

January 11, 2021

TO: OFFICERS, COUNCILORS, AND TRUSTEES

FROM: GREGORY PINTO, MD
THOMAS LEE, MD
MOE AUSTER
PAT CLANCY
ZINA CARY
RAZA ALI

RE: REPORT FROM THE DIVISION OF GOVERNMENTAL AFFAIRS

Governor Cuomo Delivers State of the State in Several Increments

On Monday, January 11, Governor Cuomo gave the first of what he said would be 4 speeches over the next 4 days to announce his 2021 State of the State Message and specific initiatives. His general themes were as follows:

- 1) Defeat Covid
- 2) Vaccinate
- 3) Address the Short-Term Economic Crisis
- 4) Plan the Economic Resurgence
- 5) Green Economy Transition
- 6) Anticipate how Covid will transform the Economy
- 7) Address Systemic Injustice

Specific Initiatives he referenced today that are of interest to physicians include:

- Noting that “our nurses and doctors were heroic but we couldn’t provide with the equipment they needed”, he proposed Creation of a Medical Supplies Act to ensure that New York State is not with the necessary equipment during a medical emergency
- Advancing “the most comprehensive Telehealth Legislation in the country”
- Expand broadband availability (to further help expand telehealth)
- Call to increase the COVID-19 Vaccine supply and identify more vaccine distribution centers
- Legalizing Adult-Use Marijuana
- Creates the Public Health Corp with Cornell University and Northwell which will train vaccine responders and would also create a Citizen Public Health Corp to train 100,000 local citizens to respond to public health emergencies
- Eliminating premiums for health insurance coverage for additional 400,000 low-income New Yorkers

He did not specifically mention the physician discipline issue he raised in yesterday’s press release [Governor Cuomo Announces Proposal to Modernize Office of Professional Medical Conduct as Part of the 2021 State of the State | Governor Andrew M. Cuomo \(ny.gov\)](#), to which we responded [Docs Upset by Nixing Due Process When Patients Make Unproven Allegations - \(mssnyenews.org\)](#), though today’s speech was generally broadly focused. Further specific health care initiatives will likely be advanced in one of the speeches later this week.

MSSNY President Dr. Bonnie Litvack, MD Statement Responding to Governor Re-Advancing OPMC Proposal

“It is stunning that after a year of physicians working on the front lines in every region of the State responding to the pandemic – in which many physicians themselves became very sick and some even passed away – that they are again faced with the proposal to eliminate essential due process rights when a complaint has been filed against them with the Office of Professional Medical Conduct. When a similar proposal was advanced last year in the Executive Budget, we highlighted that very few complaints filed with the disciplinary board (roughly 2-3%) actually result in a disciplinary action.

“We remain committed to working with the Governor and the New York State Department of Health to protect our patients through maintaining a strong disciplinary process and addressing identified gaps. However, we remain extremely concerned with overbroad measures that hold serious potential to unfairly destroy a physician’s career through the release of allegations that have not been proven yet could remain easily “searchable” on the internet forever.”

MSSNY Prioritizes Key Telehealth Policies Department of Financial Services (DFS) Extends COVID19 Telehealth Policy

One of the key items MSSNY will be working on for the 2021 legislative session, is to advocate for policies to help maintain expanded health insurance coverage for telemedicine services and to advocate for parity in payment for health care services delivered via video, as well as required insurer coverage for delivering care for audio-only visits with patients. A central part of this work will include advocating for passage of legislation to require health insurers to provide “payment parity” between telemedicine visits and in-office visits. MSSNY is teaming up in this effort with a range of provider organizations including many specialty societies, the Healthcare Association of New York State (HANYNS), communication centers, among others. To read the letter: [click here](#).

Prior to the onset of the COVID19 crisis, some physicians across the state had integrated Telemedicine into their practices, but the pandemic forced physicians, and other health care providers, to quickly increase their capacity to provide care remotely. A May 2020 MSSNY survey showed that 83% of the physician respondents indicated they had incorporated telemedicine into their practice, with nearly half the respondents noting that they were treating at least 25% of their patients remotely. Moreover, a spring 2020 Fair Health study showed that, for the northeastern part of the country, use of Telehealth went from 0.08% of claim submissions in May 2019, to 12.5% in the span of a month. (report.

