

PUBLICATION

Agency's About-Face: CMS Proposes Changes to Supervision Rules for Hospital Outpatient Therapeutic Services

August 29, 2019

Among the many provisions in the FY 2020 Outpatient Prospective Payment System (OPPS) proposed rule is one that would alter the supervision standards applicable to hospital outpatient therapeutic services. See 84 Fed. Reg. 39398, 39525-39526 (Aug. 9, 2019). <https://www.govinfo.gov/content/pkg/FR-2019-08-09/pdf/2019-16107.pdf> For more than a decade, CMS has taken the position that direct supervision is required for those services, stating in 42 C.F.R. § 410.27 that therapeutic services furnished in a hospital outpatient department must be furnished under the direct supervision of a physician or non-physician practitioner unless CMS has specified a different level of supervision for that service. This has meant, according to CMS, that a physician or non-physician practitioner must be immediately available to furnish assistance and direction through the performance of the procedure and must possess the requisite skills and credentials to supervise the service and intervene should that be necessary.

When the CMS first announced this policy in 2009, it caused immediate concern, particularly among Critical Access Hospitals (CAHs) and small rural hospitals with fewer than 100 beds who protested that they would have great difficulty complying due to staffing challenges. In response, CMS soon instructed its MACs not to evaluate or enforce the direct supervision requirement as it related to those institutions. For other hospitals, however, the direct supervision requirement generally applied, and those requirements continued to generate questions and present difficulties. Hospitals have asked what constitutes "immediate availability" as required by the regulations, what is the level of training and credentialing required for those who provide supervision, and to what extent may a practitioner who is engaged in other services provide direct supervision of the therapeutic services in question? These questions, among others, have forced hospitals to examine their policies and to take what at times have been difficult steps to ensure that direct supervision is present.

Now, however, CMS is proposing a substantial relaxation of the "direct supervision" policy for hospital outpatient therapeutic services, moving from a default standard of direct supervision to one of general supervision. As reflected in the recently released CY 2020 OPPS Proposed Payment Rule, CMS now believes that requiring direct supervision for therapeutic services is quite often unnecessary. CMS noted that Medicare Conditions of Participation (COPs) and state laws regarding scope of practice are already in place to provide protections for Medicare patients and to ensure that the services they receive are properly supervised. Further, the agency stated that its experience demonstrates that Medicare providers furnish a similar quality of hospital outpatient therapeutic services regardless of whether the minimum level of supervision required is direct or general. More specifically, CMS observed that in reviewing the data and information from CAHs and small rural hospitals, there has been no indication that the quality of outpatient therapeutic services has been affected by requiring only general supervision for those services.

In its proposal, CMS notes that it will retain the ability to consider changes to the supervision level of individual hospital therapeutic services to a level that is more intensive than general supervision. To that end, the Agency is seeking public comments on whether specific types of services, such as chemotherapy administration or radiation therapy, should be excepted from the proposed general supervision standard.

Comments:

CMS's proposal should be welcomed by hospitals that over the past decade have had to wrestle with questions pertaining to the direct supervision requirements. That is not to say that all hospitals will, or should, abandon direct supervision as a standard to be applied to a number of therapeutic procedures. As CMS has recognized, some outpatient therapeutic services involve a level of complexity and risks such that direct supervision is warranted even though only general supervision is required. Hospitals need to be mindful that the Medicare COPs require that hospitals have an organized medical staff that "operates under bylaws approved by the governing body, and which is responsible for the quality of medical care provided to patients by the hospital." See 42 C.F.R. § 482.22. Thus, hospitals will presumably want to evaluate, on a service by service basis, the level of supervision that is appropriate for that service to ensure that the appropriate standard of care is satisfied.

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