

## Washington News

### Legislative Update: June 2001

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#### **SPECIALITY DESIGNATION FOR INTERVENTIONAL PAIN PHYSICIANS**

American Society of Interventional Pain Physicians and Arent Fox also have been busy working with the Health Care Financing Administration (HCFA) to establish a specialty designation under the Medicare program for interventional pain physicians. The lack of a Medicare "specialty designation" for interventional pain management has presented a series of problems for effective and efficient access to interventional pain techniques. For example, the lack of a specialty designation has led to inadequate data collection on the use and related costs of interventional pain management procedures. Consequently, the Medicare program is paying for interventional pain physician services at a rate that, in many cases, does not cover the cost of providing those services. Further, the lack of specialty designation means that the practice expense for pain management services is not based solely on the practice expense of interventional pain management practitioners, but on the basis of the (lower) rates for the specialties from which interventional pain physicians are originally trained. Without change, the tremendous costs that interventional pain management physicians must bear in order to safeguard their patients from the potentially life-threatening complications associated with pain management procedures, cannot be sustained.

The carrier actions add to an already acute access problem. Last year, the House Commerce Committee marked-up a provision that would have created a specialty designation for interventional pain physicians. Although that provision was not included in the Medicare Benefits Improvement and Protection Act, the House Commerce Com-

mittee recently confirmed that HCFA (to its credit) will be providing a specialty designation for interventional pain physicians; however, a time line for implementation was not established. Therefore, ASIPP is requesting that Congressional offices contact HCFA by letter encouraging a timely implementation no later than the end of July 2001. At the time of publication, Congressman Ed Whitfield (R-KY) by personal contact with HCFA, and Congressman Sherrod Brown (D-OH), Congresswoman Anne Northup (R-KY), and Congressman Bart Stupak (D-MI) had notified HCFA by letter expressing their support for speedy action on this matter. ASIPP greatly appreciates their continued support and encourages Kentucky, Ohio and Michigan members to contact their offices to pass along our organization's gratitude.

#### **CRNA SUPERVISION RULE DELAYED**

The Health Care Financing Administration (HCFA) has delayed the implementation date for an additional six months of a final rule allowing states to determine whether certified registered nurse anesthetists (CRNA) must be supervised by a physician while providing care to Medicare patients. The rule, which was originally expected to take effect in March, is staunchly opposed by the American Society of Anesthesiologists and the American Medical Association. ASIPP has provided support on this issue as well.

HCFA has stated that it will release a proposal allowing governors to permit the delivery of CRNA services to Medicare beneficiaries without supervision, as well as promising to conduct a study to determine the effect on states of CRNA practices. The study is an issue of interest as the American Association of Nurse Anesthetists has argued that preventing implementation of the rule will negatively impact rural areas.

#### **NEW LEADERSHIP AT HCFA AND MedPAC**

Thomas Scully has been nominated by the Bush Administration to serve as the new administrator for the Health

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Care Financing Administration (HCFA), which administers the Medicare program. Previously, Mr. Scully worked with the former Bush Administration in the Office of Management and Budget and was a partner in the D.C. law firm Patton Boggs. Although the Senate Finance Committee held a confirmation hearing on May 16, at the time of publication, no committee vote had been scheduled. Mr. Scully, however, is expected to be confirmed.

In addition, Secretary Thompson has named Ruben Jose King-Shaw to serve as the Deputy Administrator for HCFA. King-Shaw, who formerly worked with Florida's Agency for Health Care Administration, will work under Thomas Scully as chief operating officer.

Another appointment includes Scott Whitaker, who is a former health policy advisor to Senator Don Nickles (R-OK). Mr. Whitaker has been confirmed for the post of assistant secretary of health and human services for legislation. Mr. Whitaker will serve as the legislative liaison between the Department of Health and Human Services and Capitol Hill and will work to promote the legislative agenda of Secretary Thompson.

Finally, Gail Wilensky has completed her three year term as Chair of the Medicare Payment Advisory Commission (MedPAC) and will be replaced by Glenn Hackbarth, a current member of MedPAC who has served as a health care consultant in the state of Oregon. MedPAC was established in 1997 to provide guidance to Congress on Medicare payment issues. Although Ms. Wilensky hoped to be reappointed, it is reported that her position as a Board member for a number of other profit and non-profit organizations precluded her from another term. Further, there is speculation that Congressman Bill Thomas (R-CA), Chairman of the Ways and Means Committee which has jurisdiction over the Medicare program, supported her replacement as well.

