

Is Physician Supervision Required, or Not? Recent OPSS Changes Provide Clarification

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THE ISSUE

In the preamble to the 2009 Outpatient Prospective Payment System ("OPSS") ruleⁱ, the Centers for Medicare and Medicaid Services ("CMS") indicated that on-campus hospital outpatient services require **direct** physician supervision; therefore, the supervising physician was required to be present in the outpatient department while services were being rendered. This position was not based on any new language, but rather was characterized by CMS as a "clarification" of existing law. This position by CMS was troubling for many hospitals that, for staffing efficiency, financial and administrative reasons, were not requiring supervising physicians to be physically present in the outpatient departments they were responsible for supervising.

CMS'S RESPONSE

In response to a stiff and public outcry by the hospital industry, CMS adopted a somewhat more flexible approach in its 2010 OPSS ruleⁱⁱ and in the recently released 2011 OPSS rule.ⁱⁱⁱ The highlights of these changes are as follows:

- **Supervision Requirement for Outpatient Therapeutic Services (provided 'incident to' the services of a physician):** 42 CFR § 410.27 has been amended to state that direct supervision of outpatient therapeutic services is required for services performed in the hospital or on the hospital's campus and billed as hospital services. Specifically, § 410.27 requires that the physician or non-physician practitioner ("NPP") "must be present on the same campus and immediately available to furnish assistance and direction throughout the performance of the procedure." This means that physicians or NPPs working in other locations within a hospital facility, and those working in on-campus, non-hospital facilities, such as physician offices, may serve as supervising physicians, as long as they are immediately available to furnish assistance. A physician or NPP would not be considered "immediately available" if he/she is performing another procedure or service that cannot be interrupted.

For outpatient, therapeutic services furnished in an *off-campus* setting, "direct supervision" means the physician or NPP must be present in the off-campus provider-based department of the hospital and immediately available to furnish assistance and direction throughout the performance of the procedure.

The good news is that there is greater flexibility for **on-campus** supervision, and such supervision may be provided by a physician or an NPP. The supervising physician or NPP

may be physically located in a private physician's office or in a medical office building located on campus, as long as he/she is 'immediately available'. However, the bad news is that **off-campus** supervision requires the physical presence of the physician or NPP.

- **Supervision of Therapeutic Services by Non-Physician Practitioners:** CMS has expanded the scope of hospital outpatient services for which NPPs may provide direct supervision to include all hospital outpatient therapeutic services which they are authorized to perform under state scope of practice rules and hospital-granted privileges. Those NPPs that are permitted to supervise include: physician assistants, nurse practitioners, clinical psychologists, clinical nurse specialists, certified nurse-midwives and licensed clinical social workers. In order to be qualified to supervise under § 410.27, the NPP must be "immediately available to furnish assistance and direction throughout the performance of the procedure." In the commentary to this new rule, the Department of Health and Human Services interpreted this language to mean that the supervisor must be "clinically appropriate" to supervise the service or procedure, and indicated that "it is inappropriate for the supervisory physician or nonphysician practitioner to be responsible for patients, hospital staff and services that are outside the scope of their knowledge, skills, licensure or hospital-granted privileges." Further, only an M.D. or D.O. is qualified to provide direct supervision of pulmonary rehabilitation, cardiac rehabilitation and intensive cardiac rehabilitation.

- **Supervision of Nonsurgical Extended Duration Therapeutic Services:** CMS has modified the supervision requirements for a limited set of non-surgical extended duration services, including observation services, to require direct supervision only of the initiation of a service, followed by general supervision. Initially, CMS has selected sixteen (16) services listed in Table 48A of the 2011 Final Opss Rule to which this revised policy applies including observation services, various intravenous and subcutaneous infusions, and various therapeutic, prophylactic, or diagnostic injections. The list does not include chemotherapy, blood transfusions, or post-surgical recovery. To be considered for the new category, a service must:

- Be of extended duration, frequently extending beyond normal business hours
- Largely consist of a significant monitoring component

- typically conducted by nursing or other auxiliary staff
- Be of sufficiently low risk, such that the service typically would not require direct supervision often during the service
- Not be a surgical service that includes recovery time

“Initiation of the service” means from the beginning of the service until the patient is stable and the remainder of the service can be delivered safely under general supervision. “General supervision” means the procedure is furnished under the physician’s overall direction and control, but the physician’s presence is not required during the performance of the procedure.

- **Supervision Requirement for Outpatient Diagnostic Services:** The regulations require all hospital outpatient diagnostic services furnished directly or under arrangement to follow the Medicare Physician Fee Schedule physician supervision requirements for individual tests. These supervision requirements vary based upon the specific diagnostic test involved.

- **Supervision by Medical Residents:** The regulations do not mention medical residents or address whether they are included within the definition of “physicians” and therefore eligible to supervise under the criteria for physicians discussed above. The Centers for Medicare and Medicaid Services (“CMS”) has indicated verbally that residents are considered physicians and can provide the required supervision as long as they are credentialed to do so and otherwise qualified to supervise the particular service.

- **CMS Relaxes Supervision Requirements for Critical Access and Small Rural Hospitals:** Because of the outcry from hospitals about the burden the physician supervision requirements would impose on rural hospitals, CMS revisited the issue. On March 15, 2010, CMS instructed all of its Medicare contractors not to enforce the supervision requirements for therapeutic services provided to outpatients in critical access hospitals (“CAHs”) from January 1, 2010 to December 31, 2010. The Final 2011 OPSS Rule released on November 2, 2010 extends this notice of non-enforcement for CAHs through 2011 and also expands it to apply to small rural hospitals. CMS is defining “small rural hospitals” as hospitals with 100 or fewer beds and either geographically located in a rural area or paid under the hospital outpatient prospective payments system with a rural wage index.

- **Contract Considerations:** Hospitalists, medical directors and other physicians who provide supervision of therapeutic or diagnostic services on behalf of a hospital or other health care provider, whether as employees or independent contractors may be asked to assume additional responsibilities which may necessitate revisions to their current written agreement with the institution. In addition, physicians need to be on the look out for hospitals to draft new or amend existing policies pertaining to physician supervision. Physicians should carefully review such policies and work with hospitals to comply with the new requirements outlined above.

ⁱ 73 Fed. Reg. 68502, 68702 (November 18, 2008).

ⁱⁱ 74 Fed. Reg. 60316, 60575 (November 20, 2009).

ⁱⁱⁱ The Final 2011 OPSS Rule has not yet been published in the Federal Register but is currently available on the CMS website. It is scheduled to appear in the Federal Register on November 24, 2010.

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She joined Crowe & Dunlevy in 1981, and today, as a shareholder and director, serves as the Chair of the Firm’s Healthcare Practice Group. Her practice includes representation of healthcare institutions and practitioners throughout Oklahoma and surrounding states on a broad range of health law issues, including the Anti-Kickback and Stark laws, HIPAA privacy and security

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