Additionally, the New York Department of Financial Services (DFS) extended for additional 60 days (until March 5) its emergency rules supported by MSSNY requiring New York State health insurance plans to cover Telehealth services without patient cost-sharing.

In early 2020, the DFS issued a circular letter detailing its requirements for insurers to a) waive cost-sharing requirements for services delivered via telemedicine b) permit coverage for health care services delivered via audio-only mechanisms and c) enabling delivery of telemedicine services through basic smartphone and video technologies. To read the letter: (circular letter)

Even though states have started administering Covid vaccines, public health experts anticipate that COVID-19 will remain a public health threat for the foreseeable future, making it reasonably likely that this expanded Telehealth coverage policy will need to be extended well beyond March.

Assemblyman Gottfried Reintroduces Physician-Friendly Legislation

Assemblyman Richard N, Gottfried (D-Manhattan), Chair of the New York State Assembly Committee on Health, has reintroduced three pieces of legislation that MSSNY has supported for several past legislative cycles. They are:

1. **A.832**, which would prohibit or restrict a number of practices between HMOs and health care providers that negatively impact physicians' ability to provide the highest quality of care.
2. **A.951**, which would permit some collective negotiations between physicians and health insurance plans under close supervision by the state.
3. **A.879**, which ensures that health plans can only deny payment for covered benefits after review by a physician, or other health care professional, licensed in New York State and when the provider is board certified in the same, or similar, specialty as the treatment under review.

WASHINGTON

Congress Passes Measure to Address Surprise Medical Bills

As was widely reported, among the provisions contained in the year-end Congressional Covid relief package was a comprehensive measure to establish a federal standard for addressing surprise out of network medical bills. The new federal surprise bill provisions will apply to patients insured by ERISA plans, and New York's approach would continue to be followed for out of network claims from patients insured in state-regulated plans. There are similarities in this federal standard to New York's well-regarded approach, but also significant differences for which MSSNY expressed serious concerns.

Here is a comprehensive summary of these provisions from the AMA:

<http://www.mssnyenews.org/wp-content/uploads/2020/12/Summary-of-Surprise-Billing-Language-12-21-20.pdf>

The measure, to take effect January 1, 2022, would ensure that patients are "held harmless" from surprise out of network medical bills. Like New York's law, patients would only be required to pay the in-network cost-sharing, (i.e., copayment, coinsurance, and deductibles) amount for out-of-network emergency care, for certain ancillary services provided by out-of network providers at in-network facilities, and for out-of-network care provided at in-network facilities without the patient's informed consent.

However, unlike New York's law, the federal provision calls for a 30-day open negotiation period for out of network physicians and payers to settle out-of-network claims, and if the 30 day negotiation period is unsuccessful, requires either the physician or the health plan to initiate an independent dispute resolution (IDR) process within 4 days of the end of the 30-day period.

The federal IDR process is similar to New York's mechanism in that the IDR entity would select which side – the physician's or the insurer's suggested payment - will prevail. Physicians may

batch similar services in one proceeding when claims are from the same payer, but the bill permits only 30 days of batching. The IDR entity would consider numerous sources of information brought by either party, such as the provider's training and experience, patient acuity, and the complexity of furnishing the item or service. However, in a significant departure from New York, neither provider charges nor usual and customary charges may be considered by the IDR entity, and the IDR entity is required to consider the market-based median in-network rate. This a major deficiency that MSSNY has highlighted in its advocacy efforts over the last year on this issue, and was noted by MSSNY President Dr. Bonnie Litvack in MSSNY's press release (<http://www.mssnyenews.org/covid-19/year-end-covid-package-congressional-hits-and-misses>):

The Congressional provisions also address "voluntary" out of network services by providing that non-participating providers at participating facilities may not bill a patient more than the cost-sharing requirements or balance bill the patient unless the notice and consent requirements are met. These consent requirements include providing the patient with written notice and consent 72 hours in advance of appointment; providing a good faith estimate of the costs of the services; and providing the patient with a list of in-network providers at the facility and information regarding medical care management, such as prior authorization. At participating facilities, the notice and consent exception does not apply to out-of network providers of radiology, pathology, emergency, anesthesiology, diagnostic and neonatal services; assistant surgeons, hospitalists, intensivists, and providers offering services when no other in-network provider is available.

