

## 2007 IDTF CHANGES AFFECTING SLEEP LABS

by Duane Johnson PhD



In a rare turn of events, the Centers for Medicare and Medicaid Services ("CMS") abruptly rescinded its proposed Program Integrity requirements for Independent Diagnostic Testing Facilities ("IDTF's") just days before they were to take effect. Announced on January 26, 2007, the unexpected proposals would have required many IDTF's including IDTF Sleep Labs to unwind long-standing business arrangements with little notice to comply with the February 26, 2007, effective date.

I spoke to healthcare attorney Daniel Brown about the proposed rules and what they would mean for IDTF sleep labs. Mr. Brown practices in the Atlanta, Georgia office of Greenberg Traurig, LLP, where he specializes in the legal/regulatory aspects of sleep medicine and is the author of Sleep Center Management Institute's manual Sleep Lab Compliance and the Law.

An IDTF is a location established primarily for performing diagnostic tests, such as sleep tests. It is independent of a hospital or a physician's office, and it must enroll in Medicare as a stand-alone supplier with its own National Provider Identifier number to receive Medicare reimbursement for the tests it performs. Many stand-alone sleep labs have enrolled as an IDTF.

*What was proposed?*

The proposals addressed new enrollment and operating standards for IDTF's supplemental to the adopted IDTF Standards.

*What are the Performance Standards? Are they different from the proposed changes that were rescinded?*

Yes. The Performance Standards were adopted as federal regulations following a notice period and consideration of industry comments. On the other hand, the rescinded proposals were published as changes to CMS' Program Integrity Manual without notice to anyone or the opportunity for anyone to comment.

*What's the Program Integrity Manual?*

The Program Integrity Manual sets out standards to be followed by Medicare carriers and contractors when enrolling IDTF's and paying IDTF's for their services. If the IDTF doesn't follow the Program Integrity rules, then Medicare takes the position that reimbursement for the tests performed by the IDTF should be denied.

*Can you describe the Performance Standards?*

Yes. Federal regulations require each existing IDTF and those seeking enrollment like a new IDTF sleep lab to comply with the standards as a condition to payment. While IDTF's always had certain minimum requirements to be eligible for reimbursement, CMS imposed new and additional standards effective for all IDTF's on January 1, 2007.

For example, CMS requires IDTF's to engage a "supervising physician" to provide clinical supervision over the tests performed. The new Performance Standards expand the supervising physician's responsibilities to include the overall operation and administration of the IDTF, including the employment of personnel who perform the tests and prompt recordation and reporting of test results. Presumably CMS is not requiring the supervising physician be elevated to the chief executive officer, but the language is very broad.

Important for some operators is the new location limit for supervising physicians. The Performance Standards permit a supervising physician to supervise no more than 3 IDTF sites.

Other Performance Standards require proof of minimum insurance coverage and prohibitions on direct patient solicitations as conditions for reimbursement.

Remember that these Performance Standards are now in effect and that all IDTF's are expected to follow these standards now or not bill for any service. For a copy of the fourteen New IDTF Performance Standards go to [www.sleepcmi.com](http://www.sleepcmi.com).

*Why did CMS impose these new Performance Standards?*

The Office of Inspector General ("OIG") of the Department of Health and Human Services has perceived a rise in fraud and abuse surrounding IDTF services. In 2003 the OIG found a potential \$71,000,000 in improper payments made to IDTFs in calendar year 2001. According to the OIG, poor or missing documentation or lack of medical necessity accounted for a majority of the improper payments. The OIG also warned that a number of IDTF's in California and other states are perpetrating schemes to defraud the Medicare program.

*When did CMS propose the Program Integrity changes?*

CMS published Change Request No. 5449 on January 26, 2007, to announce the proposed Program Integrity changes. The

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ing the credential is a way to differentiate yourself from other sleep techs and establish immediately that you are invested in the profession, have achieved a minimal level of core competency and continue to educate yourself about polysomnographic technology. In the sleep medicine field, the RPSGT credential is the mark of a highly skilled allied health care professional who has met the high standards of the Board of Registered Polysomnographic Technologists, an internationally recognized and accredited organization.

#### *Increased Career Opportunities*

In any profession, it is commonly accepted that credentialed workers earn more than those who are not certified. Similarly, it is commonly accepted that within the same geographic region, RPSGTs earn more than non-registered sleep techs and there is evidence that an increasing number of employers prefer to hire RPSGTs. Many employers consider the RPSGT credential a preferred requirement for job applicants. For many, earning the credential translates into an immediate increase in salary.

#### *RPSGTs Make A Difference*

Often RPSGTs start their careers working in a sleep facility in an administrative or assistant-level capacity. Others start as nurses, electroneurodiagnosticians, emergency care personnel, respiratory techs or medical doctors. It is not unusual for an RPSGT to be dual-credentialed. By excelling in their field, RPSGTs are indispensable to the diagnosis, treatment and after care of many sleep disorders. A registered sleep tech truly helps patients live better, healthier lives.

The professionalism that comes from being knowledgeable in the sleep medicine field helps increase visibility and credibility for this important –and growing – medical discipline.

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Change Request appeared without any notice or opportunity for comment. These changes were to be effective 30 days later on February 26. But in response to industry outcry, CMS rescinded the changes one week before their effective date on Feb. 19, 2007.

*Why was there opposition to the Program Integrity changes?*

Basically, the changes went much farther than the Performance Standards. For example, the Performance Standards are silent about when billing dates can start or leasing restrictions. The proposed Program Integrity changes did.

So, under current rules, if you are an IDTF seeking first-time enrollment, you would be able to back bill from the date you met all supplier qualifications, even if Medicare issued your Medicare number months later. Under the proposed changes, IDTF's could receive reimbursement only after they received their Medicare number. This makes no sense, because to get your number, you must apply only after you have your staff in place and equipment purchased with the doors ready to open for business. Then you would have to put the entire operation into hibernation for months or provide free Medicare service until the number issued.

The new Manual changes would have also prohibited IDTF's from sharing space or equipment with another active Medicare supplier. Many IDTF's lease space with physicians or others as a normal course of business. There was no explanation how to apply this prohibition – whether it applied only to Medicare providers or Medicare suppliers or if persons were exempt other than physician-owned IDTF's.

*What else did the changes want to do?*

One change was a requirement that technicians working at IDTF's would be full-time W-2 employees of the IDTF where they worked. IDTF's already require that sleep technicians be certified as an RPSGT or hold such other certification required by the local Medicare carrier. The proposed rule would require the technicians to be full-time employees rather than independent contractors.

*What happened next?*

Well, without press announcement or explanation, CMS simply posted a rescission notice on its web site on February 19. The entire text of CR 5449, "Implementation of New Compliance Standards for Independent Diagnostic Testing Facilities (IDTFs)," was expunged from the Program Integrity Manual. In its place, CMS left this short message: "NOTE: The CR 5449, dated January 26, 2007 is rescinded and will not be replaced at this time. Please discard all materials related to CR 5449. We apologize for any inconvenience this may have caused." The text can be found at <http://www.cms.hhs.gov/transmittals/downloads/R187PI.pdf>.

*Will IDTF operators see these changes again in some other form?*

We don't know at this time. CMS is not talking publicly about this matter. It is likely that CMS will try to impose the spirit of two or three of the proposed restrictions in the future. If so, it is likely that such changes would be run through the customary rulemaking process. At a minimum, that would permit industry participants to comment on the unintended effects of the changes or suggest modifications to make compliance possible.

As Dan Brown recommends, sleep professionals at all IDTF sleep labs need to stay alert to these possible changes and be sure they are complying with the new IDTF performance standards.

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