

Supervision of Hospital Outpatient Therapeutic Services: CMS's Final Answer?

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Practice Area: Health Law

The Center for Medicare and Medicaid Services ("CMS") recently published its 2010 Outpatient Prospective Payment System Final Rule ("Final Rule"). As part of its Final Rule, CMS changed and clarified the direct supervision requirements for hospital outpatient therapeutic services and procedures. The result of these changes is a relaxation of the direct supervision requirements for outpatient therapeutic services and procedures and added flexibility. Nevertheless, the Final Rule still presents challenges for hospitals in meeting the supervision standard.

In its Final Rule, CMS specifically addresses: (1) whether certain nonphysician practitioners may provide direct supervision for some outpatient therapeutic services; and (2) the definition of "direct supervision" for outpatient therapeutic services performed in the hospital or in an on-campus provider-based department of the hospital. CMS also makes technical changes in the regulations to clarify that the supervisor must be in the off-campus provider-based department and that the direct supervision standard also applies to critical access hospitals ("CAHs").

Prior Clarifications and Proposed Rules

CMS's latest revisions to its direct supervision requirement for outpatient therapeutic services follow its confusing "clarifications" to this same requirement in its 2009 OPSS Final Rule. In the 2009 OPSS Final Rule, CMS attempted to correct the "misunderstanding" that direct supervision of outpatient therapeutic services provided on the hospital's campus was assumed. CMS noted that many hospitals incorrectly interpreted its prior statements regarding this requirement to mean that no supervision or a relaxed standard of supervision was sufficient for services and procedures performed in the hospital or in an on-campus provider-based department. CMS instead asserted that it always has required direct supervision for all hospital outpatient therapeutic services, including those performed on campus.

CMS's "clarification" was interpreted by many providers as a departure from existing standards, rather than a restatement of an existing rule. In response to this confusion, and other lingering questions regarding the direct supervision requirement, CMS now further clarifies and revises the standard in the Final Rule.

Non-Physician Practitioners

Only physicians may currently provide direct supervision for hospital outpatient therapeutic services. And once the Final Rule is effective, only physicians may still supervise cardiac rehabilitation, intensive cardiac rehabilitation and pulmonary rehabilitation furnished to hospital outpatients. Otherwise, as of January 1, 2010, the following non-physician practitioners may provide the direct supervision, subject to some limitations:

- Clinical Psychologists
- Clinical Social Workers
- Physician Assistants
- Nurse Practitioners
- Clinical Nurse Specialists
- Certified Nurse Midwives

But while the ability to use non-physicians to meet the direct supervision standard may provide flexibility for some hospitals, scope of practice restrictions may temper the utility of non-physicians. CMS makes clear that only non-physicians may only supervise the services and procedures that they may perform themselves. The services and procedures must be within the non-physician practitioner's scope of practice and hospital privileges. Non-physicians also must continue to comply with other state and federal laws while providing the supervision, including any requirements for physician supervision or collaboration, after the Final Rule is effective. Physician supervision or collaboration for non-physicians is often a more relaxed standard than direct supervision, but hospitals must continue to arrange the necessary physician supervision or collaboration under state and federal law, as appropriate, to the particular non-physician. See discussion below for further comment on scope of practice.

Supervision Requirements

In the Final Rule, CMS defines "direct supervision" differently for on-campus services and procedures than it does for off-campus services and procedures. The difference lies in the supervisor's location. Otherwise, the requirements are much the same for both on-campus and off-campus locations.

• The Supervisor's Location –On-Campus Services

For on-campus services and procedures, the supervisor must be present on the same campus. CMS relaxes the direct supervision standard in the Final Rule by allowing the supervisor to be present anywhere on campus, so long as the supervisor is immediately available. Specifically, in a departure from the proposed rules, the supervisor may be present in an on-campus physician's office, on-campus skilled nursing facility or other on-campus non-hospital space.