### **PERCUTANEOUS LYSIS OF EPIDURAL ADHESIONS**

A number of Medicare carriers have issued local medical review policies that deny reimbursement for percutaneous lysis of epidural adhesions on the grounds that the procedure is "not considered medically reasonable or necessary" or that the procedure "has not yet been proven effective" or in other words, investigational. To address this problem, ASIPP, through Dr. Laxmaiah Manchikanti, and its Washington D.C. representative Bill Sarraile, contacted the Medicare medical directors in the states of Georgia,

Washington, Colorado and Iowa by letter to advance the merits of reimbursement for this treatment for patients with chronic back pain. The letters argued that (1) the vast majority of Medicare carriers pay for this procedure, serving as a example of their medical necessity and reasonableness; (2) Medicare carriers should not declare a procedure to be investigational when there is medical research that supports its usefulness; (3) the carriers failed to comply with the applicable requirements for creating a local medical review policy (LMRP) on the issue; (4) the LMRPs do not present the "convincing" evidence necessary to support a prohibition on the payment of these services; and (5) scientific literature supports performing the procedure on one day with multiple injections rather than the three day procedure as previously administered, adding to cost effectiveness.

ASIPP and Arent Fox continue to follow this issue, and are hopeful that it will be resolved in a timely and fair manner for patients in need of these services.

### **U.S. SENATE SHAKE-UP**

In a significant development in the political landscape of the 107th Congress, U.S. Senator James Jeffords (VT) announced May 24th that he is leaving the Republican party to become an Independent. He cited recent changes in the dynamics between the GOP leadership and moderates in the party after the election of President Bush, and noting his expectation of future fundamental disagreements with the President's agenda as the reasons for his departure. Senator Jeffords also stated his intention to caucus with the Democrats and support Senator Tom Daschle (D-SD) for Majority Leader, a move that will shift official control of the Senate to Democrats for the first time since 1994. With Jeffords as an Independent, the composition of the Senate now stands at 50 Democrats, 49 Republicans, and 1 Independent.

In recent weeks, the moderate Senator Jeffords — who has frequently broken ranks with Republicans over the course of his political career — attracted the ire of the Republican leadership with his vocal criticism of President Bush's proposed \$1.6 trillion tax cut and his support for a compromise \$1.35 trillion package. Senator Jeffords' insistence on increased funding for education in President Bush's Fiscal Year 2002 budget resulted in a failed compromise and strained relationships between Jeffords and the GOP Senate leadership. In an apparent slight to Jeffords, the White House failed to invite him to a reception honoring a Vermont resident as Teacher of the Year, in addition

to a whispering campaign about the White House withdrawing support for a dairy price support program of critical importance to Vermont. These events, coupled with Jeffords continued dissatisfaction with the GOP's treatment of moderates in the party, reportedly fueled his decision to switch party affiliation. Senator Jeffords' party switch will result in a shift in Senate leadership control to Democrats. Committee chairs will pass to the current ranking Democrats and, as part of the inducement for Senator Jeffords to leave the Republican party, Democrats are likely to confirm Senator Jeffords as Chairman of the Senate Committee on Environment and Public Works.

### **PHYSICIAN ASSISTED SUICIDE LAW**

The state of Oregon is the only state in the nation to enact a physician assisted suicide law. The statute has been quite controversial and has received attention from Senator Don Nickles (R-OK), who introduced the Pain Relief Promotion Act in the 106th Congress, which attempted to modify the Oregon law. Although it is expected that Senator Nickles will not re-introduce this legislation in the 107th Congress, there is the possibility that the Bush Administration will overturn the Oregon law by executive order.

Abroad, the Netherlands became the first country to allow euthanasia under certain circumstances without fear of criminal prosecution. Although public sentiment was generally supportive, thousands protested in opposition to the new law. The bill sponsors stated that the purpose of the new statute is to give doctors the freedom to participate in more frank and honest discussions on the subject without fear of legal repercussions.

### **MEDICAL RESIDENTS PETITION TO OSHA**

On April 30, the Committee of Interns and Residents, representing more than 40,000 members, shared a petition with the Occupational Safety and Health Administration (OSHA) urging the agency to institute safety guidelines for medical interns and residents. The petition suggests adhering to guidelines similar to those established by the state of New York, the only state in the country with such regulations. The petition includes recommendations such as limiting work hours to 80 per week with one day off and a ten hour break between shifts. The petition contends that such safeguards are necessary in order to ensure the delivery of quality patient care to and to protect the physical and emotional needs of medical students.

