1373 (Toll free, Option #2) or by email at [pay.gov.clev@clev.frb.org](mailto:pay.gov.clev@clev.frb.org)
- For inquiries related to Vendor Management: [Vendor\\_Management@cms.hhs.gov](mailto:Vendor_Management@cms.hhs.gov)
- No Surprises Help Desk: 1-800-985-3059