• The Supervisor's Location–Off-Campus Provider-Based Departments

For off-campus locations, the supervisor must be present in the provider-based department, although the supervisor does not have to be in the same room as the service or procedure. In the Final Rule, CMS also clarifies that if a single off-campus location has multiple provider-based departments, a single supervisor may not supervise all of the services provided in all provider-based departments at the location. Although commenters argued that this requirement may be unfairly burdensome for hospitals where only a limited number of physicians are available for coverage (i.e., rural setting), CMS states that this longstanding requirement is necessary to ensure quality of care in off-campus provider-based locations.

• Immediately Available

The supervisor must be immediately available. Although CMS has never defined "immediately available," it noted in the proposed rules that the general definition of "immediate" means "without interval of time." In the Final Rule, CMS states that "immediately available" does not mean the supervisor must stand next to the personnel providing the service or procedure, but reaffirms that the supervisor is not immediately available if he or she is performing an uninterrupted procedure or is located too far away.

• Ability to Furnish Assistance and Direction

A supervisor also must have the ability to furnish assistance and direction throughout the service or procedure. In the Final Rule, CMS clarifies that the ability to respond solely to emergencies is not enough. The supervisor must also have the ability to step in and take over a given service or procedure and/or change the patient's course of treatment. Thus, the supervised services must be within the supervisor's scope of practice and hospital-granted privileges. CMS states that it is inappropriate for a physician or non-physician practitioner to supervise services outside of his or her knowledge, skills, licensure or hospital-granted privileges.

In explaining this requirement, CMS further states that the supervisor must be "clinically appropriate" to perform the service or procedure. Although current CMS guidance provides that the supervisor does not have to be in the same department as the ordering physician, we have heard from CMS representatives that the supervisor still must be able to perform the service or procedure, not just resuscitate the patient. See Medicare Benefit Policy Manual, Chapter 6, §20.5.1. The example given by CMS is that hospitals should not designate a dermatologist to supervise radiation oncology or some service or procedure that is entirely outside the realm of dermatology. Hospitals will need to determine on a case-by-case basis whether a particular supervisor is appropriate for the situation.

CAHs

In the Final Rule, CMS clarifies that the same direct supervision standard applies to CAHs as it does to hospitals. Accordingly, CMS has revised the regulatory language to reflect the applicability of the direct supervision standard for therapeutic services performed in CAHs and in their on-campus and off-campus provider-based departments. While the direct supervision standard may present challenges for CAHs, CMS believes the flexibility for using non-physician practitioners as supervisors will alleviate some of these concerns. CMS also notes that, under the Medicare Conditions of Participation, CAHs must have a physician, nurse practitioner, physician assistant or clinical nurse available at all times the CAH operates. This physician or non-physician practitioner would not be furnishing services that were not within the physician or non-physician practitioner's scope of practice and hospital privileges; likewise, the hospital would not be providing services that are not within this practitioner's scope of practice.

Meaning of "in the Hospital or CAH"

CMS defines "in the hospital or CAH" in the Final Rule to mean: "areas in the main building(s) of the hospital or CAH that are under the ownership, financial, and administrative control of the hospital or CAH; that are operated as part of the hospital or CAH; and for which the hospital or CAH bills the services furnished under the hospital's or CAH's CMS Certification Number." CMS clarifies that the word "ownership" in this definition does not exclude space the hospital leases.

Summary

CMS has provided some flexibility in the Final Rule for direct supervision of hospital outpatient therapeutic services. Effective January 1, 2010, certain nonphysicians may supervise services within their scope of practice and hospital privileges, and the supervisor may be located anywhere on campus for services provided in the hospital or in an oncampus provider-based department. Hospitals continue, however, to face the challenge of ensuring that the supervisor is immediately available and only supervising services within his or her scope of practice and hospital privileges.

In reviewing CMS's potential "final answer" regarding supervision of hospital outpatient therapeutic services, it is important to note that it has specifically decided not to enforce compliance for services furnished on the hospital's campus in 2000-2008, where noncompliance was due to error or mistake. CMS states, however, that the usual enforcement practices of Medicare contractors is appropriate for CY2009 forward.

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