Further analysis of this far-reaching legislation is ongoing, so please remain alert for further updates.

Congressional Package Includes Expansion of Paycheck Protection Program (PPP)

As was recently reported, the Congressional year end package included an additional \$284 billion for the Paycheck Protection Program (PPP). Importantly, it would enable a second PPP forgivable loan for the hardest-hit small businesses (including physician practices) with 300 or fewer employees which can demonstrate a loss of 25% of gross receipts in any quarter during 2020 when compared to the same quarter in 2019.

Moreover, it would also provide that loans will not be included in taxable income, and clarifies that deductions are allowed for expenses paid with proceeds of a forgiven PPP loan, effective as of the date of enactment of the CARES Act and applicable to subsequent PPP loans. MSSNY had heard from several physicians concerned that receipt of a PPP loan/grant was going to cause them to not be able to deduct business expenses due to a recent IRS interpretation.

Please read here <http://www.mssnyenews.org/wp-content/uploads/2020/12/Topline-Summary-of-Select-Provisions-of-Consolidated-2020-Omnibus-Legislation-12-21-20.pdf> for a comprehensive AMA summary of this and many other provisions in the Congressional Covid relief package

Congressional Package Helps to Prevent or Reduce Medicare Cuts

As a result of an advocacy effort across medicine including from the AMA and MSSNY, the year-end Congressional package included a number of steps that helped to prevent and/or reduce what would have been enormous cuts to Medicare payments to many physician specialties. Specifically, the bill:

- Provides for a one-time, one-year increase in the Medicare physician fee schedule of 3.75%, to support physicians and other professionals in adjusting to changes in the Medicare physician fee schedule during 2021, and to provide relief during the COVID-19 public health emergency.
- Delays for 3 years the Secretary's implementation of Code G2211 which reportedly will increase the MPFS by approximately 3%.
- Delays the -2% sequestration cuts for 3 months

As noted in this chart (<http://www.mssnyenews.org/wp-content/uploads/2020/12/CY2021-Combined-Impact-without-G2211-in-CF-with-Additional-3.75-Percent-CF-Increase.pdf>) developed by the AMA analyzing the specialty by specialty impact of these Congressional actions, an example of the impact:

- Under the original CMS Medicare 2021 payment rule, ophthalmologists were expected to see a 6% cut, but now will face likely no cut.
- Under the original CMS Medicare 2021 payment rule, general surgeons were expected to see a 6% cut, but now will face likely no cut.
- Under the original CMS Medicare 2021 payment rule, neurosurgeons were expected to see a 6% cut, but now likely will face no cut.
- Under the original CMS Medicare 2021 payment rule, interventional radiologists were expected to see an 8% cut, but now it will be a likely 2% cut
- Under the original CMS Medicare 2021 payment rule, internal medicine was expected to see a 4% increase, but now likely a 6% increase.
- Under the original CMS Medicare 2021 payment rule, anesthesiology was expected to see an 8% cut, but now likely a 2% cut.
- Under the original CMS Medicare 2021 payment rule, PM&R was expected to see a 3% cut, but now likely will have a 3% increase.

Importantly, as well, the long overdue E&M increases set forth in the CMS 2021 Medicare payment rule will go forward.

We thank all the physicians who took the time to respond to our call for grassroots action on this and the litany of other "year-end" issues before Congress. We anticipate that CMS will soon issue an update announcing these changes arising from Congressional action.