

must be met. For example, nurse-midwife services performed in a hospital setting could be billed as either nurse-midwife services or hospital services. If the hospital bills Medicaid for the nurse-midwife services, the services will be categorized as inpatient hospital services (or outpatient hospital services as the case may be) and all Federal requirements relating to inpatient (or outpatient) hospital services must be met. That is, in accordance with § 440.10, the hospital services provided by the nurse-midwife must be provided under the overall direction of a physician. If a nurse-midwife bills for the services as nurse-midwife services (which happen to be furnished in a hospital setting), all Federal regulatory requirements relating to nurse-midwife services must be met. Thus, under § 440.165, the services may be performed without regard to whether the nurse-midwife is under the supervision of, or associated with, a physician or other health care provider.

This same rationale applies to nurse-midwife services furnished in the home. As long as the services are billed as nurse-midwife services, the nurse-midwife may provide services in the home and receive payment for such services without regard to whether the services were ordered by the recipient's physician. However, if the services are billed through a home health agency, the Federal requirements set forth in § 440.70 for home health services must be met.

Similarly, if nurse-midwife services provided in freestanding birth centers are billed as clinic services, then the Federal requirements outlined in § 440.90 for clinic services must be met in order to receive payment. Therefore, the services would have to be performed under the direction of a physician. If the nurse-midwife bills for the services performed in the clinic as nurse-midwife services, regulations at § 440.165 must be followed. That is, nurse-midwife services which happen to be provided in the clinic setting may be furnished without regard to whether the nurse-midwife is under the direction of a physician.

Thus, there are no restrictions on settings where a nurse-midwife may furnish services. Whether supervision by a physician or other health care provider is necessary depends on how the services are classified when they are billed. Therefore, we do not believe that the revisions suggested by the commenter are necessary since the proposed regulations already provide for nurse-midwife services in a variety of settings. We note that this regulation does not implement any new

requirements. We removed the cross references to § 440.165 in §§ 440.10, 440.20, and 440.90 for the sake of clarity. These revisions do not impose new supervision requirements.

*Comment:* Several commenters noted that the regulations did not include any reference to out-of-hospital birth centers. One commenter stated that § 440.90(c), which defines "clinic services," clearly includes services furnished in freestanding birth centers. The commenter expressed concern that removal of the cross reference to § 440.165 in this section could be interpreted to mean that nurse-midwife services furnished in freestanding birth centers are not covered under Medicaid. Commenters suggested that we revise § 440.90 to indicate that nurse-midwife services furnished in a freestanding birth center are covered under Medicaid. Other commenters recommended that specific reference to birth centers should be inserted in § 440.165(a)(1).

*Response:* Nurse-midwife services are practitioner services that are ordinarily furnished on an outpatient basis, except that nurse-midwife services may be furnished to patients in an inpatient setting reimbursable under section 1905(a) of the Act, such as a hospital or nursing facility. We do not believe that the specific inclusion of "freestanding birth center" or "out-of-hospital birth center" in § 440.165(a)(1) or the addition of such terms to the definition of clinic services found at § 440.90 is necessary. The current definition of clinic services as those services that are "preventive, diagnostic, therapeutic, rehabilitative, or palliative services that are furnished by a facility that is not part of a hospital but is organized and operated to provide medical care to outpatients" clearly includes the services of a freestanding or out-of-hospital birth center that meets the other conditions of clinic services. Nurse-midwife services furnished at a birth center would be claimed as outpatient care, either under the category of nurse-midwife services or as clinic services, unless the birth center met the definition of a hospital or nursing facility.

*Comment:* Two commenters believe that we should require nurse-midwives to have a predetermined arrangement with a physician to assure the orderly availability of physician care for purposes of consultations and referrals beyond the scope of the nurse-midwife's practice and to aid in emergency and other situations a nurse-midwife may encounter in the course of providing care.

*Response:* Section 1905(a)(17) of the Act provides in part for services furnished by a nurse-midwife that the nurse-midwife is legally authorized to perform under State law, regardless of whether the nurse-midwife is under the supervision of, or associated with, a physician or other health care provider. We do not have statutory authority to amend the regulations to require that a nurse-midwife have a predetermined arrangement with a physician. Such an arrangement would be an "association" with a physician within the meaning of section 1905(a)(17) of the Act. Congress intended State law, or the appropriate State regulatory mechanism, to define a nurse-midwife's scope of practice, including any physician supervision or association requirements.

*Comment:* One commenter stated that our proposal to remove reference to "maternity cycle" in § 440.165 is consistent with section 1905(a)(17) of the Act. The commenter noted, however, that it is important that the regulations not be interpreted to preempt State law or regulations setting scope of practice. The elimination of the "only during the maternity cycle" limitation should not be considered as the authority for nurse-midwives to receive payment for any service they may perform. The commenter gave the example that while a nurse-midwife may provide some child care services for a newborn in the course of care for a woman during her maternity cycle, this does not mean the nurse-midwife has the training necessary to provide pediatric care services.

*Response:* As discussed above, the Act specifies that a nurse-midwife's scope of practice is defined by State law or State regulatory mechanisms. Federal regulations cannot dictate the extent of services a nurse-midwife may furnish. If State law allows a nurse-midwife to provide pediatric care services, then such services are covered under Medicaid. As long as the service is categorized as nurse-midwife services and the nurse-midwife meets the requirements set in State and Federal regulations, the nurse-midwife may provide the service and receive payment for such services as nurse-midwife services.

*Comment:* One commenter stated that certified nurse-midwives should be covered as surgical, or first assistants.

*Response:* As stated above, certified nurse-midwife services are limited in scope of practice only by State law or State regulatory mechanisms. The State determines the services a nurse-midwife can legally perform. If the State laws and regulations provide that a nurse-midwife can perform surgical assistant