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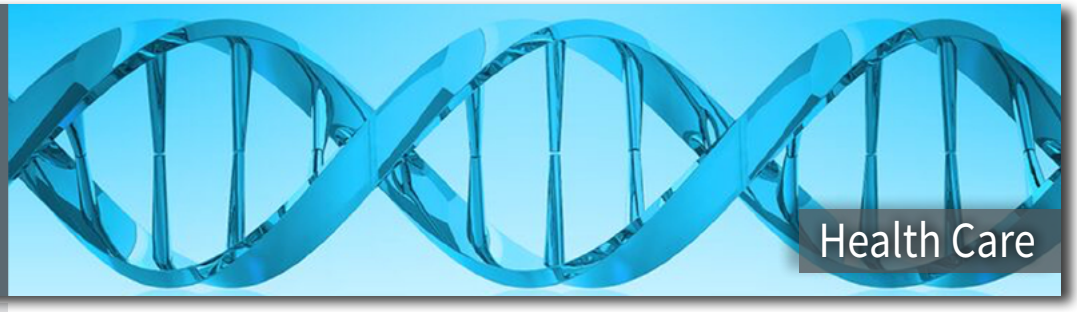


October 2017

The More Things Change, The More They Stay the Same - CMS' Guidance on Co-Located Hospitals and the Removal of Certain Hospital Within Hospital Requirements

by Bragg Hemme and Sara Iams

In this Issue:

With recent changes to the Hospital within Hospital ("HwH") rules, is it easier to meet the HwH standards? Likely, not. HwHs are hospitals excluded from the inpatient prospective payment system ("IPPS"), such as psychiatric, long-term care, children's and cancer hospitals, but are located in the same building or on the same campus as another hospital (the "host hospital"). HwHs must still meet Centers for Medicare and Medicaid Services' ("CMS") evolving and stringent views on the Conditions of Participation ("COP") requirements for co-located hospitals. CMS has long been concerned about the financial incentives for hospitals to operate a HwH in form, while in substance, operating it as a department or unit of the host hospital, using the same staff, equipment reporting structure as the host hospital, while receiving the higher reimbursement associated with IPPS-exclusion.

To allay those concerns, unless a facility retained "grandfathered" status, CMS has historically required HwHs to meet several criteria related to the separateness between and control of the HwH and its host hospital in order to be excluded from the IPPS. One of the more strenuous requirements related to showing how the hospital performed certain "basic hospital functions" outlined in 42 C.F.R. § 412.22(e)(1)(v). While CMS eliminated this requirement for long-term care HwHs beginning in 2005, it continued to apply to other types of HwHs between 2005 and today. **Effective Oct. 1, 2017, however, all HwHs are exempt from meeting the "basic hospital functions" tests. Before considering this a win, recall that the HwH must still show the same level of separateness and control to meet CMS' guidance related to COP compliance.**

The Rules Prior to October 1, 2017

The "basic hospital functions" test historically operated as part of the HwH "separateness and control" provisions. These provisions generally require HwHs to demonstrate independence from the host hospital by maintaining a separate (1) governing body, (2) chief medical officer, (3) medical staff, and (4) chief executive officer. 42 C.F.R. § 412.22(e)(1). **Prior to October 2017, these provisions also required HwHs (other than long-term care HwHs) to meet one of three "Basic Hospital Functions" tests: (1) the Basic Services Test; (2) the 15 Percent Rule; or (3) the 75 percent rule.** ***Id.***

The Basic Services Test. To meet this criterion, the HwH had to provide certain basic hospital functions directly or indirectly through contracts or arrangements "with entities other than" the host hospital or a third party that controls both. CMS prohibited the host hospital from providing these basic hospital functions:

- The quality assurance program (42 C.F.R. § 482.21);
- The medical staff (§ 482.22);
- Nursing services (§ 482.23);
- Medical records (§ 482.24);
- Pharmaceutical services (§ 482.25);
- Radiology services (§ 482.26);
- Laboratory services (§ 482.27);
- Utilization review (§ 482.30);
- Infection control (§ 482.42);
- Discharge planning (§ 482.43); and
- Organ, tissue, and eye procurement (§ 482.45).

The host could provide other services to the HwH, such as food and dietetic services, housekeeping, maintenance, and services necessary to maintain a clean and safe physical environment. 42 C.F.R. § 412.22(e)(1)(v)(A).

