October 2005

Re: Therapy Incident To background

In 1997, Congress, as part of the Balanced Budget Act, directed the Health Care Financing Administration (now CMS) to restrict payments for therapy services provided "incident to" in a physician's offices.

This provision came about as a result of a 1995 OIG report (copy previously provided) that found significant deficiencies in how Medicare Carriers were reviewing claims for therapy services provided in the physician's office. The OIG found that due to lax claims review, Medicare was paying for many therapy visits that did not meet the COVERAGE requirements.

In order to address this problem, Congress directed that Medicare not pay for therapy services provided "incident to" in the physician's office unless they met the same coverage criteria as therapy services provided by PTs and OTs. The specific language follows:

Exclusions from coverage

"…no payment may be made under part A or part B of this subchapter for any expenses incurred for items or services -

…in the case of outpatient occupational therapy services or outpatient physical therapy services furnished as an incident to a physician's professional services (as described in section 1395x(s)(2)(A) of this title), that do not meet the standards and conditions (other than any licensing requirement specified by the Secretary) under the second sentence of section 1395x(p) of this title (or under such sentence through the operation of section 1395x(g) of this title) as such standards and conditions would apply to such therapy services if furnished by a therapist"

At the time this legislation was passed, in order for Medicare to cover a therapy service provided by a PT or OT, the provider must be licensed by the state and the service must meet the following coverage guidelines.

> "Medicare requires the services must be restorative or for the purpose of designing and teaching a maintenance program for the patient to carry out at home. The services must also relate to a written treatment plan and be of a level of complexity that requires the judgment, knowledge and skills of a qualified physical therapist to, perform and/or supervise the services."

Thus, when Congress wrote the above exclusionary language, there were two requirements for Therapy services in private practice: the individual had to be licensed; and the service had to meet the coverage guidelines cited above. Because Congress specifically precluded HCFA/CMS from mandating the licensure requirement, the only thing left is the conditions for coverage.

In 1998, HCFA issued a Program Memorandum (PM) to the Carriers identifying this statutory provision and announced in the Federal Register that the PM had been issued in order to comply

with the new law. In 2001, CMS was asked to adopt the PT and OT educational standards for therapy services provided incident to in a physician's office and the requestor specifically cited the 1997 statute as the basis for the request. CMS rejected that interpretation of the 1997 law and specifically said that the law did not require the adoption of educational standards for incident to services.

In July of '04, the Centers for Medicare and Medicaid Services (CMS) released a proposed change in the Medicare Part B payment rules governing therapy services provided "incident to" a physician's professional services.

Incident To

Historically, "incident to" services have been services provided in a physician's office in conjunction with a medically necessary service provided by the physician to alleviate or treat an illness or injury. Incident to services can range from a simple injection by a medical assistant to casting of a fracture by an Orthopaedic Technician to suturing of minor wounds by a nurse. Regardless of the individual's professional credential, the person performing "incident to" services must be an employee of the physician. Incident to services are billed under the supervising physician's provider number as if they had been provided by that physician personally.

There are 4 tests that have traditionally been applied to determine whether a service can be covered as "incident to". These are:

1. It is a service commonly furnished in a physician's office
2. The charge for the service is included in the physician's bill.
3. The service must be performed under the physician's "direct" supervision (i.e. the physician is in the building at the time the service is provided)
4. The individual performing the service has some type of employment relationship with the physician (i.e. employed directly by the physician or has an independent contractor relationship with the physician).

You will notice that there are no educational or credential requirements. However, because the physician is supervising the service, he or she has accepted responsibility for the quality of the service being provided and attests to the appropriateness of the service.

Many of the "non-physician" providers currently recognized in their own right by the Medicare program (PAs, NPs, CNMs, Social Workers, etc.) were originally able to get their start in the Medicare program through the incident to arrangement.

Now, CMS has changed the "incident to" rules but ONLY as they relate to the delivery of therapy services.

Specifically, CMS has set specific education standards for individuals a physician might want to hire to provide therapy services in the physician's office. The education standard would be that the individual is a graduate of a physical therapy program (PT), occupational therapy program (OT) or graduate of a speech language/hearing pathology program (SLHP). The particular education

degree required would depend upon the type of therapy service being provided. The individual need not pass the recognized PT, OT or SLHP credentialing exams and in fact could have failed the exam multiple times.

In effect the federal government is stating that ONLY PTs, OTs or SLHPs are qualified to provide broadly defined therapy services. This is inconsistent with modern medical practice and challenges the judgment of physicians to make appropriate clinical decisions on who can best provide the care required by the patient.

The following are some talking points:

- "Incident to" has, since the inception of the Medicare program in 1965, been utilized by physicians to allow other health professionals, under the direct supervision of the physician, to provide services as an adjunct the physician's professional services.
- In order for a physician to delegate the performance of a particular task to another person, state law must permit that delegation. Such authority generally comes under the delegatory authority included in the state medical practice act, or the scope of practice statutes governing the health professional to whom the service has been delegated.
- Until now, there have never been any limitations or restrictions placed upon the physician in terms of who he or she can utilize to provide ANY incident to service. Because the physician accepts legal responsibility for the individual under his or her supervision, Medicare and private payers have <u>always</u> relied upon the professional judgment of the physician to be able to determine who is or is not qualified to provide a particular service.
- As health care has evolved and become more and more specialized, many new health professions have evolved to meet clinical demands. Typically, these health professionals are highly trained and skilled in a particular area of medicine.
- Some of these allied health professionals are licensed at the state level while others sit for and pass national certification examinations. These individuals work in physician's offices, outpatient facilities and hospitals.
- Restricting the ability of physicians to utilize allied health professionals would severely limit access to quality therapy services in those communities where a PT, OT or SLHP is not available.
- CMS, in proposing this change, offers no evidence that there is a problem that is need of fixing. The only report cited is the 1995 OIG report on coding problems with therapy services. It should be noted that while this report was released in 1995, it looked at 1991 claims data.
- Independent research has demonstrated that the quality of services provided by a variety of allied health professionals is equal to the quality of services provided by other therapists.