

## Report on Medicare Compliance Volume 31, Number 39. October 24, 2022 OPPS Rule May Cover Some Services at Home That End After PHE

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By Nina Youngstrom

Medicare payments for certain hospital outpatient department services provided to patients in their homes by telehealth will dry up at the end of the COVID-19 public health emergency (PHE) but then partially reappear because of a new regulation, an expert says.

When the PHE is over, coverage for the services, along with other “hospitals without walls” waivers, will disappear. Although HHS on Oct. 13 extended the PHE for another 90 days, that’s expected to be the last extension, which means an end to most waivers and flexibilities, said Martie Ross, a consulting principal with PYA.

In the hospital-without-walls category, CMS gave hospitals the flexibility to temporarily relocate provider-based departments to patient homes for the purpose of providing certain hospital outpatient services—counseling, therapy, education (e.g., diabetes self-management) and partial hospitalization services—by hospital clinical staff via telehealth. Hospitals bill the Outpatient Prospective Payment System (OPPS) for the services.

“If you’re using these services, the door slams shut with the end of the PHE,” Ross said Oct. 19 at a PYA webinar. “It will have significant impact.” Even though they are delivered virtually to patient homes, these hospital outpatient services don’t fall under the protective umbrella of the 151 days of additional telehealth coverage provided by the 2022 Consolidated Appropriations Act (CAA).<sup>[1]</sup>

But preservation of the coverage is probably coming from another source, Ross said. If a provision in the proposed 2023 OPPS rule is finalized, behavioral health services furnished remotely by clinical staff of hospital outpatient departments to patients in their homes will be covered outpatient services paid under the OPPS. That includes staff of critical access hospitals.

“What happens at the end of the PHE is the authority to deem the patient’s home an outpatient hospital department goes away,” Ross clarified. “With this proposed rule change, such designation no longer would be necessary, as CMS is re-defining the scope of outpatient services to permit these services to be delivered virtually.”

There are some limits that mirror the new coverage for telebehavioral health services under the Medicare Physician Fee Schedule rule, she said. For example, patients must have an initial in-person visit with the provider six months before the first telebehavioral health visit and annual in-person visits, with certain exceptions, although the CAA delayed those requirements until 151 days after the PHE ends.

### **SNF-Related Waiver Raises Concerns**

Generally, hospitals and other providers are facing the loss of more than 200 flexibilities when the PHE ends, said Kathy Reep, a consulting senior manager with PYA, at the webinar. Nearly all telehealth services, however, will be covered for an extra 151 days because of the CAA.

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Reep is particularly uneasy about compliance issues around the waiver of the three-day qualifying inpatient hospital stay normally required for Medicare coverage of skilled nursing facility (SNF) admissions. “I’m very concerned about [CMS’s guidance] having changed over time,” Reep said.

In different statements, Reep said CMS guidance on the waiver vacillated. CMS has said in:

- May 2020: “The qualifying hospital stay waiver applies to all SNF-level beneficiaries ... regardless of whether the care the beneficiary requires has a direct relationship to COVID-19.”
- May 2021: “CMS is waiving the requirement for a 3-day prior hospitalization for coverage of a SNF stay ... for those people who experience dislocations or are otherwise affected by COVID-19.”
- May 2022: “We [waived] the SNF 3-day prior hospitalization requirement for a SNF covered stay during the [PHE]. This gives temporary SNF services emergency coverage to a patient without a qualifying hospital stay who experiences a dislocation or those affected by COVID-19.”
- August 2022: “CMS temporarily waived the requirement for a three-day prior hospitalization for coverage of a skilled nursing facility (SNF) stay. This waiver provides temporary emergency coverage of SNF services without a qualifying hospital stay.”

There could be audits of this area shortly after the PHE ends. “The impact on SNFs would be denial of the stay because there wasn’t a three-day prior stay and no support to indicate the patient was affected by COVID or the originating facility had an issue with bed capacity,” Reep noted.

She suggested rethinking waiving the three-day qualifying stay for every patient if they’re not having a capacity issue. There’s also a question of whether this comes back on hospitals, Ross added.

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**1** Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, 136 Stat. 49, <https://bit.ly/3BFOAuG>.

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