

State law or regulation. Nurse-midwife services are mandatory for the categorically needy under section 1902(a)(10)(A) of the Act. At the State's option, a State may also provide these services to the medically needy.

Before October 1, 1993, section 1905(a)(17) of the Act (through a cross-reference to section 1861(gg) of the Act) and implementing regulations at 42 CFR 440.165 required that a nurse-midwife must be a registered nurse who (1) is either certified as a nurse-midwife by an organization recognized by the Secretary or has completed a program of study and clinical experience that has been approved by the Secretary and (2) performs services in the care of mothers and babies throughout the maternity cycle. Section 1905(a)(17) (again, through a cross-reference to section 1861(gg) of the Act) also specifies that the services that a nurse-midwife is legally authorized to perform under State law and regulations must be covered regardless of whether the nurse-midwife is under the supervision of, or associated with, a physician or other health care provider.

Section 13605 of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), Pub. L. 103-66, amended section 1905(a)(17) of the Act to remove the limitation that a nurse-midwife can provide services only during the maternity cycle.

B. Current Regulatory Provisions

There are four existing sections of Medicaid regulations that are affected by this final rule. Section 440.165 defines nurse-midwife services as a distinct service category and lists the requirements for coverage of services under that category. Three other sections, §§ 440.10, 440.20, and 440.90, contain cross-references to § 440.165 to indicate that nurse-midwife services may be performed in specified settings. Sections 440.10 and 440.20 provide that nurse-midwife services may be performed in inpatient and outpatient hospital settings. Section 440.90 provides that nurse-midwife services may be performed in clinic settings.

II. Provisions of the Proposed Regulations

On July 18, 1994, we published a proposed rule that set forth changes to the Medicaid regulations based on the provisions of OBRA '93 and our reexamination of existing regulations (59 FR 36419). Specifically, we proposed the following revisions:

- To amend § 440.165 by removing paragraphs (a)(1) and (c) to delete the definition of, and all other references to, the maternity cycle in accordance with

the OBRA '93 amendment that provides for the coverage of nurse-midwife services regardless of whether the services are performed in the management of care of mothers and babies throughout the maternity cycle. Removal of this limitation will allow nurse-midwives to perform any service that is allowed under State law or regulation.

- To remove the exception cross-references to § 440.165 contained in §§ 440.10, 440.20, and 440.90. Because nurse-midwife services are defined as a distinct service category under § 440.165, we have determined that the inclusion of cross-references to the description of covered nurse-midwife services within the descriptions of other covered Medicaid services is more confusing than clarifying.

III. Discussion of Public Comments

In response to the July 18, 1994 proposed rule, we received 30 timely items of correspondence. We have summarized the comments and present them below with our responses.

Comment: Several commenters requested that we revise the regulations to clarify that nurse-midwife services may be provided in a variety of settings. The commenters suggested that we explain in the regulations that a nurse-midwife can order home health visits, can be reimbursed for services provided in freestanding birth centers and clinics, and can be reimbursed for patient services provided in the home without regard to whether the services were provided under the direction of a physician or other health care provider. One commenter suggested that we revise § 440.70 to clarify that nurse-midwife services may be provided in the home and that these services are not subject to the requirement that home health services must be on the order of the recipient's physician. Another commenter requested that we revise § 440.165 to specify the settings where nurse-midwife services may be performed.

Additionally, while several commenters supported our proposed revisions to §§ 440.10, 440.20, and 440.90, other commenters were concerned that our proposal to remove the cross references to nurse-midwife services in these sections may lead parties to mistakenly believe that the supervision of a physician is required for nurse-midwife services furnished in inpatient or outpatient hospital settings or clinic settings. The majority of the comments we received focused on the issues described above.

Response: To help clarify our position on the settings where nurse-midwife

services may be provided and the restrictions imposed on services furnished in those settings, we will provide some general information on how Medicaid services are paid. We will follow this with specific information on nurse-midwife services.

A. General Principles

Generally, Medicaid services are classified by three types of categories. Each separate category may have specific Federal requirements relating to supervision or location of services. First, services are described in terms of the setting in which they are provided. Some services included in this category are inpatient or outpatient hospital services and clinic services. Second, services are described by the type of services being furnished, such as rehabilitation or physical therapy services. Finally, services are described in terms of the individual providing the service such as physician, nurse practitioner, and nurse-midwife services. Each category is separate and has a distinct set of regulatory requirements.

While we view each category of service as separate and distinct, the categories are not mutually exclusive. Some services, including nurse-midwife services, can be classified in more than one category. It is also possible that a service provided may meet the requirements under one category and not another even though, as a general rule, the service could be classified under either category. The specific circumstances under which a service is provided and how the provider bills for the service determines how the service is categorized and which regulatory requirements apply.

B. Nurse-Midwife Services

The general principles of Medicaid coverage discussed above apply to nurse-midwife services. There are no Federal restrictions on settings where nurse-midwife services may be furnished. Nurse-midwife services are limited only through State licensure or scope of practice laws. Additionally, the Act does not dictate that a nurse-midwife who practices in a hospital or clinic must receive payment through that facility. Nurse-midwife services are similar to physician services in that they may be billed in their own distinct category or alternatively may be billed under other categories such as hospital or clinic services. If nurse-midwife services are provided under the classification of inpatient or outpatient hospital services or clinic services, and billed as such, then the requirements outlined in §§ 440.10, 440.20, or 440.90