

Who's Supervising Who?: CMS's Newest Take On Supervision Of Incident To Outpatient Therapeutic Services

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Practice Area: Health Law

Quality concerns, patient demands and physician staffing all contribute to providers' focus on supervision of mid-level providers (MLPs). Regarding services provided as incident to outpatient therapeutic services, the Center for Medicare and Medicaid Services (CMS) added to the confusion by issuing a "clarification" in the CY 2009 Outpatient Prospective Payment System (OPPS) Rule that tightened supervision requirements for on-campus and in-hospital outpatient departments. Since then, however, CMS has attempted to make this "clarification" more clear with the issuance of its proposed CY 2010 OPPS Rule. This article discusses CMS's proposed rule, with a specific focus on the proposed revisions to the supervision requirements for incident to outpatient therapeutic services.

MLPs and Incident To Outpatient Therapeutic Services

Mid-level providers (MLPs) are clinical medical professionals who provide patient care under the supervision of, in collaboration with or independently of a licensed physician. MLPs also can provide hospital outpatient services (both diagnostic and therapeutic) "incident to" a physician's professional services. Incident to services are services that are "owned" by and billed for a licensed physician, but provided by the MLP under the requisite level of physician supervision.

Providers historically have considered MLPs physician extenders and incorporated them into their health care delivery models. Physician shortages only increase the focus on this group of practitioners as they are one possible solution to increasing patient demands.

However, the supervision requirements involved with such models demand that physician oversight be carefully considered when designing a health care delivery model that best utilizes MLPs.

One model of delivering outpatient therapeutic services is the use of MLPs in providing services "incident to" a physician's professional services. Services incident to a physician's services in an outpatient setting must be furnished under the order of a physician and the physician must be involved in the management of the course of treatment. Incident to outpatient therapeutic services also must be provided under the direct supervision of a licensed physician. See 42 C.F.R. § 410.27; Medicare Benefit Policy Manual, Chapter 6, § 20.5.1.

On-Campus v. Off-Campus Supervision

Providers often interpret the supervision requirement for incident to outpatient therapeutic services as different, depending on whether those services are provided within (i) a hospital facility or in an on-campus provider-based department, or (ii) off-campus in a provider-based location. CMS has stated that supervision is "assumed" to be in place for incident to services furnished in a department of a hospital that is located within the four corners of the hospital building or on campus. This assumption is based on the recognition that "physicians would always be nearby within the hospital." It has led, however, some providers to interpret the supervision requirement for in-hospital and/or on-campus departments as a more lenient, "general supervision" requirement. Many providers understood the more stringent "direct supervision" requirement only as applying to off-campus provider-based departments.

But according to CMS's 2009 "clarification," direct supervision is required for incident to outpatient therapeutic services furnished in any type of outpatient department, whether in-hospital, on-campus or off-campus. See 73 Fed. Reg. 68502, 68702-3 (November 18, 2008). Specifically, in its CY 2009 OPSS Final Rule, CMS stated that its expectation has always been that "hospital outpatient therapeutic services are provided under the direct supervision of physician in the hospital and in all provider-based departments of the hospital. See *id.*; see also Trans. 101, CR 6320, Pub. 100-02 (Jan. 16, 2009). CMS also noted in its 2009 "clarification" that "on the premises of the location" meant in the provider-based department. See 73 Fed. Reg. 68704.

This "clarification" caused problems for those providers relying on physicians outside the four corners of their outpatient provider-based departments (i.e., ED physicians) for supervision. It also cut against some providers' belief that more relaxed supervision is sufficient in on-campus provider-based departments and in-hospital settings and left unclear where a physician had to be located for the supervision of in-hospital outpatient "incident to" services. Given these facts, and the fact that many providers challenged CMS's 2009 "clarification" as a confusing policy change, CMS has addressed this issue again – this time as part of its CY 2010 Proposed OPSS Rule.

CY 2010 Proposed OPSS Rule

In its CY 2010 Proposed OPSS Rule, CMS reiterates its statement from the CY 2009 OPSS Final Rule – that it has been its expectation all along that "hospital outpatient therapeutic services are provided under the direct supervision of a physician in the hospital and all [provider-based departments] of the hospital, specifically, both on-campus and offcampus departments of the hospital." That said, CMS proposes the following revisions to its direct supervision requirement:

- Direct supervision for services furnished on campus means that the supervising physician must be present on the same campus, in the hospital or in the on-campus provider-based department of the hospital, and immediately available to furnish assistance and direction throughout the procedure. This physician may not be located in any other entity, including a physician's office, an independent diagnostic testing facility, a co-located hospital, a hospital-operated provider or supplier (e.g., a skilled nursing facility), or any other non-hospital space co-located on the hospital's campus.
- "In the hospital" means in the main building(s) of the hospital that are under the ownership, financial and administrative control of the hospital; that are operated as part of the hospital; and for which the hospital bills the services furnished under the hospital's CMS certification number.
- "Immediately available" requires the supervising physician to be physically present "without interval of time" – the supervising physician could not be performing another procedure or uninterruptible service or so far away on the main campus that he or she could not intervene right away.
- The supervising physician also must be able to step in and perform the services – not just respond to an emergency, as required under 42 C.F.R. § 410.27(f). This means that the supervising physician must have the ability to perform the service or procedure (in accordance with state-specific scope of practice and medical staff privileges).
- For off-campus provider-based departments, direct supervision continues to mean that the supervising physician must be in the off-campus department and immediately available to furnish assistance and direction throughout the performance of the procedure. 42 C.F.R. § 410.27(f) will be revised as such.

Although CMS's CY 2010 Proposed OPSS Rule creates some flexibility regarding who may provide physician supervision over incident to outpatient therapeutic services, it also includes guidance that may complicate some providers' current supervision models. For example, the "immediately available" and medical staff privileging requirements may force changes to supervision models that rely on supervising physicians who are able to respond to emergencies, but cannot step in and provide specific procedures.

Supervision by MLPs

CMS also proposes in the CY 2010 Proposed OPSS Rule that non-physician practitioners, specifically physician assistants, nurse practitioners, clinical nurse specialists and certified nurse midwives, may directly supervise all hospital outpatient therapeutic services that they may perform. The non-physician practitioner must satisfy their State law scope of practice and hospital-granted privileges, and any additional requirements, including any applicable collaboration or supervision requirements. Note, however, that a physician must still provide direct supervision for cardiac rehabilitation, inpatient cardiac rehabilitation or pulmonary rehabilitation services.

Given CMS's 2010 proposed change, hospitals may rely on MLPs more to provide and bill for outpatient therapeutic services. If finalized, this option still will require careful consideration of State supervision and scope of practice requirements to assure compliance.

Conclusion

The policies for physician supervision set forth in the CY 2009 OPSS Rule will remain in effect for CY 2009, and CMS has instructed contractors not to delay or discontinue pending enforcement actions regarding physician supervision. The proposed rule, if adopted, would not take effect until January 1, 2010. Comments to the proposed rule are due by August 31, 2009.

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