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Jenney Samuelson, Secretary
Todd Daloz, Deputy Secretary

Date: June 8, 2023

Re: Response to Public Comments on proposed Health Care Administrative Rule (HCAR) Inpatient Hospital Services (4.200) and Outpatient Hospital Services (4.201).

One comment was received from Primmer Piper Eggleston & Cramer PC on behalf of the Vermont Association of Hospitals and Health Systems. No other comments were received. The comment can be found on the following pages.

State Response:

The Agency of Human Services appreciates the comment on the definition of "outpatient hospital services" in HCAR 4.201 and the definition of "inpatient" in HCAR 4.200. The proposed rules add definitions, including "inpatient" and "outpatient hospital services", to provide clarity and to align with applicable federal Medicaid regulations.

Outpatient Hospital Services Definition (HCAR 4.201.1(b))

Rule 4.201 defines outpatient hospital services, in part, as ones "furnished to outpatients by or under the direction of a physician, naturopathic physician, or dentist." The commenter states that the exclusive reference to physicians in the proposed definitions creates a risk for future disputes and confusion that could adversely affect qualified, nonphysician practitioners. The commenter suggests that the language in the proposed definitions could be harmonized with *Medicare* regulations. The commenter proposes to define "under the direction of a physician" as "the overall direction and control of outpatient hospital services." The Medicare regulation example cited by the commenter refers to hospital outpatient therapeutic services being furnished under the "general supervision" of a physician, with general supervision meaning the procedure is furnished under the physician's overall direction and control (42 CFR § 410.27(a)(1)).

In support of the recommended changes, the commenter also suggests that the applicable federal Medicaid regulations are dated (have not changed since the 1980s) and do not reflect changes in care delivery and the increased use and independence of nonphysician practitioners. In fact, the federal government did change the definition of "outpatient hospital services" for Medicaid in 2008 (73 FR 66198) but rescinded that final rule in its entirety in 2009 (74 FR 31195). In the explanation for the rescission of the 2008 final rule, the Centers for Medicare & Medicaid Services (CMS) listed many concerned public comments, including that the Medicare outpatient hospital definition is too restrictive to meet the needs of those served under the Medicaid program. To address the concerns, CMS reinstated the regulatory definition of "outpatient hospital services" at 42 CFR § 440.20 that existed before the

2008 final rule and that is still in place today. Accordingly, CMS reviewed this rule in 2009 and chose to reinstate it without change; including its reference to physicians.

While there may be similarities in regulations, the federal Medicare regulations do not apply to the Medicaid program. The commenter recommends that the rule be revised to mean "overall direction and control…" however, the Medicare regulation cited by the commenter for hospital outpatient therapeutic services goes on to define several levels of supervision – general, direct, and personal – with general supervision requiring the least amount of oversight by the physician. The agency believes that the language in the proposed definition of "outpatient hospital services" at HCAR 4.202.1(b) aligns with Medicaid regulation, does not prohibit nonphysician practitioners from furnishing these services (if furnished under the supervision of a physician), and allows for multiple levels of supervision depending upon what is required and appropriate for the service/procedure.

Inpatient Definition (HCAR 4.200.1(a))

The comment also proposes modification to the definition of "inpatient" in the proposed rule at 4.200.1(a) to clarify the roles of physicians and other qualified practitioners. While the language as proposed is currently accurate and aligned with federal Medicaid regulation, the agency agrees that a modification to this definition would mitigate risk of future disputes should hospitals bestow admitting privileges on nonphysician practitioners. Hospital admitting privileges for inpatient care differ from the scope of outpatient hospital services that may be furnished by or under the direction of a physician. Admitting privileges are formal agreements between a provider and a specific hospital, and thus may vary from hospital to hospital. It is not the intention of this rule to limit the scope of qualified practitioners for whom a hospital may choose to grant admitting privileges.

Therefore, the agency has added "or other qualified practitioner with admitting privileges" to the definition of "inpatient" in HCAR 4.200.1(a) as follows:

(a) **Inpatient** means a Vermont Medicaid beneficiary who has been admitted to a medical institution as an inpatient on recommendation of a physician, naturopathic physician, ~~or~~ dentist, or other qualified practitioner with admitting privileges and who –

(1) Receives room, board, and professional services in the institution for a 24-hour period, or

(2) Is expected by the institution to receive room, board, and professional services in the institution for a 24-hour period or longer even though it later develops that the patient dies, is discharged, or is transferred to another facility and does not actually stay in the institution for 24 hours.

