



CMS Issues Final Rule for Physician Supervision in Outpatient Hospital Departments—Providers Will Benefit From Relaxed Supervision Requirements in 2010

The Centers for Medicare and Medicaid Services (CMS) just released the 2010 Outpatient Prospective Payment System (OPPS) Final Rule, which includes important changes to the physician supervision standards currently in effect for outpatient hospital departments. Under the 2010 Final Rule, which goes into effect on January 1, 2010, hospital outpatient departments will have significantly more options for obtaining the necessary supervision of outpatient therapeutic services. The new supervision standards are welcomed news for hospital providers, who have been lobbying CMS for the past year to repeal the stringent physician supervision rules adopted in the 2009 OPPS Final Rule.

Background

Medicare provides coverage for therapeutic services provided in outpatient hospital departments only when those services are furnished “incident to” the services of a physician. In order to meet the “incident to” standard, CMS requires that the therapeutic services are rendered under the “direct supervision” of a physician. CMS has consistently defined “direct supervision” to mean “the supervising physician must be present and on the premises of the location and immediately available to furnish assistance and direction throughout the performance of the procedure.” However, over the past ten years, CMS has significantly altered its guidance regarding the meaning of the terms “supervising physician” and “on the premises of the location.”

Further, CMS has failed to provide any guidance regarding the meaning of the term “immediately available” or the required qualifications of the supervising physician.

Prior to the 2009 OPPS Final Rule, providers relied on the supervision standards published by CMS in the preamble to the 2000 OPPS Final Rule. Under the 2000 standard, CMS required hospital outpatient departments to provide supervision by a physician (generally, an M.D. or D.O.) for all therapeutic services. However, CMS also stated that it would “assume” that the required supervision was provided in hospital departments that were on the main hospital campus. This “assumed” supervision did not apply to off-campus hospital departments, for which CMS required that a supervising physician be present in the off-campus department at all times therapeutic services were rendered.

The 2009 OPPS Final Rule

In the 2009 OPPS Final Rule, CMS retreated from its longstanding policy of assuming physician supervision in on-campus provider-based departments, but characterized this policy shift as a “clarification” instead of a “change.” While CMS acknowledged its “assumed supervision” language in the 2000 OPPS Final Rule, CMS explained that it feels providers “misunderstood” its use of the term “assume.” Specifically, CMS stated:

[W]e were concerned that some stakeholders may have



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misunderstood our use of the term “assume” in the [April 7, 2000 OPPS final rule] believing that our statement meant that we do not require any supervision in the hospital or in an on-campus provider-based department for therapeutic OPPS services, or that we only require general supervision for those services. This is not the case. It has been our expectation that hospital outpatient therapeutic services are 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.

CMS went on to explain that under the 2009 OPPS Final Rule, hospitals would be required to have a supervising physician present in both on- and off-campus hospital outpatient departments whenever therapeutic services were rendered.

The 2009 Final Rule thus represented a major shift in CMS’ physician supervision policy for outpatient therapeutic services. Since the 2009 OPPS Final Rule went into effect on January 1, 2009, providers have been both struggling to comply with the new standards and consistently lobbying CMS to revert back to the physician supervision standard established in 2000.

The 2010 OPPS Final Rule

After almost a year of lobbying efforts, CMS retreated from its 2009 OPPS Final Rule supervision standards. Specifically, on July 20, 2009 CMS published the 2010 OPPS Proposed Rule, which proposed relaxed direct supervision standards that were even less stringent than the supervision requirements published in the 2000 OPPS Final Rule. On October 30,

2009, CMS released the 2010 OPPS Final Rule, which generally adopted the same relaxed supervision standards announced in the 2010 OPPS Proposed Rule. The provisions of the 2010 OPPS Final Rule are detailed below:

1. Non-Physician Practitioners May Provide the Required Direct Supervision. Beginning January 1, 2010, CMS will permit specified non-physician practitioners to provide supervision over outpatient therapeutic services that they may themselves perform. This rule represents a significant policy change for CMS, which previously required that a “physician” (generally an M.D. or D.O.) provide supervision of outpatient therapeutic services. Under the 2010 Final Rule, CMS will permit Nurse Practitioners (NPs), Physician Assistants (PAs), Clinical Nurse Specialists, Certified Nurse Midwives, Clinical Psychologists, and Licensed Clinical Social Workers (LCSWs)¹ to supervise all hospital outpatient therapeutic services they may themselves perform under applicable State law and Medicare requirements. These non-physician practitioners must also be specifically privileged by the hospital to perform the services they are supervising and must abide by any applicable physician collaboration or supervision requirements.
2. Location of the Supervising Practitioner for Services Rendered in On-Campus Departments. Under the 2010 Final Rule, CMS essentially reverts to the 2000 location standards for supervision of therapeutic services in on-campus outpatient departments. That is, CMS states that the supervision can be provided by an appropriate practitioner who is located anywhere on the hospital campus, provided that the

¹ LCSWs were not included in the list of non-physician practitioners proposed under the 2010 OPPS Proposed Rule. However, in the 2010 Final Rule, CMS acknowledged that LCSWs are recognized by Medicare as independent practitioners who could appropriately supervise those psychiatric services which they are themselves authorized to perform.



