

# CMS Addresses Physician Supervision Requirements in Proposed 2010 Outpatient Prospective Payment System Rule

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On July 1, 2009, the Centers for Medicare and Medicaid Services (CMS) issued its proposed 2010 Outpatient Prospective Payment System (OPPS) rule. An important proposal in the 2010 OPPS rule amends and clarifies CMS requirements for supervision of hospital outpatient services, addressing significant concerns and confusion that had arisen as a result of CMS statements in the preamble to the 2009 OPPS rule, issued in late 2008. In the 2009 OPPS rule, CMS indicated that on-campus hospital outpatient services require direct physician supervision, which in turn requires the supervising physician to be present in the outpatient department while services are rendered. In the proposed 2010 OPPS rule, CMS has modified its position to a somewhat more practical, feasible approach. However, CMS has made very clear that, regardless of the location of hospital outpatient services, physician supervision will not be assumed. Rather, hospitals must have in place a plan for ensuring that, where “direct supervision” is required, an appropriately qualified physician or non-physician practitioner (NPP) is “immediately available” to furnish assistance and direction.

## Background

Certain therapeutic hospital outpatient services are covered as services “incident to” a physician’s services. In the preamble to the 2000 OPPS final rule, CMS indicated that the level of physician supervision necessary to meet the “incident to” requirement could be assumed for on-campus hospital outpatient services, but not for off-campus provider-based departments (PBDs), where physician presence in the PBD was required. The assumption that physician supervision levels were met for on-campus services continued until late 2008, when CMS issued its “clarification” in the preamble of the 2009 OPPS rule.

The stated reasons for the clarification were not themselves necessarily problematic. These included the following:

- The assumption of physician supervision in the hospital and in on-campus PBDs, as stated in the 2000 OPPS rule, did not mean that no supervision or only general supervision is required.
- The assumption of supervision was based on the historical hospital structure of a single hospital building housing predominantly inpatient hospital services. In such a setting, it was reasonable to assume that a physician would always be nearby. The physical layout of hospitals, as well as the mix of services provided, is very different today.
- The key component of “direct supervision” is the requirement that a physician must be immediately available to furnish assistance and direction, in order to ensure the delivery of safe and high-quality outpatient services.

However, CMS implied not only that a physician must be immediately available to assist in order to meet the supervision requirements, but also that a physician must be physically present “in the department” for all hospital outpatient services that require direct supervision. CMS also made clear that this standard would include both those therapeutic hospital outpatient services that are covered “incident to” a physician’s services, and diagnostic hospital outpatient services that require direct supervision under the Medicare Physician Fee Schedule.

CMS received comments from many industry groups, and has now responded with a somewhat more flexible approach. Moreover, rather than providing guidance only in the preamble, CMS has now proposed regulatory language reflecting its intended supervision rules.

## 2010 Proposed OPPS Rule

CMS has proposed three revisions to existing supervision rules, summarized here and in the attached chart.

CMS has proposed that non-physician practitioners such as physician assistants, nurse practitioners and certified nurse midwives may directly supervise those hospital outpatient therapeutic services that they are permitted to personally perform under state law. Currently, only physicians may provide direct supervision of outpatient therapeutic services. The proposed extension of the scope of NPP supervision does not apply to cardiac rehabilitation, intensive cardiac rehabilitation or pulmonary rehabilitation.

For on-campus outpatient therapeutic services, CMS has proposed that the “direct supervision” requirement will be met if the supervising physician or NPP is present in the hospital or on-campus PBD of the hospital and immediately available to furnish assistance and direction throughout the performance of the procedure. For off-campus PBDs, the rule is unchanged, and will still require that the physician be present in the off-campus PBD. The services being supervised must be within the scope of the

license and hospital privileges of the supervising physician or NPP. Note that this supervision requirement applies to the category of outpatient services covered as “incident to” a physician’s services. Certain hospital outpatient services (*e.g.*, physical therapy) have their own benefit category and therefore are not subject to these supervision rules.

CMS has proposed that all hospital outpatient diagnostic services, regardless of location, must be provided with the level of supervision required for the specific service under the Medicare Physician Fee Schedule. Where a direct level of supervision is required, the standards are the same as for therapeutic services.

Although there are some open issues remaining, the proposed revisions provide more flexibility and clarity about supervision requirements. The chart on the next page provides additional detail about the proposal.

| Type of Service   | Who Can Supervise; Qualifications   | Level of Supervision – “in the hospital” or “on-campus” provider-based department (PBD)   | Level of Supervision – “off-campus” PBD  |
|---|---|---|--|
| <p>Hospital Outpatient – Therapeutic (“incident to”) (42 C.F.R. §410.27)</p>  | <p>Physicians; NPPs may supervise what they are authorized to perform, except cardiac rehab, intensive cardiac rehab and pulmonary rehab.</p> <p>The service or procedure must be within the supervisor’s scope of licensure and hospital privileges.</p>   | <p>“Direct supervision” = present (a) on the same campus, (b) in the hospital or the on-campus PBD of hospital and (c) immediately available to furnish assistance and direction throughout the performance of the procedure.</p> <p>“In the hospital” = areas in the main buildings of a hospital that are 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 under the hospital’s CMS Certification Number (CCN).</p> <p>NOTE: A supervising physician is not “in the hospital” if in a physician office, independent diagnostic testing facility (IDTF) or other non-hospital space, even if “on-campus.”</p> <p>NOTE: “Immediately available” precludes performing other procedures that could not be interrupted.</p> | <p>“Direct supervision” = “in the off-campus PBD and immediately available to furnish assistance and direction throughout performance of the procedure.”</p> <p>NOTE: Presence “in the room” is not required, but presence is required “in the off-campus PBD.” This precludes a physician from supervising more than one off-campus PBD at the same time.</p> |
| <p>Hospital Outpatient – Diagnostic (42 C.F.R. §410.28)</p> <p>NOTE: This standard applies whether the services are provided in the hospital, in a PBD or at a non-hospital location, directly by the hospital or “under arrangements.”</p> | <p>Physicians only (with narrow exception for supervision of psychological diagnostic tests by clinical psychologists)</p> <p>Outstanding Issue: Although not specifically stated, the reference to “assistance and direction” strongly suggests proficiency and privileges equivalent to that of a radiologist for imaging services.</p> | <p>Personal, direct or general, as dictated by the MPFS Relative Value File, and as defined by §410.32(b)(3)(i)-(3)(iii), except “direct supervision” has the same meaning as “direct supervision” for hospital outpatient therapeutic services (described above).</p>  | <p>Personal, direct or general, as dictated by the MPFS Relative Value File, and as defined by §410.32(b)(3)(i)-(3)(iii), except “direct supervision” has the same meaning as “direct supervision” for hospital outpatient therapeutic services (described above).</p>   |

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