U.S. DEPARTMENT OF TRANSPORTATION
Air Ambulance and Patient Billing Advisory Committee

Meeting Summary
Third Meeting of the AAPB Advisory Committee
August 11, 2021
U.S. Department of Transportation, Washington, D.C.

The Air Ambulance and Patient Billing (AAPB) Advisory Committee (Committee) met on August 11, 2021, from 1:00 to 4:00 p.m. Eastern time, in a virtual meeting via the Zoom Webinar Platform.

The Committee discussed the impact of the Airline Deregulation Act (ADA) on States' ability to regulate air ambulance operations, and whether to recommend that the ADA be amended as a means of improving the oversight of air ambulance providers.

In accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, the meeting was open to the public. Information about the meeting, including the agenda, is available at https://www.transportation.gov/airconsumer/AAPB. The webcast of the meeting is available at https://www.transportation.gov/airconsumer/AAPB/meeting-video.

Appendix A identifies the Committee members, agency employees, and others who attended the meeting. Appendix B is the list of Committee recommendations. All presentation materials that were provided at the meeting are available for public review and comment at https://www.regulations.gov, docket number DOT-OST-2018-0206.

Welcome, housekeeping matters, and introductory remarks

The Committee meeting began at 1:00 p.m. on August 11, 2021. Blane Workie, Department of Transportation (DOT) Assistant General Counsel for the Office of Aviation Consumer Protection and Designated Federal Officer (DFO), gave welcoming remarks and provided meeting logistics. Ms. Workie stated that the meeting would be recorded, and that the recording would be available on the Committee's website.

Lisa Swafford, Committee Chair and DOT Deputy Assistant General Counsel for the Office of Operations, then introduced herself and gave brief opening remarks, followed by introductions of the Committee members.

Presentation by Charles Enloe, DOT – Background

Charles Enloe, an attorney in DOT's Office of the General Counsel, presented on the express preemption provision of the Airline Deregulation Act of 1978 and the way that courts have applied that provision in the air ambulance context.

Mr. Enloe read the text of the ADA preemption provision, which is codified as amended at 49 U.S.C. § 41713(b)(1). He discussed several interpretations of the provision that the courts have provided. He then described certain State air ambulance laws that courts have held to be preempted by the ADA, including State laws banning balance billing and State laws banning subscription or membership programs.

Mr. Enloe then discussed the ways in which the ADA might apply to a dispute over the amount of payment that a patient or insurance company owes to an air ambulance provider. He explained that the ADA would not prevent enforcement by a provider, patient, or insurance company of an express contract or an implied-in-fact contract (which is an actual agreement manifested by the parties' conduct rather than a writing). And he noted that courts have suggested that this is true even if the parties to the contract do not agree on a price, but State law imposes a default price term that the parties could have contracted around.

Mr. Enloe then discussed two situations in which there might not be any sort of contractual agreement. First, he discussed the transportation of an individual patient without an agreement,. He explained that in that context, State law equitable theories—such as unjust enrichment, *quantum meruit*, and implied-in-law contract—often provide that a party who provides a benefit is entitled to compensation. Second, he discussed State worker's compensation laws that entitle providers to compensation from a State fund or private insurers.

Mr. Enloe noted that both State law equitable theories and State worker's compensation laws limit the amount of compensation to which a provider is entitled, and that it could be thought that the ADA preempts these limits as applied to air ambulance operators. He noted, however, that such a conclusion could impact the entitlement of a provider to *any* compensation, that this is an unsettled area of law, and that the courts have explored a number of approaches.

Mr. Enloe explained that some air ambulance operators have argued that non-contractual State law principles can give air ambulance operators the *right* to payment, and that the ADA prohibits patients or insurers from contesting the *amount* of payment. He discussed recent litigation in which the U.S. Court of Appeals for the Tenth Circuit held that the ADA preempted limits imposed by Wyoming on the amounts paid to air ambulance providers by the State worker's compensation fund, and the Wyoming Supreme Court then held that the preempted provision was severable from the State law giving providers an entitlement to compensation.

Mr. Enloe stated that the opposite view would be that the ADA prohibits patients, insurance companies, *and* air ambulance providers from relying on non-contract State law principles, meaning that air ambulance providers might not have a legal entitlement to payment in the absence of a contract. He explained that some courts have expressed a willingness to consider this argument, especially in recent months.

