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2011 General Assembly preview

First physician elected in 20 years

Twenty-nine new faces graced the House and Senate chambers when the current General Assembly first took its seats on January 4, 2011. Among those 29 were 22 men, 7 women, 7 Republicans and 22 Democrats, one nurse and one physician.

The physician is Christopher S. Ottiano, MD, a board-certified general surgeon and spine specialist who is the new Senator representing District 11 (Portsmouth and Bristol). In his third run for public office, Dr. Ottiano, a Republican, defeated the incumbent Democrat, Charles "Chuck" Levesque, who had served in the General Assembly (both House and Senate) since 1993.

Dr. Ottiano received his medical degree from Tufts University School of Medicine in 1995 and did his residency at Baystate Medical Center. He has offices in Smithfield and Johnston. Dr. Ottiano is the first

physician elected to the General Assembly since 1990. (The last was former RIMS President Nick Tsiongas, MD, MPH.)

The other health care professional newly elected to the Rhode Island General Assembly is David Bennett, RN, a psychiatric nurse working at Butler Hospital. In his second run for public office, Mr. Bennett first had to defeat incumbent Al Gemma in the September 14 Democratic Party primary. Having then prevailed in the November 2 general election as well, Mr. Bennett now represents House District 20 (Warwick).

Making a very strong but ultimately unsuccessful bid to represent Senate District 35 (North Kingstown, East Greenwich, Warwick) was Mark Schwager, MD. Dr. Schwager, having already served two terms as an East Greenwich Town Councilman, handily defeated a strong and *continued p.2*

"Prior Authorization": a hot issue again

Having demanded RIMS' considerable attention on and off for a decade already, "prior authorization" requirements for high-end imaging studies are once again on the front burner, thanks to recent moves by both Blue Cross and United-Healthcare that many physicians find onerous, wasteful and costly.

While payers in much of the rest of the country years ago turned to vendors like MedSolutions to ratchet down utilization of expensive imaging modalities, the principal Rhode Island payers, including Blue Cross, United and Neighborhood Health Plan, long displayed a commendable willingness to accept RIMS' leadership in a cooperative search for a better approach for Rhode Island.

In two notable efforts undertaken since the year 2000, both of which were spearheaded by former RIMS President Yul D. Ejnes, MD, physicians representing the key medical specialties sat down with the payers to identify best practices and work out a community-based, educational approach toward the common goal: assuring optimal and efficient use of advanced imaging in patient care, based on standards developed and endorsed by national medical specialty societies.

Despite a general spirit of cooperation and good will, the success of these efforts turned out to be limited by the available data of the day. Some national specialties had far more complete and credible protocols than others. On the payers' *continued p.3*



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RHODE ISLAND MEDICAL NEWS

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SUBSCRIPTION INFORMATION

A one year subscription to *Rhode Island Medical News* costs \$50. The publication is free to members.

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The Rhode Island Medical Society was founded in 1812 to promote the art and science of medicine. RIMS is the eighth oldest state medical association in the country.

In cooperation with the Brown University School of Medicine, the Rhode Island Department of Health, and Quality Partners of Rhode Island, the Society also publishes a monthly magazine, *Medicine and Health Rhode Island*.

FROM PAGE ONE

well-financed Democratic opponent in the September 14 primary but in the general election faced a Republican with deep pockets and a well-known family name.

Budget woes, redistricting will dominate this Assembly session

Given the deep rut the state's economy and budget find themselves in, Governor Lincoln Chafee and the General Assembly will face hard choices and be forced to make unpopular decisions this year. Tax increases and further cuts in state services appear inevitable.

The Governor's choice to head the Department of Human Services, former House Finance Chair Steven Costantino, has long been on record favoring consolidation of the state's social service agencies, including the Department of Health; the Department of Children, Youth and Families; the Department of Behavioral Healthcare, Developmental Disabilities and Hospitals

(BHDDH, nicknamed "Buddha," formerly MHRH), and the Department of Elderly Affairs under the Department of Human Services. Such consolidation would promise more seamless delivery of services and perhaps realize some economies for the state budget.

Meanwhile, 2010 census results will trigger redrawing of the 113 House and Senate districts. The line dividing the state's two congressional districts will shift as well, in order to balance out the populations in the districts, as required by law. Changes in the General Assembly districts always have potential to generate some friction here and there.

RIMS' legislative agenda

Despite the challenges, the Rhode Island Medical Society will be asking the General Assembly to consider an ambitious and far-reaching series of new and reintroduced proposals to promote the public health. These include a new state mandate for health insurers to spend a greater proportion of premium dollars on health care, new taxes on

Provider taxes

RIMS reaped a bitter reward for three and a half years of effort and tens of thousands of dollars expended, when the Providence District Court finally handed down its decision in November in the case of Rhode Island Medical Imaging et al vs. Sullivan.

The RIMS-sponsored lawsuit against the state was the Medical Society's response to the legislature's enactment in June 2007 of two taxes (or "sur-charges," as the law calls them) imposed on many physician-owned facilities that perform imaging, surgery and endoscopy on an ambulatory, non-emergent basis. Proceeds from the taxes flow into the state's general fund.

