June 17, 2010

Marilyn Tavenner  
Acting Administrator  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attention: CMS-1498-P  
Room 445-G  
Hubert H. Humphrey Building  
200 Independence Avenue, SW.  
Washington, DC 20201

Subject: CMS-1498-P: Medicare Program; Proposed Changes to the Hospital Inpatient Prospective Payment Systems and Proposed Fiscal year 2011 Rates; Hospital Conditions of Participation for Rehabilitation and Respiratory Care Services

Dear Ms. Tavenner:

On behalf of our 72,000 member physical therapists, physical therapist assistants, and students of physical therapy, the American Physical Therapy Association (APTA) is pleased to submit comments on the Centers for Medicare & Medicaid Services (CMS) proposed rule entitled “Medicare Program; Proposed Changes to the Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Proposed Fiscal Year 2011 Rates; Effective Date of Provider Agreements and Supplier Approvals; and Hospital Conditions of Participation for Rehabilitation and Respiratory Care Services Medicaid Program: Accreditation Requirements for Providers of Inpatient Psychiatric Services for Individuals under Age 21, Federal Register Vol. 75, No. 85, pages 23851-24362 (May 4, 2010). APTA’s goal is to foster advancements in physical therapy practice, research, and education. The mission of APTA is to further the profession’s role in the prevention, diagnosis, and treatment of movement dysfunctions and the enhancement of the physical health and functional abilities of members of the public.

Physical therapists furnish services in hospital settings and therefore certain provisions in this rule have a significant and direct effect on physical therapists.

Proposed Changes to Medicare Conditions of Participation Affecting Hospital Rehabilitation Services and Respiratory Care Services

In the rule, CMS proposes changes affecting the Medicare conditions of participation for hospitals relating to the types of practitioners who may provide rehabilitation services and respiratory services. The rationale for this proposal is that CMS received several
public requests for clarification of the Medicare conditions of participation for hospitals relating to rehabilitation services at section 482.56 and respiratory care services at section 482.57.

In the rule, CMS clarifies that practitioners who are allowed to order rehabilitation should be qualified licensed practitioners who are responsible for the care of the patient and who are acting within the scope of practice under State law. In addition, these practitioners should be authorized to order rehabilitation services by the hospital’s medical staff, in accordance with hospital policies and procedures and State laws. While we agree with this statement, we are concerned with several other statements and assumptions made by CMS in the preamble text of this rule. Specifically, CMS states that there is a conflict of interest if a physical therapist is “granted ordering privileges because physical therapists would order physical therapy services for a patient for which medical necessity has not been established.” In addition, CMS states that it would potentially compromise coordination of care and patient safety if physicians are unaware of what services have been ordered for their patients.

As CMS proposes changes to the hospital conditions of participation, it is important to recognize that these policies are far-reaching as they would necessarily apply to both inpatient and outpatient hospital services and to all patients treated at a hospital meeting these conditions of participation (not just Medicare patients). Thus, APTA believes that CMS has a special obligation to assure that these conditions of participation do not conflict with state scope of practice acts, especially since CMS has other tools to address any concerns it might have regarding Medicare coverage or payment of services. While APTA recognizes that current regulation and most hospital policy requires a referral from the physician managing the inpatient, CMS needs to consider the fact that the outpatient hospital setting is different than the inpatient setting. CMS’s assumption that physical therapists might provide medically unnecessary services and that patient safety might be compromised in the outpatient hospital setting if services are not ordered by a physician is without basis.

For many years, federal and state legislators, regulators, and payers have recognized that physical therapists work independently, as well as in collaboration with a variety of individuals, to treat their patients. In addition to outpatient hospital departments, physical therapists work in a number of different outpatient therapy settings, including rehabilitation agencies, comprehensive outpatient rehabilitation facilities, physical therapist private practice offices, and physician offices. Outside of the hospital setting, Medicare payment regulations and conditions of participation do not require an order for outpatient physical therapy services in these settings. Rather, the Medicare payment regulations require that the plan of care be reviewed and certified by the physician within 30 days of the first therapy encounter and recertified at a minimum every 90 days thereafter. In addition, forty-eight states and the District of Columbia currently permit patients to see physical therapists for evaluation of their condition without a physician referral/order. Among those states, forty-five states and DC also permit physical therapists to initiate treatment without requiring such referral/order. These policies have been in effect for many years and those adopting them clearly did not believe they would compromise patient safety or coordination of care. Therefore, we question why CMS would conclude
that these problems would occur in the outpatient hospital setting when patients receive rehabilitation services.

