

OPPS Proposed Rule: Physician Supervision



American Hospital
Association

Agenda

- **Background and History of “Incident to”**
- **2009 OPPS Proposed & Final Rule**
- **AHA Comments and Actions**
- **CY 2010 OPPS Proposed Rule**
- **AHA Comments for Discussion**



Outpatient Therapeutic Services are “Incident to”

- **THE LAW: Social Security Act § 1861(s)(2)(B)**
 - Medicare pays for hospital outpatient therapeutic services furnished “incident to” a physician’s service.
- **THE REGS: 42 CFR §410.27(a)(1)(i)-(iii):**
 - Hospital “incident to” services conditions:
 - (1) services furnished by or under arrangement made by a hospital;
 - (2) as an **integral though incidental part of a physician’s service**; and
 - (3) furnished in the hospital or at a department of a provider, as defined in §413.65(a)(2), that has provided-based status.
- **Examples of outpatient therapeutic services:**
 - Clinic/ED visits, OP psychiatric services (partial hospitalization), drug infusions, cardiac rehabilitation, wound debridement, HBOT,
 - DOES NOT INCLUDE: PT/OT/SLT, diagnostic services (x-ray, MRI), clinical lab services, dialysis.



Until 1998, Medicare Intermediary Manual

Medicare Intermediary Manual (§ 3112.4(A))

- Did not require a specified level of physician supervision for payment of incident-to hospital outpatient department services
 - “the services and supplies must be furnished on a physician’s order by hospital personnel and **under a physician’s supervision.**”



1998 OPPTS Proposed Rule & 2001 Final Rule

- First time that a **specific level** of physician supervision required for “incident to” hospital outpatient services.
 - **Off-campus PBDs**: Require “**direct physician supervision**” for services furnished in a department or clinic “**offsite and that is not on the hospital premises.**”
 - § 410.27(f): “Direct supervision means that the 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. It does not mean that the physician must be present in the room when the procedure is performed.”
 - **BUT.....**



1998 OPPS proposed rule & 2001 final rule, cont.

On-campus PBDs:

- “[O]ur proposed amendment of §410.27 to require direct supervision . . . **does not apply to services furnished in a department of a provider that is located on the campus of the hospital.**” (65 *Fed. Reg.* 18,525.)

In the hospital:

- No specific supervision requirements



Medicare Benefit Policy Manual, Sec. 20.5.1

Between 2001 and 2009, this “expectation” lived in section 20.5.1 of the Medicare Benefit Policy Manual.

- “The physician supervision requirement is **generally assumed to be met where the services are performed on hospital premises.**”



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2009 OPPTS Proposed & Final Rule

- **In 2009 rule, CMS rewrites history:** (73 Fed. Reg. 68,702.)
 - “Misunderstanding” about what, if any, level of physician supervision is required for incident to services furnished in a hospital or an on-campus PBD
 - “Restatement and clarification of the policy”
 - “it is 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.**”
- **Subsequently, in Open Door Forum calls, CMS states:**
 - Physician providing “direct supervision” must be *physically present in the department* during all times services are provided
 - Supervising physician must have *hospital privileges* to supervise
 - Clarifies that this **applies to both hospital and CAH outpatient therapeutic services**



Major Concerns About 2009 Policy

- **Looking back: 2001-2009**
 - CMS characterization as “restatement and clarification” of existing policy **exposes hospitals to significant enforcement scrutiny**
 - CMS, OIG, DOJ, RAC, etc.
 - Whistle-blower lawsuits
- **Looking forward: 2009 and beyond**
 - Burden on hospitals, requiring more physicians to be engaged for direct supervisory coverage without a clear clinical need.
 - Special concern for CAHs and for communities with severe physician shortages.
 - Will impact patient access to outpatient therapeutic services, especially in rural areas.



April 14 Letter to Director Blum

The undersigned organizations write to request that the CMS **withdraw or delay the recent policy change regarding physician supervision** of hospital outpatient therapeutic services as described below, and that it immediately instruct contractors that no enforcement actions should be initiated or pursued until the issues raised in this letter are addressed.

Association of American Medical Colleges
**American Association of Cardiovascular and Pulmonary
Rehabilitation**
American Hospital Association
American Psychiatric Association
American Society for Radiology Oncology
Catholic Health Association
Federation of American Hospitals
National Association for Medical Direction of Respiratory Care
National Association of Psychiatric Health Systems
National Rural Health Association
Premier
VHA Inc.



**American Hospital
Association**

June 1 Letter to Director Blum

Our members remain very concerned about certain CMS statements from the 2009 OPPS rulemaking that have the potential to subject hospitals to substantially heightened and unwarranted enforcement scrutiny. As the agency considers next steps related to its policy, **we strongly urge CMS to take immediate steps to mitigate the new and inappropriate enforcement risks** that the troubling CMS statements have created.

