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CMS RESPONDS TO CONCERNS REGARDING THE SUPERVISION POLICY FOR HOSPITAL OUTPATIENT SERVICES...AND THEN SOME

On July 2, 2009, CMS released the display copy of the CY 2010 Outpatient Prospective Payment System (OPPS) Proposed Rule (Proposed Rule). In the Proposed Rule, CMS addresses some of the issues and concerns identified after CMS clarified the physician supervision policy for hospital outpatient services in the CY 2009 OPPS Final Rule. For hospital outpatient therapeutic services, CMS proposes site-of-service definitions and certain qualifications for supervising physicians, and also proposes allowing non-physician practitioners (NPPs) to supervise some hospital outpatient therapeutic services. In the Proposed Rule, CMS also extends some of these changes to supervision of outpatient diagnostic tests. Comments to the Proposed Rule will be accepted until 5:00 pm on August 31, 2009.

Background

In the CY 2009 OPPS Final Rule, CMS clarified that "direct supervision" requires the physician to be present on the premises of the provider-based department (PBD) whether the department is on- or off-campus and that "hospital outpatient therapeutic services [be] provided under the direct supervision of physicians *in the hospital and in all provider-based departments* of the hospital, specifically *both on-campus and off-campus departments* of the hospital." (Emphasis added). The extension of the "in the department" presence standard to both on-campus PBDs and departments within the four walls of the hospital took many in the provider community by surprise, prompting certain stakeholders, including the American Hospital Association, to reach out to CMS and request clarification or withdrawal of the rule. CMS responded to provider concern by addressing the issue in the Proposed Rule.

Who Can Supervise Hospital Outpatient Services?

"Supervision by Certain Non-Physician Practitioners"

CMS proposes expanding the physician supervision policy to allow certain NPPs to directly supervise some hospital outpatient therapeutic services. Under the Proposed Rule, NPPs, including physician assistants, nurse practitioners, clinical nurse specialists, and certified nurse-midwives, will be allowed to supervise therapeutic services that the NPP may perform in accordance with State law and scope of practice rules and hospital-granted privileges. The NPPs must continue to meet all regulatory requirements such as collaboration and supervision requirements.

Notably, NPPs will not be able to supervise outpatient diagnostic services, cardiac rehabilitation (CR) services, intensive cardiac rehabilitation (ICR)

services, or pulmonary rehabilitation (PR) services, all of which must be supervised by a physician.

"Qualifications of Supervisory Physician/NPP"

In the Proposed Rule, CMS states that the supervisory physician/NPP must be prepared to step in and perform the service, not just respond to an emergency. This includes the ability to take over performance of a procedure and to change a procedure or the course of treatment being provided to a particular patient. Despite *Medicare Manual* guidance that says the supervising physician need not be of the same specialty or in the same department as the ordering physician, CMS now states in the Proposed Rule that in order to furnish appropriate assistance and direction, "we believe the supervisory physician or non-physician practitioner must have, within his or her State scope of practice and hospital-granted privileges, the ability to perform the service or procedure."

Where Must the Physician/NPP Be When Providing Supervision?

"When Services are Provided In the Hospital and In On-Campus Provider-Based Departments"

CMS proposes that when outpatient therapeutic services are provided in a hospital or in on-campus PBDs, the physician/NPP must be present on the same campus, in the hospital or the on-campus PBD of the hospital, and immediately available to furnish assistance and direction throughout the performance of the procedure. In this regard, CMS states, "to be present in the hospital or the on-campus PBD of the hospital and immediately available requires that the physician or non-physician practitioner must be physically present in areas on the campus of the hospital that are part of the hospital, including the on-campus PBDs, that are operated by the hospital, and where services furnished in those areas are billed under the hospital's [CMS certification number]." The supervising physician/NPP may not be located in any other entity, such as a physician's office, IDTF, co-located hospital, or hospital-operated provider or supplier (such as a SNF or HHA), or any other non-hospital space that is co-located on the hospital's campus.

"When Services are Provided in Off-Campus Provider-Based Departments"

Under the Proposed Rule, direct supervision of outpatient therapeutic services furnished in off-campus PBDs will continue to mean that the supervising physician/NPP must be present in the off-campus PBD and immediately available to furnish assistance and direction throughout the performance of the procedure. CMS only proposes a technical change to the regulatory language to remove the phrase "present and on the premises of the location" and replace it with "present in the off-campus provider-based department."

When is the Physician/NPP "Immediately Available"?

CMS opts not to define the term "immediately available" in the Proposed Rule but does provide some comments related to the current definitions of direct supervision that apply to PBDs and physician office settings. These definitions specify that the physician must be physically present in order to provide direction and assistance during the performance of services or tests.

CMS further states that the general definition of "immediately" means "without interval of time" and that a supervisory physician/NPP can not be immediately available when, for example, the supervisory physician/NPP is performing another procedure or service that can not be interrupted. Finally, CMS states that "it would be neither appropriate nor 'immediate' for the supervisory physician or non-physician practitioner to be so physically far away on the main campus from the location where the hospital outpatient services are being furnished that he or she could not intervene right away."

Conclusion

In the CY 2010 OPPTS Proposed Rule, CMS offers guidance and revises its policy on physician supervision requirements for hospital outpatient services. Some of the changes are favorable to providers – for example, CMS proposes allowing NPPs to supervise therapeutic services (except CR, ICR and PR). Some of the changes may present new challenges for providers – for example, CMS proposes certain qualifications for supervisory physicians/NPPs. Some of the changes at least give providers standards to apply – for example, CMS proposes new location-specific definitions for hospital and on-campus locations and provides commentary on when CMS believes that a physician/NPP is "immediately available" to provide direct supervision.

Providers are encouraged to review the new proposals, as well as their current physician supervision policies, and submit any comments to CMS by 5:00 pm on August 31, 2009. Comments may be submitted electronically to: <http://www.regulations.gov>. Follow the instructions for "Comment or Submission" and enter the file code (CMS-1414-P) to find the document accepting comments.

If you have questions regarding the proposed physician supervision policy, please contact Joan L. Lowes at 248/740-7505 (jlowes@hallrender.com), Lori A. Wink at 414/721-0442 (lwink@hallrender.com), Regan E. Tankersley at 317/633-4884 (rtankersley@hallrender.com) or your regular Hall Render attorney.

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