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February 14, 2023

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Via: email

Re: Comments on Proposed Inpatient and Outpatient Hospital Rules

The following comments are being provided on behalf of the Vermont Association of Hospitals and Health Systems in relation the proposed Health Care Administrative Rules for inpatient and outpatient hospital services. We recognize that the proposed rules replicate, and are intended to comply with the applicable federal Medicaid rules. However, the federal rules have not changed since 1982, and 1987, and do not reflect the changes in care delivery and the increased prevalence, and independence of nonphysician practitioners who are essential to ensuring access to high-value care.

This comment requests that DVHA including additional detail in the rules regarding the complimentary roles of physicians, and nonphysician practitioners to reflect current practices, and avoid potential confusion that could adversely affect qualified practitioners, and health care providers. The exclusive reference to physicians in the proposed rules creates a risk for future disputes similar to what affected the Medicare Recovery Audit Contractor program from 2013 to 2018 where the Medicare Recovery Audit Contractors interpreted a similar Medicare rule as requiring a signed physician order for inpatient admissions. After the RACs repeatedly denied inpatient claims CMS stated in the 2019 Inpatient Prospective Final Rule that "it was not our intent when we finalized the admission order documentation requirements that they should by themselves lead to the denial of payments for medically reasonable and necessary inpatient stays. CMS, Medicare IPPS Final Rule, 83 Fed. Reg. 41144, 41507 (Aug. 17, 2018). https://www.govinfo.gov/content/pkg/FR-2018-08-17/pdf/2018-16766.pdf

Potential confusion, and operational complexity could be avoided by harmonizing, to some degree, the language in the proposed rule with the corresponding Medicare rules by expressly supporting the role of other qualified practitioners in the direction, and supervision of hospital services. For example, the Medicare rule for hospital outpatient therapeutic services at 42 CFR § 410.27(a)(1) states that hospital outpatient therapeutic services must be furnished under the general supervision of a physician or a nonphysician practitioner, and general supervision means the procedure is furnished under the physician's or nonphysician practitioner's overall direction and control, but the physician's or nonphysician practitioner's presence is not required during the performance of the procedure. 42 CFR § 410.27(a)(1)(iv)(A).

We propose that section 4.201 be modified as follows to clarify the roles of physicians and other qualified practitioners in relation to outpatient services.

4.201 Outpatient Hospital Services

4.201.1 Definitions

For the purposes of this rule, the term:

(b) **Outpatient hospital services** means preventative, diagnostic, therapeutic, rehabilitative, or palliative services that are furnished to outpatients by or under the direction of a physician, naturopathic physician, or dentist; and are furnished by an institution that meets the definition of "hospital" in Health Care Administrative Rule 1.101 – Definitions. Under the direction of a physician refers to the overall direction and control of outpatient hospital services, and does not limit the authority of other qualified practitioners to order, and/or supervise outpatient hospital services in accordance with their hospital privileges, scope of practice, and applicable state law.

Also, the Medicare inpatient admission rule at 42 CFR § 412.3, states that that for the purposes of payment under Medicare Part A, an inpatient is admitted pursuant to an order by a *physician or other qualified practitioner with admitting privileges*..

We propose that section 4.200 be modified as follows to clarify the roles of physicians and other qualified practitioners in relation to inpatient services. .

(a) **Inpatient** means a Vermont Medicaid beneficiary who has been admitted to a medical institution as an inpatient on recommendation of a physician, naturopathic physician, or dentist and who –

(1) Receives room, board, and professional services in the institution for a 24-hour period, or

(2) Is expected by the institution to receive room, board, and professional services in the institution for a 24-hour period or longer even though it later develops that the patient dies, is discharged, or is transferred to another facility and does not actually stay in the institution for 24 hours.

(3) The recommendation of a physician refers to the overall direction and control of inpatient hospital services, and does not limit the authority of other qualified practitioners to admit patients, and order inpatient hospital services in accordance with their hospital privileges, scope of practice, and applicable state law.

Thank you for your consideration.

Sincerely,

John H. Wallace