Mr. Enloe then explained that the United States took a middle ground position in the *Scarlett* litigation in the Tenth Circuit: if an air ambulance provider relies on non-contractual State law principles to claim an entitlement to payment, the patient or insurer may rely on the same State law principles to argue that the provider is claiming more than the amount to which it is entitled. He noted that the Eighth Circuit endorsed a similar position in *dicta* in 2018.

Mr. Enloe noted that the enactment of the No Surprises Act, which generally bans balance billing by air ambulance providers, should make payment disputes between providers and patients less likely. He noted, however, that worker's compensation disputes will likely remain.

Mr. Enloe described two recent cases involving the Texas worker's compensation system: a Texas Supreme Court case holding that the ADA does not preempt limits on the amount worker's compensation insurers are required to pay to air ambulance operators, and a decision of U.S. Court of Appeals for the Fifth Circuit holding that the ADA *does* preempt those limits.

Presentation by Charlotte Taylor – Perspective of Air Ambulance Providers

Ms. Charlotte Taylor, an attorney at the law firm Jones Day, spoke to the Committee on behalf of air ambulance operators. She noted that air ambulance operators recommend against carving out air ambulance operations from ADA preemption. She added that exempting air ambulance operators would create more legal uncertainty and have unintended consequences that would be detrimental to the market for air ambulance services.

On the issue of uncertainty, Ms. Taylor discussed the possibility that Federal field preemption could still displace State law if the ADA's express preemption were repealed, as courts have held that field preemption applies in other aviation subjects, such as airline safety (including the safety of air ambulance operators), and airline consumer protection. She also noted the possibility that conflict preemption could apply where an operator's compliance with both State and Federal law were an impossibility due to conflicting requirements. Ms. Taylor argued that these other forms of preemption would create uncertainty for the industry.

Ms. Taylor also discussed potential unintended consequences of exempting air ambulance operators from ADA preemption. She stated that air ambulance operators based close to State borders often provide a lot of services in neighboring States, and with the repeal of preemption, States could pass burdensome route requirements that would prevent operators from providing transportation to other States. She noted that this could create a complex patchwork of State requirements on certification, staffing, and other subjects, which would create barriers for operators and competition.

Ms. Taylor concluded her presentation by noting that the AAPB Advisory Committee's work is a reflection of Congress' efforts to set in motion solutions to air ambulance issues, and recommending appeal of ADA preemption at this late date would undermine Congress' efforts.

Presentation by Brian Webb, National Association of Insurance Commissioners – Perspective of State Insurance Regulators

Mr. Webb noted that NAIC has worked on the issue of air ambulance balance billing since 2013. NAIC saw more complaints coming in from consumers in recent years. Mr. Webb stated that

NAIC saw prices of air ambulance services increase significantly recently, and some up to 2 to 3 times. He noted that this was burdensome to consumers since they are billed.

Mr. Webb observed that air ambulance operators typically do not enter into contracts with patients and that States tried to step in to address this issue of a patient being put in the middle between air ambulance providers and insurers with balance billing. States looked at imposing requirements on air ambulance operators related to reporting, price disclosures, and dispatch lists. Some States were successful in encouraging out in-network agreements, and some States tried to impose balance billing restrictions as applied to air ambulance providers. But courts, as discussed by other presenters, found preemption under the ADA and limited States' ability to regulate in this area.

Mr. Webb stated that he worked with Congress on the 2018 FAA Reauthorization Act. He mentioned that NAIC worked with Senator Tester and other members to try and secure language that enables States to address air ambulance balance billing issues and regulate in this specific area. Mr. Webb added that the issue of safety, rates, routes, services are understandably a concern under the ADA, but those changes are not being recommended by NAIC. According to Mr. Webb, NAIC recommended language that was narrow to let States protect consumers. He emphasized that the AAPB Advisory Committee was created under the 2018 FAA Reauthorization Act through the efforts of NAIC working with Congress.

Mr. Webb stated the work of the AAPB Advisory Committee is to look at the problems with patient billing for air ambulance services. He recommended that this Committee report back to Congress that there is a problem under ADA preemption and States are part of the solution. He noted that NAIC supports the passage of the No Surprises Act (NSA) because it does a great job at protecting the consumer. However, he explained that there is an issue of States being the primary regulators of air ambulances under NSA and then States being preempted in this role under the ADA. Mr. Webb asserted that the NSA protects against balance billing, but introduces a possible conflict with the ADA on enforcement. Mr. Webb said NAIC is looking for language that allows States to regulate air ambulance services. However, Mr. Webb cited to Section 2799B-4 of the Public Health Service Act that each State may require a provider or health care facility (including a provider of air ambulance services) subject to the requirements of this part to satisfy such requirements. Mr. Webb indicated that NAIC believes this provision indicates the role of States to enforce regulations under the NSA and to protect consumers. He acknowledged that the ADA would still preempt this role for the States.

