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Jenney Samuelson, Secretary
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Date: October 4, 2023

Re: Response to Public Comments for Global Commitment Register notice GCR 23-032: Disabled Children's Home Care/ Katie Beckett Institutional Level of Care

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Comments and Responses on Introductory Questions in Institutional Level of Care Tool

Comment: This comment relates to question two in the proposed tool. The commenter recommends that Vermont Medicaid determine level of care even if it is determined that the child is not disabled.

Response: Vermont Medicaid is not making this recommended change because it would be inefficient and would unnecessarily use the limited resources of Disability Determination Services (DDS), DVHA's Health Care Appeals Team (HCAT), the Assistant Attorney Generals (AAGs) representing the Department of Vermont Health Access (DVHA), and DVHA's contracted medical consultant for Disabled Child Home Care/Katie Beckett (DCHC) level of care appeals. It is not efficient to determine level of care in cases in which disability is denied because, in many cases, the issue of level of care will never need to be decided because the disability decision will be upheld on appeal. Further, HCAT and the AAGs would need to prepare the case, including arguments, on both disability and level of care, which would mean reviewing all the documents, preparing the witnesses to testify, including the medical consultant, which DVHA does not presently do for disability appeals.

This approach, of not deciding level of care if disability is denied, is consistent with how Vermont Medicaid handles other Medicaid eligibility decisions. If a required criteria is not met, Vermont Medicaid does not determine whether other criteria are met because it has already been determined that the individual is not eligible for Medicaid.

Comment: This comment relates to question three in the proposed tool. The commenter recommends that in addition to a child being determined to meet the level of care requirement if they meet all criteria for one of the four institutional settings, that a child be determined to meet level of care if the child meets some, but not all, of the criteria for two or more institutions.

Response: Vermont Medicaid will not be amending the tool as recommended by the commenter. The commenter's proposal that Vermont Medicaid consider DCHC institutional level of care to be met if the enrollee meets some of the criteria in the four institutional settings is inconsistent with the federal requirement that a child must require an institutional level of care in a hospital, skilled nursing facility, or an intermediate care facility to be eligible for DCHC. 42 CFR 435.225(b)(1) Social Security disability law at 20 CFR 435.926 and 416.926a explicitly provides that a person may medically or functionally equal a listing. There is no similar legal support in Medicaid that a child may medically or functionally

meet an institutional level of care. Federal Medicaid law on DCHC requires that a child actually meets one of the specified institutional levels of care. *Id.*

Comment: This comment relates to question four in the tool. The commenter made six points related to this question:

1. That the question is more stringent than is required by federal Medicaid regulations because it asks whether the medical needs of the child can be safely and adequately met by services provided in the community.
2. That the requested scope of documentation is overly narrow because it only asks about medical provider documentation.
3. That the referenced scope of need is overly narrow because it only considers whether the "medical" needs of the child can be met in the community.
4. That the question is inappropriate because any reasonable person would assume that the services must be actually available from an outside provider, and that that would be unreasonable due to staffing shortages for community-based services.
5. That the question conflicts with a Medicaid requirement that certification for an inpatient psychiatric hospital level of care is permissible only if ambulatory care resources in the community do not meet the need.
6. That the question should be modified to state that the "totality of documentation supports that the child can receive an appropriate level of care in the community, whether through the provision of services or care provided by family, or a combination."

Response: Based on the commenter's feedback, Vermont Medicaid has revised question four as follows: "Does medical provider and additional documentation attest to or demonstrate that it is appropriate to provide institutional level of care to the child outside of an institutional setting?" This change aligns the question with 42 CFR 435.225(b)(2) which requires that is appropriate to provide hospital, SNF, or ICF level of care outside of an institution.

Vermont Medicaid agrees that other sources, such as family and the school, are important sources of documentation of a child's needs, and has revised question four to reference both medical and "other" documentation, to address the commenter's concerns.

The revisions to question four make the commenter's remaining criticisms of this question (scope of need, role of family, conflict with psychiatric care requirements) moot.

Comments and Responses on Inpatient Hospital Level of Care:

Comment: The commenter makes two main criticisms of the proposed criteria for inpatient hospital level of care:

1. That the criteria uses certain terms that are not defined.
2. That the criteria "ignores federal and state Social Security law… and creates a separate and more restrictive level of care standard."

