

PUBLICATION

CMS Proposed Rule Aims to Increase Access to Behavioral Health Providers

Authors: Bahati Mutisya
August 2022

On July 7, 2022, the Centers for Medicare & Medicaid Services (CMS) issued its 2023 Physician Fee Schedule Proposed Rule (Proposed Rule) seeking public comment regarding payment policy changes and other Medicare Part B issues. The Proposed Rule announced several goals, one being to expand access to covered behavioral health services, which include mental health as well as substance use disorder treatment. CMS aims to reach this goal in multiple ways, including by altering supervision requirements for providers, creating a new general behavioral health integration service, improving opioid treatment programs, and extending the use of telehealth beyond the COVID-19 Public Health Emergency (PHE).

This article focuses on the proposed change that would relax the supervision requirements for services provided incident to physician services, which may allow expansion of the clinical team that can provide behavioral health services billed to Medicare. Here is a summary of what this part of the Proposed Rule means and the impact it could have.

The Proposal

As we continue living in the COVID-19 PHE, the demand for behavioral health services remains high and has been on the rise, according to [2020 and 2021 surveys conducted by the American Psychological Association](#). Yet, the supply of behavioral health services is limited, due to overwhelming workforce shortages that are projected to affect multiple behavioral health providers by 2025, including psychiatrists, psychologists, mental health and substance abuse social workers, school counselors, and marriage and family therapists, as stated in [HRSA's National Center for Health Workforce Analysis](#). Existing restrictions on the supervision of these services further limit the use of certain behavioral health providers. CMS aims to address these concerns in the Proposed Rule with an amendment to the current supervision requirements.

The Medicare statute does not have a benefit category for services provided by licensed professional counselors (LPC) or licensed marriage and family therapists (LMFT). Instead, LPC and LMFT services are billed indirectly when providers perform their services as "auxiliary personnel." Under current CMS regulations, auxiliary personnel are individuals providing behavioral health services incident to physician services who must act under the "direct supervision" of a physician (or other practitioner). See 42 CFR § 410.26(a). Direct supervision is defined as the supervising physician must be present in the office where the services are being provided (Note: This can include virtual presence via audio/video technology during the PHE). See 42 CFR § 410.32(b)(3)(ii). This means auxiliary personnel are restricted to providing services when a supervising physician is also available to be present.

The Proposed Rule offers more flexibility for auxiliary personnel by allowing these individuals to work under the "general supervision" of the billing physician. This would mean that the physician has "overall direction and control," but the physician's presence would not be required in the office during treatment. 42 CFR § 410.32(b)(3)(i). Thus, beneficiaries needing behavioral services such as counseling or cognitive behavioral therapy would have easier access to more providers in various settings. CMS expressly noted in its [announcements](#) that it intends this proposal to allow greater use of behavioral health providers such as

"marriage and family therapists, licensed professional counselors, addiction counselors, certified peer recovery specialists, and others" to help address beneficiaries' growing behavioral health needs.

CMS specifically noted in the Proposed Rule that auxiliary personnel would still be required to meet all other requirements to provide services, including obtaining a state license, thereby ensuring that beneficiaries are treated by qualified individuals.

The Impact for Behavioral Health Providers

If this Proposed Rule becomes final, the increase in access to behavioral health providers working under physicians will mean additional resources for behavioral health clinical teams, but this ability to reach more patients will also increase the need for coordination of care among providers. The Proposed Rule does not indicate that physicians can take a step back from their supervisory role in patient care. While physicians need not be in the room or in the building where services are being provided, they must be knowledgeable regarding the care of their patients. Physicians should be reviewing service notes from the provider after a visit, and there should be an open flow of communication between the provider and the supervising physician to address any issues as early as possible.

Ensuring robust communication among providers will be critical to maintaining quality of care, and many behavioral health facilities may have to evaluate their current systems to ensure providers are able to coordinate appropriately. While the majority of the health care industry has moved to or is moving to electronic record-keeping systems, a June 2022 [report from the Medicaid and CHIP Payment and Access Commission \(MACPAC\)](#) states that only 6% of behavioral health facilities use electronic health records (EHRs). Thus, most behavioral health providers are still relying on telephone, paper, or fax to exchange patient information with other providers, which could cause barriers to the integration of services. Behavioral health facilities should consider implementing electronic systems that will allow for smooth and secure transmission of data among multiple providers.

Efficient coordination, as well as diligent record-keeping, is critical to providing quality services and ensuring that providers are properly paid for services rendered. Notably, the Proposed Rule changes how physicians supervise auxiliary personnel, but does not expand on the tasks that physicians can delegate to auxiliary personnel, and the physician is still responsible for billing for the services provided under their supervision. While the Proposed Rule allows more providers to be involved in behavioral health treatment, the team of providers must be in sync regarding what services are best for the patient, how records are maintained, and how services are billed.

Public comments on the Proposed Rules may be submitted online or via mail and are due no later than 5 p.m. Eastern time on September 6, 2022.

For more information, please contact [Bahati Mutisya](#) or any member of Baker Donelson's Reimbursement Team.