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NSA INDEPENDENT DISPUTE RESOLUTION PROCESS – THE PARTIES' FULL PARTICIPATION MATTERS

By NAIRO

Under the No Surprises Act ("NSA") if the provider and the health plan do not agree on the payment or non-payment of the services, then Congress included an independent dispute resolution process that, in general, mimics "baseball style" arbitration.[1] The Government decided to use a dispute resolution process that is swift and efficient when it decided to use "baseball style" arbitration, after the parties participate in mandatory open negotiation.[2]

However, the process's success depends on the parties ***fully*** participating in both the open negotiation and the dispute resolution process. Full participation means both parties show up and both parties are very forthcoming on the facts around the dispute and the evidence to support the facts. Without this full participation, the process suffers and the outcomes are skewed. Why is this true and what does it mean to "fully participate"?

Engage in Meaningful Open Negotiation

The success of the No Surprises Act (NSA) process depends on meaningful participation during the mandatory open negotiation period, which provides both parties an opportunity to communicate directly, exchange information, identify and address potential errors, and understand, challenge, and respond to each other's positions. When used in good faith, open negotiation can resolve disputes without formal IDR proceedings or, if resolution is not reached, ensure the dispute enters the Federal IDR process with a clearer record and more fully developed positions from both sides.

When the parties only engage in open negotiation in a perfunctory manner, or they do not engage at all, they often proceed to IDR with arguments that fail to address the issues raised by the opposing party.[3] The result is a less complete evidentiary record for the IDRE and a dispute resolution process that is less effective than Congress intended. Meaningful participation in open negotiation helps ensure that only disputes that cannot be resolved through direct engagement proceed to formal arbitration, while also improving the quality of the record and submissions presented during the Federal IDR process.

Provide Dispute-Specific Evidence and Arguments

Once the dispute is initiated, the parties should ensure that any arguments and supporting documentation are directly relevant to the specific facts and circumstances of the dispute. Irrelevant,

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[1] Congress rejected the approach advocated by some of using a benchmark to determine the payment by the Health Plan.
[2] Two key traits of "baseball style" arbitration are: (1) it is a decision on the evidence and arguments made by the parties in their submissions only – no "back and forth" is allowed; and (2) the decision must select one offer or the other- there is no "splitting the baby" or refusing to accept either offer. The IDRE is bound by law to select one offer or the other and cannot reduce it, increase it or reject both.
[3] Unless the parties choose to share it, the parties are not privy to each other's submissions to the IDRE. The IDRE is not required by law to share the submissions, and many parties consider their submission to contain proprietary information.

unsupported or unhelpful information detracts from and undermines what is important. As a best practice, parties should consider whether their evidence specifically advances their position in the dispute rather than relying on statements or materials that could be applied broadly to any case.

Support Arguments with Reliable Evidence

Full participation by the parties means supporting any argument made with evidence that proves the point. Mere assertions will rarely be given any weight by the IDRE. Parties should only advance arguments for which they possess sufficient supporting evidence. IDREs cannot make decisions based on facts that are not in the evidence provided.

Submit Complete Information Early and Respond to Requests for Information

The parties should make their arguments and provide their evidence at the earliest possible time in the dispute. In particular, parties should submit all information necessary to support an eligibility determination at the time of dispute initiation whenever possible. Providing complete, reliable, and dispute-specific information at the outset helps ensure that threshold issues can be resolved efficiently and reduces the risk of delays caused by missing or incomplete documentation. IDREs are permitted by law, *but not required by law*, to conduct outreach to obtain evidence not provided.[4] Early submission of all relevant evidence also gives the IDRE sufficient time to review the record, conduct any outreach it determines is necessary or helpful, and consider any responses received while keeping the dispute on track for completion within the applicable timeframe.

Incomplete information is not useful to the IDRE.[5] Providing no information or partial information is not full participation. Under the new Final Rule published June 4, 2026, the IDRE can treat a dispute as withdrawn if unable to make an eligibility decision due to necessary information not being provided by the parties in response to a request for additional information by the IDRE.[6] Where the record remains incomplete and the information necessary to determine eligibility is not fully provided, the IDRE may be unable to proceed and may treat the dispute as withdrawn or the IDRE, in weighing only the information available to it, may make a determination that a party asserts is incorrect because the party has information that was simply not provided timely to the IDRE.

Respond to Offer & Fee Requests

Parties should not ignore requests for offers because they believe the dispute is ineligible. Instead, parties should clearly present their eligibility arguments and provide supporting documentation. If the IDRE ultimately determines that the dispute is eligible, the objecting party should be prepared to submit any additional evidence and its offer while preserving its eligibility objection for the record.

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[4] As of the writing of this paper, the Regulation was amended by a recent Final Rule effective August 3, 2026, which makes it clear that the parties should provide "an explanation and documentation to support its assertion" when objecting to a dispute, and should do so "within 3 business days after the date of IDR initiation." 29 CFR 2590.716-8(b)(2)(iii) & (b)(2)(iii)(A)(8). The Initiating party is to attest that the items or services are qualified for the IDR process and are eligible "and the basis for the attestation." Id. at (b)(2)(ii)(A)(11).

[5] For example, if either party is claiming a "cooling off' period is relevant then ALL the information needed to prove all the elements (same IP and NIP, same service code, appropriate dates) must be provided to the IDRE. If a party only provides proof on a few of the elements, it hinders the ability of the IDRE to make a fully-informed decision and it forces assumptions.

[6] 29 CFR 2590.716-8(c)(3)(ii)(C).

Parties should ensure that all required fees are paid, and appropriate offers are submitted within the applicable deadlines. Timely payment and offer submission are critical elements of participation in the Federal IDR process. If only one party timely pays the required fees and submits its offer, the IDRE is generally required to select that party's offer by default. Conversely, if neither party timely pays the required fees and submits an offer, the IDRE must treat the dispute as withdrawn.[7]

Submit a Good-Faith Offer

Parties should make offers that reflect their good-faith assessment of the value of the disputed items or services. Full participation includes submitting an offer so that, if the IDRE determines the dispute is eligible, it can evaluate each party's position regarding the appropriate payment amount. Some arbitrators may take the view that if a party makes a $0 offer or a nominal value offer it is communicating that it does not believe the items or services at issue have any value or have nominal value. The IDRE must choose between the two offers and may not compromise between the offers. Where a party believes a prior payment fully satisfies its obligation, that position is generally better reflected by an offer equal to the amount already paid rather than a $0 offer because that party will deduct what has already been paid from the award amount.

In Conclusion: A swift and efficient process for resolving disagreements over the value of out-of-network services that are the subject of the No Surprises Act can work very well, but only if the parties fully participate in the process.

About NAIRO

The National Association of Independent Review Organizations (NAIRO) is an industry trade association formed in 2000. We are comprised of URAC accredited Independent Review Organizations (IROs), Health Utilization Management (HUM), and Workers' Compensation Utilization Management (WCUM) entities. Our mission is to protect the integrity of the medical peer review, utilization review, and independent dispute resolution (IDR) processes.

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[7] 29 CFR 2590.716-8(c)(3)(ii)(D).