Response:
Terms used in level of care tool criteria are now defined

Vermont Medicaid agrees with the commenter that certain terms in the proposed tool should be defined and has addressed these concerns in the final level of care tool. Vermont Medicaid has eliminated the use of the following terms in the hospital level of care criteria: intensive medication regimen (replaced with "medication management"), imminent adverse event, plan of care, and active treatment, thus resolving the commenter's concerns regarding these terms. Vermont Medicaid has defined the three remaining terms identified by the commenter: skilled observation and assessment, professional expertise, and unstable medical condition.

Vermont Medicaid has defined "skilled observation and assessment" to closely align with Medicare law at 42 CFR 409.33(a)(2), as the commenter recommended. Skilled observation and assessment will constitute a skilled service when the skills of a technical (e.g., respiratory therapist) or a professional operating within their scope of practice (e.g., RN) are required to identify and evaluate the patient's need for modification of treatment or for additional medical procedures.

Vermont Medicaid has defined "professional expertise" to mean a nursing or prescribing professional (e.g., physician, PA, APRN) working within their scope of practice. Vermont Medicaid agrees with the commenter that parents of medically needy children are often very knowledgeable about their child's care needs and that professional staff in the hospital may look to them for information. However, the parent's knowledge about their child's care needs is not relevant to determining hospital level of care.

The term "unstable medical condition" was changed to "unstable <u>chronic</u> medical condition." (Emphasis added) Because DCHC is a program designed to meet the long term care needs of eligible children, the child's needs must be chronic. The skilled care that the child requires cannot be solely for acute care or care of a short duration.

Unstable chronic medical condition has been defined to mean a persistent medical condition that could change frequently and/or rapidly so that frequent monitoring and/or adjustment to treatment regimens may be required at any point in time. The use of this term in criteria one is intended to address the present potential for complications or rapid deterioration such that it requires skilled observation and assessment to detect health and life threatening situations that must be responded to promptly by rendering appropriate care, and potentially performing emergency procedures. Vermont Medicaid disagrees with the commenter that this term is duplicative of analysis done when determining whether the child is disabled.

The above terms, along with others used in the tool, are defined in the endnotes to the revised tool.

The tool describes an inpatient hospital level of care, not what services Medicaid will cover if provided in a hospital and determined to be medically necessary

Federal Medicaid law does not define the criteria for hospital level of care; therefore, state Medicaid agencies must define it for DCHC purposes. In its second main criticism of Vermont Medicaid's proposed level of care criteria, the commenter mistakenly concludes that it "ignores federal and state Social Security law." The commenter, in describing inpatient hospital level of care, incorrectly relies on 42 CFR 440.10 that <u>defines</u> inpatient hospital services and Vermont Medicaid Covered Services Rule 7201 (hereinafter "Vermont Medicaid Rule") which provides <u>what inpatient hospital services Medicaid will cover</u> if determined to be medically necessary (e.g., use of the ICU, operating room, medical equipment).

Neither of the laws cited by the commenter purport to provide criteria for inpatient hospital level of care, an entirely different concept than a definition or a list of covered services. Level of care is the intensity of the level of effort, e.g., the services, technology, and expertise, that is needed to care for an individual; it is intended to define what care is ordinarily only provided in an inpatient hospital setting. A child may require a skilled service listed in Vermont Medicaid Rule 7201, such as physical therapy, occupational, or speech therapy, on a daily basis, but that alone would be insufficient to require a hospital level of care as no physician would institutionalize a disabled child solely for receipt of these therapies.

Vermont Medicaid revised the tool in a good faith effort to collaborate with public stakeholders who submitted comments

While the criteria in Vermont Medicaid's proposed tool accurately reflects the inpatient hospital level of care, Vermont Medicaid, in the spirit of collaboration, has revised the tool to address concerns of the commenters. The revised tool provides that a child requires an inpatient hospital level of care if all of the following criteria are met:

1. The child's severe or potentially unstable chronic medical condition requires skilled observation and assessment multiple times during a 24-hour period, as well as electronic monitoring, treatment, and medication management. Examples include continuous cardiopulmonary electronic monitoring, ventilator management, and supervised infusions of IV medications.
2. The child's care is prescribed by a licensed physician, in an ongoing direct treatment relationship with the child, within their scope of practice.
3. The services, technology, and professional expertise required for the child is equivalent to that ordinarily only provided by an inpatient acute care facility.