Mr. Webb stated that NAIC would recommend at the very least that the Committee recognize the problem of ADA preemption in this area and it should be clear in advocating for that States to regulate in the narrow areas of network participation, reimbursement and balance billing, and transparency. He further underscored his point from earlier not to include other elements of ADA preemption such as safety. Mr. Webb said that Congress needs to provide direction on aligning the ADA with the NSA that allows States to enforce the NSA. Mr. Webb suggested that States would assist consumers that have complaints by working with insurance companies licensed in

the State, and air ambulance providers licensed in the State. Mr. Webb declared that the consumer should be out of it and should not receive balance bills. Mr. Webb stated that this language was offered by NAIC to Congress..

Mr. Webb also asked that as DOT implements regulations under the NSA regarding air ambulance providers, that DOT work with the Department of Health and Human Services (HHS), the Department of Labor, and the Department of the Treasury. Mr. Webb contended that only when a State law does not apply, should DOT be the regulator. He advocated for States being the primary regulators, as he believes this was the intended purpose of the NSA. Mr. Webb stated that NAIC is proposing this regulatory recommendation and it should be supported with a legislative recommendation as well to address ADA preemption. According to Mr. Webb, to ensure adequate enforcement of the NSA, a narrow change to the ADA is NAIC's recommendation to the Committee.

Presentation by Matthew Baumgartner, Armbrust and Brown – Perspectives of Workers' Compensation Industry and Managers of Employee Benefit Plans

Mr. Baumgartner provided the perspective of the workers' compensation industry and the perspective of managers of employee benefit plans.

Workers' Compensation

Mr. Baumgartner stated that the ADA is a deregulation statute which ended the authority of the Civil Aeronautics Board (CAB) to set rates for commercial airlines. He explained that rate setting was thought to be necessary when the industry was getting established, but by the late 1970s it was apparent that there was a viable consumer market. Mr. Baumgartner added that the air ambulance marketplace is very different from commercial aviation. He noted that workers' compensation is a purely State-level insurance and labor regulatory system which runs largely independent of Federal law; it is designed to spread the risk and cost of workplace accidents among employers and to replace tort suits.

Mr. Baumgartner stated that workers' compensation for air ambulance transport was obviously beyond the intended scope of the ADA. He stated that the preemption argument currently being adopted by courts (*i.e*., that the ADA preempts States from regulating workers' compensation for air ambulance transports) is based on textual literalism and not on statutory intent. He stated that he has made the same anti-preemption arguments to various courts, but with varying degrees of success. He stated that some courts consider the consequences of preemption, and some do not. He elaborated that some courts say that the default State standard (quantum meruit or implied-in-fact standards) would "obviously" apply to fill the gap that appears if preemption exists, but other courts say that there is a void in the law regarding the proper amount of payment.

Mr. Baumgartner argued that a statutory or regulatory solution would restore the proper balance of State and Federal interests. Specifically, he argues that ADA preemption of State workers' compensation serves no Federal aviation interest. He observed that the ADA promotes deregulation, but in practice air ambulance operators are using the ADA as means to *require*

State workers' compensation carriers to pay the operators' billed charges: this is "super-regulation," not deregulation.

Mr. Baumgartner also explained that the ADA deregulated pricing for commercial air transportation, and preempted State regulation so that States would not replace Federal regulation with regulations of their own. However, he stated that there has never actually been Federal deregulation of pricing for air ambulance service. Mr. Baumgartner stated his belief that, to the contrary, Medicare and Medicaid regulate Federal rates for that service, and prohibit balance billing; thus, there is no Federal deregulation purpose as to air ambulance insurance payments. He noted that after the passage of the NSA, there is now Federal regulation of air ambulance pricing for Medicare, Medicaid, and private health insurance: if there is ADA preemption in the workers' compensation context, then workers' compensation would be the only unregulated payor group left.