The 15 Percent Rule. To satisfy this criterion, the HwH had to demonstrate that the cost of services obtained under contracts with the host (or a third party that controls both hospitals) represented no more than 15 percent of its total inpatient operating costs (as defined in § 412.2(c)). 42 C.F.R. § 412.22(e)(1)(v)(B). "Inpatient operating costs" include the costs of routine care (room and board), ancillary services (radiology, lab), special care unit operating costs, and malpractice costs. 42 C.F.R. § 412.2(c).

The 75 Percent Rule. Finally, the HwH could also demonstrate that it received at least 75 percent of its patient referrals from a source other than the host hospital. 42 C.F.R. § 412.22(e)(1)(v)(C).

The Rules After Oct. 1, 2017

The 2018 IPPS final rule changed two key aspects of the HwH separateness and control provisions. First, effective Oct. 1, the separateness provisions outlined in 42 C.F.R. § 412.22(e)(1)(i) – (iv) only apply when a HwH is an IPPS-excluded hospital co-located with an IPPS hospital. They do not apply when the co-located hospitals are both IPPS-excluded.

Second, the final rule eliminated the requirement for HwHs to comply with any of the three "Basic Hospital Functions" tests in 42 C.F.R. § 412.22(e)(1)(v). See 82 Fed. Reg. 37990, 38293 (Aug. 14, 2017). CMS viewed the tests as duplicative of CMS' interpretation with the hospital COPs. **A plain reading of the COPs suggests that they are less stringent than the HwH Basic Hospital Functions tests, but informal CMS guidance related to all co-located hospitals has articulated a different, and more inflexible, standard.** *See* CMS Hospital Co-Location Webinar (May 5, 2017), *presented in part by* David Eddinger (Technical Director, Hospital Survey & Certification, CMS); CMS Hospital Co-Location: To Be or Not to Be? Presentation, *presented by* Marie Vasbinder (CMS Director of Division of Acute Care Services).

Under this informal guidance, CMS clarified that any co-located hospital, including HwHs, must individually and independently meet the COPs in distinct space 24/7, and it cannot rely on the host or any other hospital for compliance. Co-located hospitals **cannot**:

- Share a governing body or unified medical staff;
- Share space or enter into part-time leases of space;
- Directly admit patients from the host hospital to the co-located hospital;
- Have patients/public travel through clinical space of the host hospital to get to the co-located space;
- Behave like a department or unit of the host hospital;
- Share an emergency response team;
- Comingle or share staff of any kind;
- Share any of the following services;

1. Nursing Department;
2. Medical Records Department;
3. Pharmaceutical Services;
4. Respiratory Services;
5. Discharge Planning; or
6. QAPI program.

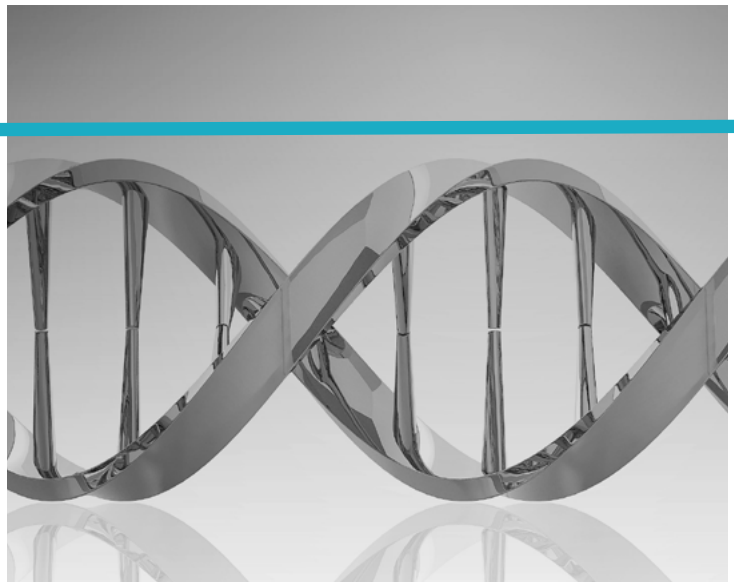
CMS does permit the co-located hospital to contract with the host hospital for radiology, laboratory, kitchen and food preparation, security, housekeeping and maintenance. Further, patients and the public can travel through public space, such as lobbies, elevators, public corridors in non-clinical space to enter and exit the co-located hospital.

Even without the HwH Basic Hospital Functions requirements, we recommend that any hospital located within another hospital examine their compliance with the COPs and these additional CMS guidelines to avoid any survey risk, and, in the case of a HwH, to protect its IPPS-excluded status.

Authors:

Bragg E. Hemme
Shareholder | Denver
303.583.8232
bhemme@polsinelli.com

Sara V. Iams
Associate | Washington, D.C.
202.626.8361
siams@polsinelli.com



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