Illinois Health and Hospital Association

August 12, 2021

Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: No Surprises Act, Notice and Consent Documents and Model Disclosure Notice (CMS-9909-IFC)

Dear Secretary Becerra and Administrator Brooks-LaSure:

On behalf of our more than 200 member hospitals and nearly 40 health systems, the Illinois Health and Hospital Association (IHA) appreciates the opportunity to comment on the Standard Notice and Consent Documents Under the No Surprises Act (Consent) and the Model Disclosure Notice Regarding Patient Protections Against Surprise Billing (Notice) provided by the Departments of Health and Human Services, Labor, Treasury, and Office of Personnel Management (the Departments) via the Requirements Related to Surprise Billing; Part I final rule with comment period (IFC). IHA values the opportunity to engage the Departments to make these documents as clear and effective as possible as the healthcare community implements the No Surprises Act. In general, we urge the Departments to use consistent language throughout these documents and to ensure these documents mirror the required content and guidelines described in the IFC.

Standard Notice and Consent Documents Under the No Surprises Act (Consent)
IHA appreciates and agrees with the intent of the No Surprises Act: to provide greater consumer protections around surprise balance billing. To that end, we urge the Departments to explicitly and consistently use the term "surprise balance billing" throughout related documents and notices. In the Consent, the phrases "surprise billing" and "unexpected medical bills" are used interchangeably. Balance billing is the practice that, when done in the circumstances covered by the rule, results in a "surprise" bill. However, there is no use of the phrase "balance billing." Thus, we suggest the Departments amend the Consent, using the phrase "surprise balance

billing" throughout. This phrase is more specific and speaks directly to the protections afforded by the No Surprises Act. "Surprise billing" and "unexpected medical bills" are simply too vague and may be the opinion of patients for situations that fall outside of the protections afforded by the No Surprises Act. As a result, those phrases may confuse patients and inundate providers and insurers with unwarranted allegations that their bills violate the No Surprises Act.

Similarly, the third page of the Consent describes the protections provided by the No Surprises Act as both "federal consumer protections" and "consumer billing protections under federal law." IHA suggests the Departments use one consistent phrase. Additionally, we urge the Departments to again be specific about the protections afforded by the No Surprises Act, i.e., protections specific to "surprise **balance** billing." We also question the necessity of the statement "I'm giving up some consumer billing protections under federal law" as it is not a required statement under the IFC. While we do not argue the substance of this statement, we do question the tone and departure from the explicitly outlined and required statements and elements in the IFC. We suggest the Departments remain consistent, including only those phrases required under the IFC to mitigate potential confusion. Alternatively, if the Departments want this statement included, we suggest they propose such a statement through the rulemaking process. Such specificity is important because providers must modify these documents to be specific to individual consumer interactions, and we want to ensure that our members have the resources and instructions necessary to fully comply with the law.

Additionally, we request that the Departments add language to the Consent indicating that the total cost estimate provided by the facility or provider does not represent a contract or binding amount (149.420(d)(2)). As acknowledged in the IFC, circumstances may arise causing the final cost to differ from the estimate. Relatedly, on the second page the Departments write, "If your plan covers the item or services you're getting, federal law protects you from higher bills." While this statement may be true, it is also possible that utilizing the services of an out-of-network provider will result in lower patient financial obligations than if a consumer went to an in-network provider, particularly if the consumer has not yet met their deductible. A more accurate statement may be, "If your health plan covers the item or services you're getting, federal law protects you from paying surprise balance bills for items and services received."