In view of physical therapists’ extensive training and expertise, state and federal licensing and reimbursement regulations permit licensed physical therapists to practice independently and have determined that patient safety is not jeopardized. A standard physical therapy curriculum trains graduates to be independent professionals. At a minimum, physical therapists are required to earn a post-baccalaureate degree from an accredited education program. Currently, 97% of programs are at the doctoral level. Graduate education in physical therapy is built on foundational courses in biology and anatomy and also includes specific instructional objectives on the muscular and skeletal systems, as well as training in exercise science, kinesiology, social and psychological determinants of healing, pathology, and pharmacology. On average, candidates for a master of physical therapy degree must complete almost 2,800 hours of didactic and clinical training, while candidates for a doctoral degree must complete over 3,300 hours of such training.

Physical therapists are licensed in all 50 states and are required to abide by their state statutes and regulations when providing physical therapy services. State laws and other regulatory requirements set forth educational requirements to practice physical therapy legally within the defined area of jurisdiction, the definition and scope of physical therapy practice and supervision requirements. Ethical guidelines that ensure safe and effective delivery of physical therapy services to patients/clients also govern physical therapist practice. As a licensed professional, the physical therapist should assume responsibility for the delivery of all physical therapy services and for the safety and effectiveness of physical therapy services provided.

In the proposed rule, CMS raises concerns about physical therapists providing medically unnecessary services if a physician does not order those services. APTA strongly disagrees with this statement as physical therapists are responsible for knowing the coverage requirements under the Medicare program and the coverage requirements of other payors and for complying with these requirements. For example, CMS has set forth extensive provisions in its Medicare Benefit Policy Manual (100-02), chapter 15, to define circumstances when physical therapy services are considered “reasonable and necessary” and therefore would be paid by Medicare. In addition, many of the Medicare contractors have developed local coverage policies on physical medicine and rehabilitation that set forth the guidelines. In addition, physicians are involved in the review and certification of the therapy plan of care under Medicare. Since 1988, CMS has developed many other methods for ensuring appropriate utilization for therapy services. For example, CMS has clarified policies regarding the definition of skilled services and documentation and has implemented system edits. Physical therapists are required to comply with these standards in order to receive payment for the services that they furnish.

In the outpatient hospital setting, it appears to make little sense for CMS to infer that a conflict of interest exists when a physical therapist, acting within their scope of practice, determines that a patient needs physical therapy services. If the same principle were applied, it would mean, for example, that a surgeon should not furnish surgical services to a patient because doing so involves a conflict of interest. The same would apply to other physicians, nurse practitioners, physician assistants and other practitioners. A conflict of interest is often
tied to financial gain resulting from the provision of services. When services are provided in a hospital by physical therapists, the payment for those services does not go to the physical therapists, but rather to the hospital. Therefore, the presumption that there is a conflict of interest is flawed. In any event, given current state policies with respect to the practice of physical therapy, APTA strongly opposes adoption of hospital conditions of participation that would conflict with these policies based on some vague concern about a potential conflict of interest, especially since the conditions of participation affect the care provided to all of a complying hospital’s patients.

In conclusion, we agree that CMS should defer to state law with respect to which qualified licensed practitioners are allowed to order services, are responsible for the care of the patient and are acting within their scope of practice under State law. CMS should also continue to allow a hospital’s medical staff, in accordance with hospital policies and procedures and State laws, to identify who may order rehabilitation services. We, therefore, ask that the final rule not preclude physical therapists from acting within their scope of practice and make clear that the hospital conditions of participation are not intended to do so.

Thank you for your consideration of these comments. If there are any questions about our comments or additional information is needed, please contact Gayle Lee, JD, Director, Federal Payment Policy and Advocacy, at 703-706-8549 or gaylelee@apta.org.

Sincerely,

R. Scott Ward, PT, PhD
President