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practitioner is immediately available to respond. In a surprising move, the 2010 Final Rule will also permit practitioners within on-campus private practice offices (e.g. in an on-campus Medical Office Building) or other provider institutions (e.g. a Home Health Agency or IDTF) to provide supervision of therapeutic services rendered in on-campus hospital departments. CMS has never before allowed physicians outside of the main hospital or an on-campus hospital department to provide direct supervision of outpatient therapeutic services.

3. Location of the Supervising Practitioner for Services Rendered in Off-Campus Departments.

Under the 2010 Final Rule, CMS will continue to require that each off-campus hospital department have an appropriate supervising practitioner within the department whenever therapeutic services are rendered. CMS also specifically states that a single practitioner cannot supervise services in multiple departments, even if those departments are co-located in the same off-campus hospital building. Further, CMS states the supervision requirements cannot be met by a supervising physician in a co-located private physician office, IDTF, Home Health Agency or other co-located provider institution.

4. Definition of "Immediately Available."

In response to numerous requests for clarification, the 2010 OPSS Final Rule includes a description of when CMS will consider a supervising practitioner to be "immediately available." The Rule defines "immediately available" to mean that the "supervisory physician or nonphysician practitioner [cannot 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." Accordingly, even though CMS has stated that the supervising practitioner for services rendered in on-campus

provider-based departments can be located "anywhere on the hospital campus," CMS also expects that hospitals ensure supervising practitioners are close enough to the site of services that they could intervene "right away" if necessary. CMS also clarified that a supervising practitioner would not be considered "immediately available" if he or she was involved in another procedure or service that he or she could not interrupt.

5. Supervising Practitioner's Credentials.

In the 2010 Final Rule, CMS also offers important guidance regarding the supervising practitioner's credentials. CMS explains that the supervising practitioner "must be prepared to step in and perform the service, not just to respond to an emergency." Accordingly, CMS states that the supervising practitioner must have "within his or her State scope of practice and hospital-granted privileges, the ability to perform the services or procedure" he or she is supervising.

6. Critical Access Hospitals.

In response to numerous questions from the hospital industry, the 2010 Final Rule clarifies that the "direct supervision" requirements for outpatient therapeutic services do apply to Critical Access Hospitals (CAH).

7. CMS Did Not Suspend Enforcement Efforts Under 2009 Standard.

Despite numerous requests from the hospital industry to repeal or preclude enforcement of the stringent 2009 OPSS Final Rule supervision standards, CMS stated that the agency will not repeal the FY 2009 physician supervision standard. CMS clarified that until January 1, 2010, when the 2010 OPSS Final Rule goes into effect, both on- and off-campus outpatient departments will be required to have a supervising physician present in the provider-based hospital department whenever therapeutic services were being rendered. CMS also stated that it would not interfere with any



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enforcement actions brought by its contractors under the 2009 standard.

8. Supervision of Cardiac and Pulmonary Rehabilitation Services Must Be Provided by a Physician.

Despite numerous requests to permit non-physician practitioners to provide supervision of pulmonary rehabilitation, cardiac rehabilitation, and intensive cardiac rehabilitation services, CMS stated that the agency would continue to require a physician (M.D. or D.O.) to supervise these services. Further, the supervising physician must meet the expertise and credentialing requirements set forth in CMS' cardiac and pulmonary rehabilitation coverage policies and regulations.

CMS did revert back to the 2000 OPPS Final Rule location requirements for supervision of cardiac and pulmonary rehabilitation services. Specifically, under the 2010 Final Rule, the supervising physician may be located anywhere on the hospital campus when the rehabilitation services are rendered in an on-campus department of the

hospital, so long as the physician is immediately available to intervene. When the services are rendered in an off-campus hospital department, the supervising physician must be immediately available and present within the off-campus department where the services are being rendered.

For more information about the direct supervision requirements published in the 2010 OPPS Final Rule, please contact Mary C. Malone or Rachel J. Suddarth at (804) 967-9604, or by email mmalone@hdjn.com, or rsuddarth@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website at www.hdjn.com.

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