We also question references to provider choice on the first page of the notice document. The text box labeled "IMPORTANT" contains the following sentence: "You aren't required to sign this form and shouldn't sign it if you didn't have a choice of health care provider when you received care." The next section contains a similar sentence: "You shouldn't sign this form if you didn't have a choice of providers when receiving care." IHA understands that the intent of the No Surprises Act is to protect consumers when they cannot choose their health care provider. However, the Consent should only be presented to consumers for services covered by the No Surprises Act and furnished by an out-of-network provider when an in-network provider is available at the same facility. In other words, these statements are unnecessary because consumers that do not have the opportunity to solicit health care from an in-network

provider should never need to view nor sign the Consent. Finally, we would argue that patients, especially within hospitals, cannot "choose" every provider that supports their care. As a result, the statements imply a right not supported by the No Surprises Act.

Finally, at the bottom of page 3, the Departments write, "Take a picture and/or keep a copy of this form." Consumers will likely receive the standard notice and consent documents while in a facility or provider office. Given the capabilities of most cell phones to capture images, videos, and photos and, in moments, upload them to the internet, many facilities and provider offices have "no personal cell phone" policies to protect patient privacy. We suggest the Departments modify this phrase so as not to inadvertently challenge providers' privacy policies.

Model Disclosure Notice Regarding Patient Protections Against Surprise Billing (Notice)
IHA thanks the Departments for creating a model Notice, as many of our members expressed interest in seeing the precise language the Departments expect to see to consider a provider or facility compliant with the disclosure requirements in the IFC. Additionally, we appreciate that the model Notice specifies that the No Surprises Act protects against surprise balancing billing. To that end, we request that the title of the model Notice be consistent with the rest of the document. Instead of "Your Rights and Protections Against Surprise Medical Bills" we urge the Departments to change the title to "Your Rights and Protections Against Surprise Balance Billing." Similar to our comments on the Consent, we believe specificity is important in communicating the protections afforded consumers under the No Surprises Act. Moreover, in the first text box of the Notice, we suggest the Departments combine the phrases "surprise billing" and "balance billing" to read "surprise balance billing." Consistency in terminology mitigates confusion when a consumer that may not have high health literacy is reading this disclosure.

We also suggest the Departments describe protections for post-stabilization services as described in the IFC, as this is an expansion of traditional protections under the Emergency Medical Treatment and Labor Act (EMTALA).

At the bottom of the first page of the Notice, the Departments specify providers to which surprise balance billing protections apply. However, the interim final rule is more expansive than this list of providers, stating protections apply to ancillary services *including* services furnished by the listed provider types. IHA urges the Departments to rephrase this section. Revisions might include "This applies to ancillary services, including emergency medicine, anesthesia, pathology, radiology, laboratory, and neonatology services, as well as services furnished by assistant surgeons, hospitalists, or intensivists." Additionally, we note that the description does not mention protections for unexpected urgent services following consumer agreement to the Consent for out-of-network services. We urge the Departments to consider including an explanation of these protections in the Notice.

Finally, on the second page of the model Notice the Departments write that the consumer's health plan generally must "Base what you owe the provider or facility (cost-sharing) on what it would pay an in-network provider or facility and show that amount in your explanation of benefits." Technically, the IFC requires the "plan or issuer" base cost-sharing on the "recognized amount" that is:

(1) An amount determined by an applicable All-Payer Model Agreement under section 1115A of the Social Security Act;
(2) If there is no applicable All-Payer Model Agreement, an amount determined by specified state law; or
(3) If there is no applicable All-Payer Model Agreement or specified state law, the lesser of the amount billed by the provider or facility or the qualified payment amount.

We believe the Departments meant to say that consumers are subject to the same cost-sharing percentage that they would be subject to for an in-network provider (e.g., 20%); however, the phrasing of this particular bullet point does not make that clear. We ask the Departments to revise this explanation to not confuse or mislead the consumer.

Secretary Becerra and Administrator Brooks-LaSure, thank you again for the opportunity to comment on the standard Notice and Consent documents and model Disclosure notice. Please direct questions or comments to Cassie Yarbrough, Senior Director, Medicare Policy, at cyarbrough@team-iha.org or 630-276-5516.

Sincerely,

A.J. Wilhelmi,
President & CEO
Illinois Health and Hospital Association