### **ANTITRUST LEGISLATION**

Congressman Barr (R-GA) has pledged to introduce a new antitrust bill during the 107th Congress that would permit physicians to engage in collective bargaining with health plans. The American Medical Association has listed passage of this proposed bill as one of its top two priorities for this year. Similar legislation was passed by the House of Representatives in the 106th Congress, but opposition in the Senate kept it from becoming law. Introduction of the Barr bill is expected this summer. ASIPP has been a strong supporter of this legislation.

On the state level, a Michigan based health maintenance organization, The Wellness Plan, has agreed upon a collective bargaining plan with the Physicians for Responsible Negotiation (PRN), the labor organization made up of employed physicians and medical residents that was established in 1999 by the AMA following a decision by the National Labor Relations Board permitting their organization. This plan, which applies to 38 physicians who work in several Wellness Plan clinics in Detroit, establishes a joint commission for reviewing medical decisions. This is the first successful collective bargaining plan achieved by the PRN.

### **MEDICARE REFORM**

Chairman Grassley with Senate Finance and Chairman Tauzin with House Energy and Commerce have both listed Medicare reform as a top priority for the first session of the 107th Congress. Medicare reform legislation is expected to include a prescription drug benefit, as well as reform of the administering agency and possibly some limited provider givebacks.

As a first step toward reform, Senator Murkowski (R-AK) and Congressman Toomey have introduced the Medicare Education and Regulatory Fairness Act (MERFA), which is designed to protect physicians should accidental overpayments occur from the Medicare program. Although the American Medical Association supports this measure, the Inspector General for the Department of Health and Human Services claims that the bill goes overboard in its attempts to protect physicians and actually provides too much leeway. In addition to establishing a repayment plan, the bill also seeks to create physician education tools to help them in dealing with the complexity of the Medicare program. ASIPP has contacted a large number of Con-

gressional offices seeking their support for this important legislation.

There is also support for readdressing the Medicare + Choice programs. The Medicare Benefits Improvement and Protection Act of 2000 provided additional funding for the Medicare + Choice program, but there is general agreement that more needs to be done. Secretary Thompson has committed to conducting a study to determine why health maintenance organizations are pulling out of Medicare + Choice and to decide how to keep them involved in the program.

In addition, the American Hospital Association recently released a study showing that providers spend about half an hour filling out paperwork for every hour spent with a Medicare patient. This amount is viewed as a heavy toll for providers whose primary duty of delivering care to the patient may be thwarted due to the regulation obligations.

Building upon the sentiment of frustrations with the Medicare program, the Practicing Physician Advisory Council (PPAC) was asked by HCFA to rank their top five grievances with Medicare based upon a fifteen point list. PPAC's final listing was as follows: 1) Advanced Beneficiary Notices, which can be confusing to beneficiaries as well as to doctors regarding their appropriate use; 2) coverage of follow-up visits for cancer patients, which PPAC contends should be standard; 3) coverage of per-operative evaluations, which they feel should also be standard; 4) Certificates of Medical Necessity, which are often viewed as burdensome paperwork; and 5) laboratory services, because policy on what is and isn't covered differs from carrier to carrier. The Physicians' Regulatory Issues Team (PRIT) considers these five items as a starting point and hopes to review the responses and figure out solutions.

Lastly, a number of former HCFA administrators are encouraging Congress to provide more greater funding than the 4.9 percent increase proposed by the Bush Administration for Fiscal Year 2002. They contend that HCFA has more obligations than its staff can carry out due to the expansion of Medicare benefits over the last several years. Suggested increases range from ten percent to twenty-five for administrative purposes.

### MEDICAL PRIVACY

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 required the Secretary of Health and Human Services to create and implement medical privacy

guidelines if Congress failed to do so in a self-imposed three year time limit. As a result, the Department of Health and Human Services (HHS) released privacy rules in December 2000 in the final days of the Clinton Administration. Due to a technical glitch, implementation of the new regulation known as the Standards for Privacy of Individually Identifiable Health Information, was delayed until February, at which point the new Secretary, Tommy Thompson, opened the rule for a public comment period. HHS received approximately 7500 comments and has promised to review them and modify the rule as necessary, in spite of its April 2001 effective date. Health care providers have two years to implement the new regulations.