Association of American Medical Colleges

American Hospital Association

Federation of American Hospitals

National Association of Psychiatric Health Systems



American Hospital
Association

Director Blum's June 11 Reply



DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid

7500 Security Boulevard
Baltimore, MD 21244-1850

JUN 11 2009

Roslyne D.W. Schulman
Senior Associate Director
American Hospital Association
Liberty Place, Suite 700
325 Seventh Street, NW
Washington, DC 20004-2802

Dear Ms. Schulman:

As we stated in last year's final rule, this policy was a clarification of long-standing policy. While we understand that you disagree that we were only describing a clarification, any change to this policy would have to be adopted through notice and comment rulemaking. We will consider the points made in your letter as we develop the CY 2010 OPPS proposed rule.

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I hope this information is helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Blum".

Jonathan D. Blum
Director, Center for Medicare Management
Acting Director, Center for Drug and Health Plan Choice



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CY 2010 OPPTS Proposed Rule (July 1)

- **Proposed rule contains good and bad news.**
- **Bad news first....**
 - Does not resolve vulnerability for 2001 through 2009.
CMS continues to explicitly assert that:
 - The 2009 “restatement and clarification” made no change to long-standing supervision policies.
 - These policies continue to be in effect for 2009.
 - CMS has not instructed contractors to delay or discontinue enforcement actions.
 - **The AHA will continue to urge that CMS**
 - **rescind the 2009 policy change**
 - **instruct its contractors not to pursue enforcement actions.**



CY 2010 OPPS Proposed Rule (July 1)

Good (?) news for CY 2010 and beyond.. CMS proposes:

- **Non-physician practitioners (NPPs) may provide direct supervision of hospital and CAH outpatient therapeutic services**
 - PAs, NPs, CNSs, CNM may directly supervise if
 - services are within State's scope of practice and hospital-granted privileges
 - NPPs may supervise hospital and CAH services both ON-CAMPUS and OFF-CAMPUS
- Caveat: This proposed policy WOULD NOT apply to cardiac or pulmonary rehab due to statutory issues.
- Caveat: This proposed policy WOULD NOT apply to outpatient diagnostic services



CY 2010 OPPTS Proposed Rule (July 1)

Loosening of physical presence standard for “direct supervision” when outpatient services provided on-campus

- For outpatient services furnished *in a hospital or CAH, or in an on-campus PBDs of a hospital or CAH*, revises “direct supervision” definition
 - Supervisory physician or NPP must be *present on the same campus, in the hospital or CAH or in on-campus PBDs of the hospital or CAH, and immediately available* to furnish assistance and direction throughout the performance of procedure.
- Define “in the hospital” to mean
 - Areas in the main building(s) of a hospital under the ownership, financial, and administrative control of the hospital; that are operated as part of the hospital; and for which the hospital bills the services furnished under the hospital’s provider number.
- Thus supervisory physician or NPP cannot be elsewhere, e.g., in on-campus physician office, IDTF, SNF, etc.



CY 2010 OPPTS Proposed Rule (July 1)

For outpatient therapeutic services furnished in an ***off-campus PBP***

- Supervision may be provided by NPPs
- However no change in definition of “direct supervision” for off-campus PBDs
 - The physician or NPP **must be present in the off-campus PBD** and immediately available to furnish assistance and direction throughout the performance of the procedure



CY 2010 OPPTS Proposed Rule (July 1)

Outpatient Diagnostic Services

- Physician supervision requirements vary by individual tests, as listed in the Medicare PFS Relative Value File.
- The existing regulatory definitions of general and personal supervision would continue to apply.
- For diagnostic services requiring “**direct physician supervision**” that are provided **in the hospital or CAH, or in an on-campus PBD**,
 - propose to use **same loosened physical presence standard** as proposed for outpatient therapeutic services.
- For diagnostic services in an **off-campus PBD**, direct supervision would continue to mean physician must be present in the off-campus PBD and immediately available
- For all hospital or CAH outpatient diagnostic services **provided under arrangement in non-hospital locations**, such as IDTFs and physicians’ offices, the existing definitions of personal, direct, and general supervision that apply to diagnostic tests performed in physician offices would apply



Next Steps...

- Plan to meet with CMS regarding on-going enforcement vulnerability for 2001-2009.
- AHA will submit comments before the August 31 deadline.
 - WE NEED YOUR HELP TO CRAFT OUR COMMENTS TO CMS



DISCUSSION

1. **How helpful is CMS's proposal to allow NPPs to provide supervision for outpatient therapeutic services?**
 - Do you think that the supply of NPPs is adequate to meet supervision needs?
 - Is the exclusion of cardiac rehab/pulmonary rehab from this NPP policy a big problem or do physicians already supervise those services?
 - Should AHA recommend that this NPP proposal be extended to diagnostic services?
2. **How helpful is the revised definition of “direct supervision” for on-campus outpatient services?**
 - Does only allowing the supervising physician or NPP to be on hospital owned and controlled property pose a problem?
3. **What other changes should AHA recommend to the physician supervision policy?**



Contact Information

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