Mr. Baumgartner stated that there is no real danger of air ambulance providers being subject to a "dizzying array" of State rules, as air ambulance providers attest. States have an interest in ensuring care to its employees. State workers' compensation systems are carefully balanced plans that control costs to employers, ensure employees' access to cost-free care, and eliminate costly lawsuits by employing administrative solutions, including dispute resolution systems. Mr. Baumgartner contended that ADA preemption in the air ambulance context threatens to break this balance by siphoning off funds for the unique benefit of air ambulance providers at the expense of every other participant in the system. Moreover, he argues that the ADA provides no Federal alternative to the carefully balanced State system. Mr. Baumgartner cites as evidence the lack of process under the ADA by which parties can bring rate disputes to DOT. He noted that the "nightmare scenario" for States is "Federally sanctioned air piracy" where air ambulance providers charge what they please, with no enforceable State payment standard, and balance bill injured employees for amounts that could easily exceed the employee's annual pay.

Employee Benefit Plans

Mr. Baumgartner stated that self-funded employee benefit plans are governed by ERISA and are not State-regulated (in contrast to workers' compensation). He noted that, unlike workers' compensation, in the ERISA context there is no fallback State standards for appropriate rates.

Mr. Baumgartner explained the billing process for air ambulance service in the ERISA context. According to Mr. Baumgartner, after transport is provided, a bill is sent to the health plan along with a demand for payment of full billed charges, sometimes using the ADA as a justification. The employee is balance billed. The employee then complains to the employer and health plan. He explained that this puts the plan fiduciary in a difficult position because the fiduciary wants to cover the costs, but exorbitant costs can jeopardize the solvency of the plan as a whole, particularly for small businesses and transports in rural areas. Mr. Baumgartner stressed that this business model is not the free-market outcome that Congress intended through the ADA.

Mr. Baumgartner added that the No Surprises Act may help, but it is unclear how it will work in practice. He noted that, under the HHS interim final rule's cost-sharing provisions, the qualifying payment amount would be determined by "the lesser of the billed charge or the plan's

or issuer's median contracted rate," which is problematic in the air ambulance context because there are not many contracted rates and the ones that do exist have been forced upon plans to avoid balance billing to employees. Mr. Baumgartner also noted that, with other health care services, the NSA defers to State law to determine a recognized amount or out-of-network rate, but these do not exist in the air ambulance context because of ADA preemption.

Proposed Solution

Mr. Baumgartner stated that for the workers' compensation industry, the solution is to carve out ADA preemption for air ambulance service. In the ERISA context, he stated that the provisions of the NSA would apply, but the ADA's preemption provisions take away the incentives to set in-network agreements and take away applicable State payment standards. He added that removing that obstacle would also create more network agreements by eliminating the business model that is based on surprise billing and balance billing. He also noted that States would have no incentive to enforce unfairly low payments that would lead providers to reduce access to care. Instead, Mr. Baumgartner suggested that air ambulance providers would have to work within the parameters of State systems, just like other health care providers. He concluded by stating that removing ADA preemption may change the way air ambulance providers do business, but on balance this would solve far more problems than it creates.

Presentation by Dia Gainor and Joseph House – Perspective of National Association of State EMS Officials

Ms. Gainor is the executive director of the National Association of State EMS Officials (NASEMSO). She introduced Mr. Joseph House, the executive director of the Kansas board of emergency medical services and a member of the NASEMSO board of directors who gave the presentation and spoke on behalf of NASEMSO.

Mr. House indicated that NASEMSO represents State EMS offices in all 50 States, DC, and U.S. territories. He explained that State EMS offices are charged with the sole responsibility of protecting the public through effective oversight of EMS, including EMS provided by ground and air ambulances. Mr. House specified that NASEMSO works to ensure clinic safety, clinical quality, and minimal standards are met to protect the public during care and transport.

Mr. House stated that ADA preemption has negatively impacted States' ability to regulate medical care. He emphasized that the inclusion of air ambulance service within the ADA and treating an air ambulance similar to an air carrier rather than a medical resource effectively removes the States' ability to regulate how health care occurs within a State's borders.

Mr. House discussed the certificate of need, as presented earlier, and how it is impacted by preemption under the ADA. He said that States do not have the ability to say whether a need occurs in a State as the ADA prioritizes and promotes competition over appropriate medical care. Mr. House explained that certificates of need arose because of ambulance services racing to handle calls, or if a specific provider received a call for transport, the company may send it to

another part of their operations even if it was not the closest location. He said he observed this in the State of Kansas.

Mr. House also discussed preemption and the requirement for air ambulances to maintain accreditation as a permit requirement. He indicated that the ADA hinders States' ability to establish a minimal set of standards that were generally accepted within the industry since preemption does not allow for States to require accreditation for air ambulance services.

Mr. House discussed preemption of State legislation as it is applied to insurance and State workers' compensation law. He contended that the ADA leaves States and the consumers with the burden of covering the increased charges for air ambulance services.