Three national medical associations contributed financially to RIMS' fight, recognizing that American physicians everywhere have a stake in the Rhode Island tax case. The AMA's Litigation Center contributed \$20,000. The American Academy of Ophthalmology contributed \$5000, and the American Academy of Dermatology \$2500. RIMS is grateful to these national organizations and to the many medical practices and individual physicians who strongly supported RIMS' efforts to fight the good fight on behalf of the medical community.

Judge Robert Pirraglia's 43-page decision rejected every one of the physician plaintiffs' arguments, which contended that the tax laws were unconstitutionally vague and discriminatory. The full text of Judge Pirraglia's decision is available at www.rimed.org.

While the judge's ruling was disappointing, it was hardly surprising. Though RIMS' legal arguments were thoroughly researched, well constructed and cogent,

sugary beverages and tobacco, liability reforms in three key areas, mitigation of the burdens of health insurers' prior authorization requirements, new restrictions on tanning salons, relaxation of physician dispensing restrictions, tax credits for on-call services, expansion of e-prescribing to include controlled substances, among other RIMS initiatives.

Meanwhile, RIMS' leadership will also be deeply involved in shaping state efforts to prepare Rhode Island for the next phases of national health care reform, including the requirement that states set up health insurance exchanges by 2014. Re-elected Lieutenant Governor Elizabeth Roberts will be getting more support from Governor Chafee than she did from Governor Carcieri as she moves ahead with what she calls "getting national health reform right for Rhode Island." ❖

Prior Authorization, continued

side, data systems turned out to have a crippling weakness: they could identify where the tests were performed, but far too often could not identify who ordered them.

Ultimately the payers, while acknowledging the value and validity of RIMS' process, found that rapidly rising cost pressures compelled them to move ahead with more aggressive, bureaucratic measures – namely, prior notification and prior authorization – which in the meantime had been "proven" to save millions of dollars for other payers across the country.

In the end, Blue Cross was the first the Rhode Island payer to require prior authorization for non-emergent, high-end imaging studies. Their chosen vendor to manage the new imaging program, MedSolutions of Franklin, TN, promised BCBSRI that the insurer would save at least seven million dollars in the first year; and indeed, Blue Cross' outlay for imaging dropped by more than the predicted

amount during the first year under "prior authorization." Moreover, it dropped that much despite the fact that Blue Cross did something that it long refused to do and repeatedly told RIMS it would never do: namely, accede to RIMS' demand that radiologists be permitted to relieve ordering physicians of the burdens of securing prior authorizations, as, RIMS argued, had been successfully implemented in other jurisdictions.

BCBSRI's ultimate willingness to permit ordering physicians to delegate the authorization process to radiologists has been a major saving grace of the prior authorization program – until now. In 2010 BCBSRI announced it would revert to its original intent and bar radiology centers from performing pre-authorization work on behalf of ordering physicians, effective January 1, 2011.

At this writing, the shift in Blue Cross policy continues to be a major topic of RIMS' discussions with Blue Cross, the Health Insurance Commissioner and the Director of Health.

Two ironies are apparent in this turn of events. One irony is that the Medical Society, in response to members' complaints about United-Healthcare's newly onerous imaging management program, had been preparing to demand that United revise its processes so as to be more in line with those of Blue Cross.

A second and greater irony is the contrast between BCBSRI's acknowledged leadership in promoting primary care in recent years and this new burdensome imaging policy, which primary care physicians regard as a setback. It is primary care physicians who order about 55% of advanced imaging studies and are most heavily burdened by the new obligation to secure prior authorizations themselves. One physician observed that the new imaging rules could serve to offset the good will and respect Blue Cross has earned under its new leadership since 2004. ❖

the court nevertheless found that they were insufficient to overcome two major hurdles that RIMS recognized clearly from the beginning: First, courts tend to be especially deferential to legislatures in tax matters, where legislatures have broad powers, not only to levy taxes, but to do so in ways that may be permissibly discriminatory.

Second, when it comes to questions of equal protection under the 14th Amendment to the U.S. Constitution and analogous provisions of the Rhode Island Constitution, legislatures need have only a "rational basis" for discriminating against physicians, because physicians are not regarded as a disadvantaged group in American society. The "rational basis" standard happens to be easy to meet. Furthermore, the legislature need not articulate any actual rationale at the time it passes a discriminatory bill. If the constitutionality of a law is later questioned on an equal protection basis, defendants and courts are free to speculate and backfill any number of "rational bases" that might possibly have been on the legislature's collective mind as justification for a discriminatory law.

In consultation with RIMS' attorneys in the Boston and Providence offices of Donoghue Barrett and Singal, with the five named plaintiff physician groups, and with the numerous special stakeholders in the lawsuit, consensus emerged that an appeal to the Rhode Island Supreme Court was certain to be costly and unlikely to yield a better result, and was therefore inadvisable. Moreover, a rejection by the Supreme Court would lend greater weight to the matter and could thus make things worse. The matter is therefore considered closed. ❖