April 4, 2022

Chiquita Brooks-LaSure, MPP
Administrator
Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244

RE: CY 2023 Rulemaking Request: Revisit E/M Split (or Shared) Services 2023 Policy

Dear Administrator Brooks-LaSure:

On behalf of the Emergency Department Practice Management Association (EDPMA), we write to request that the Centers for Medicare and Medicaid Services revisit its calendar year (CY) 2023 policies regarding split (or shared) evaluation and management (E/M) visits as was finalized during CY 2022 rulemaking. EDPMA represents emergency physician groups and their practice partners. Our members serve over half of all visits to emergency departments in the nation.

"Substantive Portion" Based Only on Time Is Inappropriate

As part of the CY 2022 rulemaking cycle, the Agency addressed billing for split (or shared) services "as an E/M visit in the facility setting that is performed in part by both a physician and an NPP [non-physician practitioner] who are in the same group." In particular, we are concerned with CMS' approach to defining the "substantive portion" of split (or shared) services for purposes of identifying the billing practitioner. As part of the CY 2022 Medicare Physician Fee Schedule (MPFS) proposed rule, CMS set out to define the "substantive portion" of split (or shared) services as "more than half of the total time spent by the physician and non-physician practitioner performing the visit." In response to stakeholder concerns, CMS phased in the revised approach to determining the "substantive portion" of the service:

- For CY 2022, the substantive portion to determine the furnishing practitioner would be based on "the practitioner who spends more than half of the total time, or performs the history, exam, or MDM [medical decision making]."
- For CY 2023, however, CMS determined that the definition of "substantive portion" would be finalized as originally proposed (i.e., "more than half of the total time spent by the physician and non-physician practitioner performing the visit.")

As we articulated in our response to the CY 2022 MPFS proposed rule, ***EDPMA is opposed to defining "substantive portion" based solely on time, particularly as it applies to emergency department (ED) E/M visits***. Time is not a key component of the ED E/M code set given the nature of the services described by those codes, nor should it be. Requiring that "substantive portion" be defined based on time to a code set that is not defined by time would add administrative burden to the practitioners billing those codes and undermine the services that those codes are intended to represent.

CMS Should Apply a Distinct Split (or Shared) Services Policy to ED E/M Visits

We believe that a CMS policy based on comparative clock time is flawed**.** If CMS were to continue to apply the same policy for split (or shared) visits to ED E/M visits as it does to the other E/M code sets, the requirement for tabulating individual practitioner time on each patient in a busy emergency department, where multiple patient care actions are actively in process on numerous patients concurrently is simply not reasonable. In this environment – one that requires rapid multi-tasking – this will clearly add significant administrative burden. The cadence and flow of an emergency department involves parallel cognitive processing over multiple patients, areas in the department, and is reassessed/modified on a minute-by-minute basis. It is not unusual for a single physician or NPP to care for 8-12 patients at a time, and even with an EMR, this new requirement for logging cumulative time will significantly reduce the efficiency of an already strained system, now further driven by this administrative demand. Therefore, using time to define a split (or shared) visit creates a cognitive distraction and administrative burden in direct contradiction to CMS' *Patients Over Paperwork* initiative. In an attempt to accurately account for time measurement, there is potential for a patient safety event and poor accuracy of the work performed.

In the CY 2022 proposed rule, CMS even acknowledged the "unique construct" of ED E/M visits and requested comments on whether they should be subject to separate policies. EDPMA provided comments highlighting the need to address the ED E/M code set separately. ***EDPMA urges CMS to put forward a proposal to address the unique ED setting and acknowledge the current policy is not applicable in the ED setting***. For ED E/M visits, as described in further detail below, ***EDPMA continues to believe that the most appropriate standard for determining which practitioner furnished the "substantive portion" of the service is the practitioner who performed and was responsible for the medical decision-making associated with the service.***

CMS Must Revise the List of "Qualifying Activities" for Purposes of Defining "Substantive Portion" of ED E/M Services

Even if CMS were to retain the time component in some form, CMS' list of "qualifying activities" is not appropriate for ED E/M services and fails to recognize that all time spent as counted by the clock is not equivalent. A physician's time is most frequently spent in significant medical decision-making, consideration of differential diagnoses, assuring that evaluations, treatments, and recommendations optimize patient safety, and review of co-morbidities and the potential for medication interaction. These activities also take time and reflect the years of advanced training and experience the physician brings to the clinical care team. However, the time spent on these functions should not in any way be equated to other elements of time, such as history-taking, ordering medication, or documenting in the electronic health record. In addition, activities that are not captured by electronic health record (EHR) data elements would go "uncounted" even while being medically necessary and just as important for patient care as other items that are recorded in the EMR.

More importantly, the value of individual patient care activities that require time are decidedly not the same. The policy of simply adding up minutes or hours spent by physicians and NPPs, and comparing whoever spent more time is inherently flawed, and perversely encourages inefficiency, especially for time-consuming but low-value activities.

For example, if one practitioner spent 40 minutes gathering a history, recording current medications, and documenting the patient encounter in the electronic health record, and another did the physical exam, reviewed key lab and x-ray results, performed significant medical decision-making, and determined appropriate treatment – but only took 30 minutes – the "substantive portion" would be deemed to be the much lower value services in CY 2023.

EDPMA favors a system that reflects the *value* of time spent, not simply time itself. Therefore, for CY 2023, ***EDPMA recommends that, for purposes of determining the "substantive portion" in the context of the ED E/M code set, the practitioner conducting MDM during the patient's same visit before discharge from the emergency department, should be the method for determining the "furnishing practitioner***." Merely counting time in the emergency department setting could shift the billing provider to the clinician who is not responsible for the ultimate MDM that is determined for that particular patient. The clinician responsible for the ultimate MDM that is determined for the patient should be the clinician billing for the split (or shared) ED E/M visit. ***In the alternative, EDPMA would request that CMS continue its CY 2022 policy for split (or shared) services through at least CY 2023 as it more broadly achieves the same goals.***

We appreciate the opportunity to provide input in advance of CY 2023 MPFS rulemaking. If you have any questions or we can provide any additional information, please do not hesitate to contact EDPMA Executive Director Cathey Wise at cathey.wise@edpma.org.

Sincerely,

Don Powell, DO FACEP
Chairman
Emergency Department Practice Management Association

CC: Sarah Leipnik Division of Practitioner Services
Hospital and Ambulatory Policy Group