Mr. House said NASEMSO believes that ADA preemption should be amended to exclude air medical transportation because marketplace regulation is only effective when the consumer has a choice. Mr. House noted that consumers/patients do not have an opportunity to make that decision in the EMS world, where it is a medical decision. He asserted that transportation should be based on what is clinically sound and appropriate to transport a patient to a facility that can provide care.

Mr. House said the fundamental economic theory that prices should decrease when demand decreases has not proven true in air medical transportation industry. He cited to data from the Health Care Cost Institute that the cost of rotor wing and fixed wing transportation both went up even if the rate of use did not. He said it is not a proportionate change and marketplace forces are not appropriate for medically necessary air transportation.

Mr. House discussed memberships with air ambulance companies and the ability of memberships to adversely influence the decision of transportation toward incentives as opposed to clinical needs. He elaborated that subscription plans influence the availability of health services and also increase the costs of air medical transportation for non-members.

Mr. House discussed numerous laws that are in effect to protect patients where delays can impact mortality and morbidity. His first example was the Emergency Medical Treatment and Labor Act (EMTALA), which he stated requires anyone coming to an emergency department to receive treatment that would stabilize the patient, and includes a prudent layperson standard that improved patient mortality and morbidity outcomes. Mr. House then mentioned the Veterans Reimbursement for Emergency Ambulance Services Act (VREASA) , which he explained requires the Veterans Administration (VA) to pay EMS claims by also utilizing the prudent layperson standard. He noted that this law enabled veterans to get emergency transport to the closest medical facility in an emergency and not to a VA facility. Now, according to Mr. House, the No Surprises Act dictates the medical necessity of emergency services and what facilities provide transport. Mr. House indicated how CMS recognizes these issues, citing to Section 10.4.1 of the Medicare Benefit Policy Manual that states the medical condition required

immediate and rapid ambulance transportation that could not have been provided by ground ambulance.

Mr. House stated that air ambulances are being used when time is not of the essence when the patient condition is stable and can be transported safely through other means. He said the disparity does require stringent utilization review and regional oversight. Any time this matter is brought up by States, they are met with an "elephant gun" of ADA preemption preventing the States from doing such things.

Mr. House said the time a patient spends in a facility may not be shorter utilizing air medical resources, but the time for the patient's definitive care is shorter. He provided statistics that on average, a patient receiving ground ambulance transportation between facilities is 90 minutes. Rotor wing transportation for a patient between facilities is on average 110 minutes, and fixed wing is 195 minutes. He stated, however, that the transport times to enable the ability to go greater distances is not proportionate. Mr. House discussed how States attempted to perform utilization review on addressing the issue of time response of ambulance services. He noted that the States have consistently been met with challenges on their authority to take action based upon preemption.

Mr. House stated that NASEMSO believes that DOT should absolutely remain with the authority over safety for vehicles in the air and on the ground. Also, Mr. House shared NASEMSO's belief that States should have responsibility for all other matters to the provision of air ambulance services. States have broad authority over the delivery of health care, licensing of health care professionals, standards for hospitals and other health care facilities, establishment of time sensitive systems of care, and regulation of health insurance. Mr. House stated that for these reasons listed and various regional capacities and capabilities, it is States and local units of government that are the entities that have the capability to provide effective oversight of air ambulance and ground ambulance services.

Mr. House said that State EMS offices design plans for effective delivery of EMS services. He remarked that the plans include quality review, peer review, and regional performance improvement to achieve better patient outcomes. He stated his belief that oversight should remain as close to the consumer as possible and stressed , he said that States have the capacity to carry out this function. He mentioned statistics that show the effectiveness of State regulation over interstate boundaries that are crossed by ambulances indicating that a State can regulate effectively in this area. He used the State of Kansas as an example.

Mr. House offered the following three recommendations: (1) amend the ADA to exclude air medical transportation; (2) state clearly that States and local units of government have the ability to regulate all aspects of air ambulance services; and (3) retain DOT's operational safety authority over air medical transportation.

Prepared Remarks by Members of the Public

Remarks by William Bryant

Mr. Bryant, a health care consultant, said that he has worked on three kinds of air ambulance cases: (1) cases where the air ambulance provider charged too much or far too much; (2) cases where the insurance company paid far too little or nothing at all, leaving the consumer with a balance bill; and (3) cases where creative outside law firms found "little, unique arguments" to argue about for months and years.

