



# Massachusetts Society of Anesthesiologists

PO Box 549154 Waltham, MA 02454-9154

## Officers

**Nathan Jones, MD**  
*President*

**Cathie Jones, MD**  
*President-Elect*

**Jennifer Dearden, MD**  
*Vice-President*

**Galina Davidyuk, MD**  
*Secretary*

**David Feinstein, MD**  
*Treasurer*

**Maitriyi Shah, MD**  
*Immediate Past President*

## Executive Office of Health and Human Services

### Listening Session

**Re: Out of network commercial payment rates for emergency and nonemergency services**

**June 30, 2021**

The Massachusetts Society of Anesthesiologists (MSA), which represents 1,000 physician anesthesiologists practicing in the Commonwealth, submits these comments as a follow up to comments provided by MSA and ASA former president, Alexander Hannenberg, M.D., at the June 24, 2021 EOHHS listening session regarding its development, pursuant to Chapter 260 of the acts of 2020, of a report to the Legislature providing recommendations on the establishment of non-contracted out-of-network commercial payment rates for emergency and nonemergency services.

Since the enactment of Chapter 260, Congress passed into law the “No Surprises Act,” which addresses surprise out of network billing that would protect patients from surprise medical bills from out of network (OON) providers; impose transparency requirements for insurance plans and providers that require patients be provided certain information regarding provider’s participation, or not, in the patient’s network; and creates a fair uniform system to determine the reimbursement rate paid by insurers to physicians and hospitals for services rendered.

Focusing on the Chapter 260 charge to EOHHS, **MSA would urge EOHHS to recommend that the federal “No Surprises Act” take effect as scheduled on January 1, 2022 and be applicable to state regulated commercial insurance plans.** The “No Surprises Act” covers ERISA self-insurance plans, which covers 60% of covered lives in the Massachusetts commercial insurance market. It would also cover state regulated health plans for states that do not have an OON law. **It makes little sense to have two competing laws regulating the health insurance market in regard to OON services. Allowing the federal “No Surprise Act” to take effect and cover all health insurance plans in Massachusetts will ensure consistency among all commercial health plans and protect all patients equally.**

**MSA**  
**P.O. Box 549154**  
**Waltham, MA 02451**  
[MAAnesthesiologists@mms.org](mailto:MAAnesthesiologists@mms.org)  
**t: 781-434-7329**  
**f: 781-464-4896**  
[www.mass-anesthesiologists.org](http://www.mass-anesthesiologists.org)

## **MSA Opposes Use of Medicare as a Default Fee for OON Services**

At the listening sessions, representatives of insurers requested that EOHHS recommend an OON default rate based on a percentage of Medicare. The common reference to such a rate in their view is 135% of Medicare.

Medicare is not, and has never been intended to be, a broadly applicable payment system in which the amount of a fee reflects fair market value or actual costs for medical services. Rather, it functions as a distribution of a limited federal budget for this social service system, not unlike Medicaid fees that are more a function of government budget considerations than a realistic value for services. Further, **Medicare rates differ widely across specialties. MSA would caution against using Medicare fees as a benchmark in any solution. We would note that for medical services other than anesthesia, Medicare payments are 80% of the average commercial payment rates. For anesthesia services, which are on a different type of payment system, the Medicare payments are 33% of the average commercial insurance payment rates. These comparisons have been established by federal agencies, including the Government Accountability Office (GAO) in a July 2007 report. The use of Medicare as a benchmark would be devastating to our specialty. A 135% benchmark would be well below the current commercial rates paid by insurers and would incentivize insurers to not contract with anesthesia providers and treat them as OON providers.** This would require greater subsidies by hospitals to maintain 24/7 anesthesia services, creating greater stress on hospitals, particularly community hospitals serving large Medicare and Medicaid populations, to maintain services; and would affect our ability in Massachusetts to recruit and retain anesthesiologists and nurse anesthetists. **Equally, if not more important, this could reduce patient access to care through hospital consolidations and closures.**

When Congress developed the “No Surprises Act,” it had the opportunity to consider using Medicare as a benchmark, but it rejected that approach. Instead, it created a system of payment for OON services that incentivizes payers and providers to negotiate fair and adequate rates. Payers will make an initial payment to the OON provider (Qualifying Payment Amount- largely based on median in network rate for the particular service). If a dispute over the payment occurs, the provider and payer have 30 days to try to negotiate a resolution, before accessing an independent dispute resolution/ arbitration under the law. Arbitration process is baseball-style (each party submits an offer and the arbitrator has to choose one of the two offers). The arbitrator cannot consider public payer rates (e.g., Medicare and Medicaid) or billed charges. The arbitrator’s decision is final and the losing party is responsible for the fees. Going to arbitration is not a slam dunk for either party. What this whole process creates is an incentive for both the provider and payer to reach a fair resolution to payment for services without involving the patient. Further, unlike a benchmark based on Medicare, it does not have the potential to disrupt the marketplace due to the artificial vagaries of the Medicare as described above.

In establishing a reasonable process for reimbursement for OON services, a balance must be struck such that there are neither incentives for participating providers to go out of network, nor out of network default rates so low that insurers will not contract with providers. We believe the “No Surprise Act” strikes the right balance to ensure that OON providers are fairly compensated; will not go out of network (process to collect higher payments is time consuming and possibly at risk); and the patient is held harmless except for their in-network cost sharing responsibilities. The establishment of a Medicare based default rate will disrupt that balance and

result in insurers easily opting for no contract and paying an OON rate that is less than their current rates for anesthesia services.

MSA would respectfully urge EOHHS to recommend to the Legislature that the federal “No Surprise Act” take effect January 1, 2022 and be applicable to all health insurance plans.

Respectfully submitted,

Nathan T. Jones, M.D.  
President  
Massachusetts Society of Anesthesiologists