There are a number of concerns with the new rules including the cost of implementation and the written consent provision that currently requires providers to obtain a patients signature "before using or disclosing protected health information to carry out treatment, payment, or health care operations." This provision, therefore, effectively will prohibit friends and family from picking up a patient's prescription without the written consent of the individual for whom the medication is prescribed. Given that it is estimated that forty percent of prescription medications are retrieved by someone other than the patient, consumer groups and health business groups fear this new requirement is simply unworkable. Furthermore, there is general concern that the new privacy regulations are only intended to establish a minimum level of protection, thereby allowing higher state protections to stand. However, despite the existing concerns, providers should begin implementing the new rules and should expect to hear of possible modifications from HHS throughout the two year period.

### MEDICATION ERRORS REPORTING

U.S. Pharmacopeia (USP) sent a letter to the state of Oklahoma requesting approval and legal protection for providers reporting to its medication error database, MedMARx, which is designed to receive anonymous reports and to provide comparisons. The Oklahoma Board of Health has agreed to do so, making it the first state in the country to offer legal protection for the reporting of medication errors.

Similarly, the state of California has enacted a law requiring its hospitals to implement an official plan to prevent medication errors. In part, the plans are to include technological measures such as the computerized physician order entry or CPOE, which is designed to preclude inappropriate drug interactions or incorrect prescription orders

due to poor handwriting. Critics of this plan say that technological programs are extremely costly and far too new to be advantageous. Some systems are not compatible with others and run the risk of becoming quickly outdated. Exemptions were included for some small and rural hospitals.

The Massachusetts legislature is reviewing two different pieces of legislation that address medical errors, but through a different approach than that of California. Rather than instituting mandates, the proposed legislation seeks to offer a one-time bonus to providers that implement medical error reducing technology. The second bill would offer low interest loans and grants for instituting such technology.

On the federal level, Senator Jeffords (I-VT) and Senator Kennedy (D-MA), the expected new Chairman of the Senate Health, Education, Labor and Pensions Committee, recently expressed their interest in introducing legislation to prevent medical errors. Interestingly, Treasury Secretary Paul O'Neill testified before Congress on March 20 that reducing medical errors should be a key focus for reducing costs in the Medicare program, which, according to the 1999 Institute of Medicine study, costs the nation about \$20 billion annually.

### **PATIENTS BILL OF RIGHTS**

A number of managed care reform bills have been introduced in the 107th Congress. The lead bills on this subject are S. 6, the Patients' Bill of Rights Act, introduced by Senate Minority Leader Tom Daschle (D-SD); S. 283, the Bipartisan Patient Protection Act of 2001, introduced by Senators John McCain (R-AZ) and Edward Kennedy (D-MA), its House companion measure, H.R. 526 introduced by Congressmen Ganske (R-IA) and Dingell (D-MI); and S. 889 sponsored by Senators Frist (R-TN), Jeffords (R-VT) and Breaux (D-LA).

Congressman Norwood (R-GA) was a primary leader on Patients' Rights legislation in the House during the 106th Congress, but has held off this year from sponsoring or introducing a bill of his own in order to provide the White House with an opportunity to draft language. Although the Frist, Jeffords and Breaux bill, S. 889, has received the support of the White House, Norwood has expressed opposition to that measure and remains in negotiations with the Administration.

Education reform has been a primary focus in Congress, but health care is expected to be the next major issue addressed by the legislative body. Senator McCain has suggested adding S. 283 as an amendment to the education bill, but his colleague and fellow sponsor of S. 283, Senator Kennedy, is concerned that such a move may threaten the livelihood of the education bill on which he has worked diligently. Therefore, such a move seems unlikely, but most estimates state that debate on PBOR will occur in the Senate sometime this summer.

### **MEDICARE PRESCRIPTION COVERAGE**

The House Energy and Commerce Subcommittee on Health held a hearing in mid May to discuss the merits and challenges of instituting prescription drug coverage under the Medicare program. Republicans tend to align with the Administration's proposal of providing the benefit to the most needy populations, while Democrats contend that the benefit should be available to all. The primary stumbling block is not differences in policy, but funding. The Congressional Budget Office, which provided testimony at the May hearing, stated that even conservative coverage will be very costly due to the retirement of the baby boom generation. In addition, Medicare benefits have been increasing over the past several years and are expected to continue to rise, further taxing the seniors health care system.