Mr. Bryant said that he thinks everyone shares the goal of trying to protect consumers. He asked rhetorically whether the way to do that is to "throw out 30 years of the ADA working," or whether instead it is best to rely on the No Surprises Act. He expressed the view that the NSA does a good job of solving the problem of protecting consumers and resolving rate disputes, by allowing providers and insurers to either agree on a contractual price, work out disputes on a case-by-case basis, or utilize a nationally-consistent independent dispute resolution program. He expressed concern about allowing 50 different State systems of rate regulation, especially since States only regulate half of insurance products.

Mr. Bryant responded to the presentation by Mr. House by saying that he was not sure the Committee has the authority to opine on anything beyond billing issues.

Remarks by Michael Baulch, Association of Critical Care Transport

Mr. Baulch, a nurse and board member of the Association of Critical Care Transport (ACCT), told the Committee that ACCT strongly supports the No Surprises Act, and said that Congress in enacting that legislation had adopted many of ACCT's recommendations.

Mr. Baulch expressed the opinion that the ADA applies differently in the context of the air medical industry than in the context of commercial passenger airlines; for example, air medical patients do not choose their air ambulance provider the way that customers can choose their airline flights. He also said that patients have no ability to choose a provider that is in their insurance network, and no ability to choose ground ambulance over air ambulance. He argued that we should not trust the competitive air medical marketplace to protect consumers in the absence of adequate State and Federal oversight.

Mr. Baulch argued that the air medical marketplace is not working in the best interest of consumers. He provided statistics regarding the growing number of air ambulance helicopters and bases over the last 40 years and the growing saturation of markets.

Mr. Baulch said ACCT recommended that the Committee recommend amending the ADA to enable State regulatory oversight of the medical aspects of air medical service, even if those regulations are related to, or have an indirect economic impact on, prices, routes, or services. He said that if the Committee did not make that recommendation, or if Congress does not make such

an amendment, DOT can and should provide economic oversight to avoid oversaturated markets and high prices that bankrupt families.

Remarks by Bernard Diederich

Mr. Diederich told the Committee that he worked for the Civil Aeronautics Board for 15 years, that he then worked on air ambulance deregulation at DOT from 1985-2010, and that he has been engaged in the private practice of air ambulance law for the last 10 years.

Mr. Diederich argued that there would be nothing beneficial to amending the ADA, and that marketplace forces are preferable to State regulation. He said that States already have a number of non-preempted controls over air ambulance operations, including: (1) State regulation of the medical aspects of air ambulance services; (2) State selection of prices, routes, or services through commercial contracts; and (3) State regulation through Medicare and Medicaid, under which they act as agents of a blanket Federal program. He also noted that the ADA's preemption provision does not have an infinite reach, as it does not cover State laws with a tenuous, remote, or peripheral effect on prices, routes, or services.

Mr. Diederich said that if ADA preemption is removed, States and courts will have to face implied preemption arguments, which he contended would not be preferable.

Mr. Diederich noted that some have argued that Congress did not mean for air ambulances to be covered by the ADA preemption provision. But he said that as a former regulator, he could assure the Committee that Congress did not act so haphazardly. He noted that the courts have issued repeated rulings consistent with DOT's position on ADA preemption, and that Congress has never chosen to amend the ADA as applied to air ambulances. Finally, he said that although the Subcommittees found problems, they also offered specific solutions, none of which involve an overhaul of the ADA.

Following these remarks, the Committee took a brief recess.

Committee Discussion and Recommendations

Ms. Workie initiated the Committee's discussion by summarizing the arguments that had been raised by the presenters. She noted that there was general agreement among the members that the safety of aircraft and operations should remain preempted and addressed by DOT (through the FAA).

<u>Workers' Compensation Programs</u>

One member representing air ambulance operators agreed with the assertion that the NSA addresses most issues around self-funded plans, but that workers' compensation programs might not be addressed by the law. Mr. Baumgartner, who earlier spoke on workers' compensation plans, responded that if workers' compensation programs, particularly their payment standards and patient balance billing protections, were subject to ADA preemption, then workers' compensation programs become the only unregulated payor group. Mr. Baumgartner noted that

this would be a big issue to state insurance regulators. He also stated that air ambulance operators have been defeating workers' compensation balance billing prohibitions in court, based on an ADA preemption theory. A member representing state insurance regulators noted that the Advisory Committee, when it considers recommendations regarding workers' compensation programs, should also ensure that such recommendations cover "monopolistic" states like North Dakota and Washington, which require employers to purchase workers' compensation coverage from a government-operated insurance fund, rather than from private insurers.

