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CMS Proposes to Both Ease and Tighten Physician Supervision Requirements for Hospital Outpatient Services

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On July 1, 2009, CMS placed on display its **proposed changes** to its Hospital Outpatient Prospective Payment System rule. Included among those changes are proposals to alter CMS's physician supervision requirements pertaining to hospital outpatient services, requirements that have been in flux since last year. As readers will recall, in CMS's calendar year (CY) 2009 proposed and final rules, the agency provided what it termed a restatement and clarification of the requirements for physician supervision of hospital diagnostic and therapeutic services. (See "**Be Careful What You Assume**" and "**Clarity is Hard to Find.**") In those rules, CMS appeared to reverse long-standing policy by requiring physician supervision in locations and instances when that supervision had previously been assumed to be in place. In the 2010 proposed rule, however, CMS has proposed a somewhat different approach.

In a marked departure from its CY 2009 policy, CMS first proposes that non-physician practitioners – physician assistants, nurse practitioners, clinical nurse specialists, and certified nurse midwives – be permitted to supervise all hospital outpatient therapeutic services that they themselves may perform in accordance with state law, scope of practice, and hospital-granted privileges, provided that they continue to meet all additional requirements, including collaboration and supervision requirements, specified elsewhere in the Medicare regulations. CMS further clarified that, under existing policy, clinical psychologists may provide direct supervision. For cardiac rehabilitation, intensive cardiac rehabilitation, and pulmonary rehabilitation services, CMS continues the position that only a doctor of medicine or osteopathy may provide the direct supervision required.

CMS also proposes a significant shift in its policy regarding direct supervision of hospital outpatient therapeutic services furnished on the main campus of the hospital and either "in the hospital" or in an on-campus provider-based department of the hospital. For services furnished on a hospital's main campus, CMS proposes that the physician or non-physician practitioner supervisory personnel must be present in the hospital or provider-based

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departments located on the campus of the hospital, and be immediately available to furnish assistance or direction throughout the performance of the procedure. CMS proposes to define "in the hospital" as meaning areas in the main buildings of a hospital that are under the ownership, financial, and administrative control of a hospital; that are operated as part of the hospital; and for which the hospital bills the services furnished under the hospital's provider number. The supervisory physician or non-physician practitioner 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 skilled nursing facility, ESRD facility or home health agency, or in any other non-hospital space that may be co-located on the hospital's campus.

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CMS further provides in its proposal a definition for the term "immediately available" that many providers may find more restrictive. With regard to services provided in provider-based departments of hospitals, the physician or non-physician practitioner must be immediately available to furnish assistance and direction throughout the performance of the procedure and 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, if necessary, to change a procedure or course of treatment being provided to a particular patient. This has to be done "right away," without the passage of any interval of time. Consequently, the supervisory physician or non-physician practitioner may not be performing another procedure or service that could not be interrupted. Moreover, although CMS has stated in the past that the supervisory personnel "need not be in the same department as the ordering physician" and need not necessarily "be of the same specialty as the procedure or service that is being performed," CMS is now stating, in its proposed rule, that 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 being supervised.

Finally, CMS is proposing no significant changes to the requirements for direct supervision in off-campus provider-based departments, other than to allow non-physician practitioners to provide direct supervision in the provider-based departments for the services that the practitioners, themselves, may perform. The supervisory physician or non-physician practitioner must be present in each provider-based department of a particular off-campus remote location, although the physician need not be in the same room where the procedure is being performed. Thus, it would be inappropriate, according to CMS, to allow a physician or non-physician practitioner to supervise all services being provided in all provider-based departments at a particular off-campus remote location.

Ober|Kaler's Comments: The CMS proposal sends a bit of a mixed message. On the one hand, CMS says that direct supervision does not require a physician or non-physician to be present in each on-campus department to supervise services. At the same time, CMS cautions that, irrespective of where the supervision takes place, the physician or non-physician personnel must be "immediately available" to step in and render assistance and that the supervision must be provided by someone who has the ability to perform the service or procedure being performed. This could require hospitals to restructure their supervision arrangements. Given this mixed message, providers may well wish to comment on the specific proposals. Comments are due no later than 5 p.m., August 31, 2009.

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