Aligning ADA with the NSA

Ms. Workie then noted that the NAIC presenter suggested that to align the ADA with the NSA, there should be a narrow carve-out regarding network participation, billing practices, and transparency. She recalled that the presenter had added that states will be the primary enforcers of the NSA, but that, according to this presenter, it is unclear whether a state can take any action against an air ambulance operator for failure to follow the NSA, due to the ADA. Ms. Workie asked the members for their thoughts. Mr. Baumgartner responded that in courts, air ambulance operators are defeating balance billing prohibitions, including those applicable to workers' compensation programs, on a preemption theory. He added that if the balance billing ban is preempted, individuals could end up being balance billed, with particular provisions of the NSA no longer enforceable by state authorities. A member representing state insurance regulators responded that, although the NSA is designed with the expectation that States would regulate network participation, ADA preemption creates a hole for private insurance. He added that the Committee should clearly define that states have the authority given to them under the NSA.

State Regulation of Medical Services

A member representing air ambulance operators asserted that States need the authority to be able to preserve access and wholly oversee licensing of medical requirements that may be related to economic regulation of air ambulance services in the post-transport context. Mr. House, who gave a presentation from the perspective of State EMS officials, suggested that the Committee consider a recommendation that the ADA be amended to exclude air medical transportation, to clearly identify that states and local units of government have the ability to regulate all aspects related to the provision of ambulance services, and to clearly identify that DOT retains the ability to regulate all aspects related to the operational safety of vehicles, air and ground. A Committee member representing the workers' compensation insurance industry agreed with the suggestion. Another member, representing air ambulance operators, disagreed, noting that the focus on amending the ADA should be narrow. He added that the Committee only needed to make sure that its recommendations can withstand a challenge under the ADA, and if they do not, then Congress should narrowly amend the ADA to allow the recommendations to move forward.

The Committee then voted on five recommendations. Ms. Workie reminded the Committee that, as a quorum existed (75% of the members were present), a recommendation receiving a majority of the votes of the members present is adopted by the Committee. The four recommendations that obtained majority support of the Committee are as follows:

Recommendation #1 – The ADA should not preempt State laws to the extent necessary to align the ADA with the NSA (relating to network participation, reimbursement and balance billing, and transparency for an air carrier that provides air ambulance service).

Recommendation #2 – The ADA should not preempt State laws relating to State regulation of workers' compensation insurance programs with respect to air ambulance services including monopolistic State funds in Ohio, North Dakota, Washington and Wyoming.

Recommendation #3 – The ADA should be amended to exclude air medical transportation, to clearly identify that States and local units of government have the ability to regulate all aspects related to the provision of ambulance service, and to clearly identify that the DOT retains the ability to regulate all aspects related to the operational safety of vehicles, air and ground.

Recommendation #4 – The ADA should not preempt State laws relating to licensing of medical services of air ambulance providers, even if they have incidental effect on prices, routes, and services.

The Committee did not adopt a fifth proposal, which was to amend the ADA to enable the Committee's May 2021 recommendations to be implemented to the extent the ADA preempts their implementation.

Ms. Workie noted that members who dissented with the recommendations would have the opportunity to express their views in the report.

Conclusion

The meeting concluded with the opportunity for final comments from the Committee and the public in attendance.

Ms. Swafford and Ms. Workie thanked the Committee for its collegiality, hard work, and its extensive thoughtful recommendations. Ms. Swafford noted that she would follow up with the Committee regarding production of its report.

The third meeting of the AAPB Advisory Committee was adjourned by Ms. Swafford around 4:00 p.m.

I hereby certify that, to the best of my knowledge, the foregoing minutes are accurate and complete.

Lisa Swafford
Chair
Air Ambulance and Patient Billing Advisory Committee

Appendix A - Attendees

Committee Members

Lisa Swafford, Chair, representing the Department of Transportation.

Dr. Michael Abernethy, University of Wisconsin School of Medicine and Public Health, representing physicians.

Elizabeth Battaglino, HealthyWomen, representing consumer advocacy groups

Susan Connors, Brain Injury Association of America, representing patient advocacy groups.

Jon Godfread, State of North Dakota, representing State insurance regulators.

John Haben, UnitedHealth, representing health insurance providers.

Thomas Judge, LifeFlight of Maine, representing air ambulance operators (community/State/government owned).

Anne Lennan, Society of Professional Benefit Administrators, representing managers of employee benefit plans.

Kyle Madigan, Dartmouth Hitchcock Advanced Response Team, representing nurses.

Asbel Montes, Acadian Ambulance Service, representing air ambulance operators (fixed wing).

Christopher Myers, Air Methods, representing air ambulance operators (rotary wing).

Ray Pickup, WCF Insurance Group, representing the workers' compensation insurance industry.

Rogelyn McLean, Centers for Medicare & Medicaid Services, representing the Department of Health and Human Services.

DOT and Other Governmental Representatives

Blane Workie, Designated Federal Officer

Robert Gorman, Department of Transportation

Charlie Enloe, Department of Transportation

Ryan Patanaphan, Department of Transportation

Ami Lovell, Department of Transportation

Registered Attendees

LAST NAME	FIRST NAME	ORGANIZATION
Alston	Erin Lambie	American College of Obstetricians and Gynecologists
Baulch	Michael	Assn of Critical Care Transport
Barko	Ruthie	Air Methods
Bennett	Steve	APCI (American Property & Cas. Ins. Assn)
Bertugli Spece	Angela	Highmark Health
Boron	Andrew	MASA Global
Brown	Sharon D.	MASA Global
Bryant	William	Sierra Health Group
Brzakala	Maggie	Foley & Lardner LLP
Buchanan	Kendall	Cigna
Canaday	Nick	Texas Division of Workers' Compensation
Carter	Cynthia	Airbus
Cosello	Jennifer	MedFlight/MedCare Ambulance
Curtis	Cameron	AAMS (Association of Air Medical Services)
Dawson	Kirstin	CVS Health
Diederich	Bernard	Retired
Eastlee	Christopher	AAMS
Eisenstein	Megan	National Air Transportation Association
Grabowski	Robert	Metro Life Flight/ Health Medical Center
Griffith	Dean	Jones Day
Hall	Christopher	PHI Air Medical
Heffelfinger	Matthew	West Michigan Air Care
Henry	Ann	APCI (American Property & Cas. Ins. Assn)
Hernandez	Marcos	MASA Global
Lawyer	Michael	UT Health East Texas AIR
Liggins	Eboné	AHIP (America's Health Ins Plans)
Marasco	Ed	Quick Med Claims
Mayle	Carolyn	Air Methods
McCutcheon	Gene	Metro Life Flight
Morrow	Keith	Metro Aviation, Inc.
Motzkin	David	PHI Health
Mulhern	Michael	DHART
Munk	Jeff	Munk Policy and Law
Murray	Alexis	AHIP
Nelson	Jeff	Texas Department of Insurance
Nolan	Julie E.	Akin Gump Strauss Hauer & Feld LLP
Norton	Jo Betsy	Texas Mut. Ins Co
O'Brien	Madeline	Georgetown U. Health Policy Institute
Parker	R. Adam	Sanford Health
Paul	Jincy	Tufts Health Plan
Peek	Roxanne	Emprize Group

Rogers	Liz	Gundersen Health System
Rothe	Thomas	APCI
Sadler	Cate	Airbus
Satterfield	DJ	Mercy Hospital Springfield
Schultz	Jacob	Gundersen Health System
Sheehan	Leo	AHIP
Smith	Richard E.	Vidant EastCare
Spivey	Rob	First Flight Flight Communications
Tanner	Jeff	Lynchburg General Hospital
Thomson	David	East Carolina University
Vlossak	Frank	Williams & Jensen
Weber	Holly	Metro Aviation, Inc.
Whipple	Richard	Mission Hospital
Wijetunge	Gamunu	National Highway Traffic Safety Administration
Wolf	Jennifer	IAIABC (Intl Assn of Indus. Accident B&C)
Woodruff Lyons	Holly	House Committee on Transportation & Infrastructure

APPENDIX B – RECOMMENDATIONS

Recommendation #1 – The ADA should not preempt State laws to the extent necessary to align the ADA with the NSA (relating to network participation, reimbursement and balance billing, or transparency for an air carrier that provides air ambulance service).

Recommendation #2 – The ADA should not preempt State laws relating to State regulation of workers' compensation insurance programs with respect to air ambulance services including four State monopoly services.

Recommendation #3 – The ADA should be amended to exclude air medical transportation, to clearly identify that States and local units of government have the ability to regulate all aspects related to the provision of ambulance service, and to clearly identify that the DOT retains the ability to regulate all aspects related to the operational safety of vehicles, air and ground.

Recommendation #4 – The ADA should not preempt State laws relating to licensing of medical services of air ambulance providers, even if they have incidental effect on prices, routes, and services.