These terms, used in the criteria, are defined in the endnotes to the tool: unstable chronic medical condition, skilled observation and assessment, direct treatment relationship, and professional expertise.

Revised criteria one describes the child's chronic medical condition, which must be severe or potentially unstable, along with the types of services that must be provided. A child must require skilled observation and assessment multiple times during a 24 hour period to be determined to meet inpatient hospital level of care. Criteria one provides examples of services that are provided in an inpatient hospital setting; the list is not exhaustive. Revised criteria one requires that a child's condition be "potentially," not actually, unstable, and only requires this standard to be met when the child's condition cannot be described as "severe." Thus, a child may meet this criterion if their condition is either "potentially unstable" or is actually "severe."

Revised criteria three functions as a definition of hospital level of care, i.e., the child must require services, technology, and professional expertise at a level that is ordinarily only provided by an inpatient hospital. This revised criterion aligns with the third criteria that the commenter recommends in their full comments, except instead of requiring, as the commenter recommends, that such services, technology, and professional expertise be ones covered in Vermont Medicaid's covered services rule on inpatient hospital, it provides that these items must be equivalent to those ordinarily only provided by an acute inpatient hospital. This difference- what medically necessary services Medicaid will cover in a hospital setting, versus the overall level of services provided - is critical and exemplifies how the commenter conflates the legal definition of inpatient hospital services and a description of inpatient hospital covered

services with the separate concept of a hospital level of care. It is only after determining that a child meets a hospital level of care, that Vermont Medicaid would cover medically necessary services covered in a hospital setting.

Vermont Medicaid is not revising criteria three, as recommended by the commenter, to provide that the necessary services, technology, or professional expertise equivalent are ones that “can be provided by a service provider or by a parent or other family member in the home or community due to patient education or training provided.” The ability of a parent, other family member, or a service provider in the community to provide such services is not relevant to determining whether the child requires an inpatient hospital level of care.

Revised proposed criteria one and three work together and both are required. While the latter defines hospital level of care, the former sets out the requirements necessary to meet that level of care in terms of the child’s condition and the services that they require. These criteria are designed to ensure that the frequency and complexity of the required skilled medical interventions are so substantial that that they would normally only be provided in an inpatient setting.

Criteria two is new and requires that the child’s care is prescribed by their treating physician, in a direct treatment relationship with the child, working within their scope of practice. Medicaid law requires that inpatient hospital services be prescribed by a physician. 42 CFR 440.10(a)(2) “Direct treatment relationship” is defined as the “medical provider delivers health care to the individual, including diagnoses and medical orders, on an ongoing basis.” This requirement is to ensure that services are prescribed by a medical professional who knows and has treated the child over time, rather than, for example, a one-time examiner. This criterion is required for all four institutional levels of care.

Original criteria four, which provided that the signs and symptoms exhibited by the child, or the high probability of an imminent adverse event requires acute monitoring/and treatment, was removed in its entirety, thus resolving the commenter’s concerns related to how imminent an adverse event must be to be qualifying.

Vermont Medicaid also removed original criteria five, in its entirety, as recommended by the commenter. The criterion provided that active treatment had to be necessary and set forth in a plan of care that included a program of specialized health services with treatment goals, objectives, and planned interventions. Vermont Medicaid agrees with the commenter that the existence of a plan of care is a way to document an institutional level of care, but its existence does not determine whether level of care is met. For a child to be determined to meet any of the four institutional levels of care, there must be adequate medical documentation in the child’s file. This requirement is captured in the tool at question five.

In determining whether hospital level of care is met, Vermont Medicaid considers all necessary care, including palliative and hospice care, regardless of whether the goal of the care is to improve, stabilize, prevent more rapid deterioration, or provide palliative or end-of-life care.
It is not necessary to state the above in the revised tool; there is no suggestion in the tool that such types of care would not be considered in determining whether hospital level of care is met. Vermont Medicaid will ensure, through training, that the clinicians administering the tool know that there is no such restriction.

Comments and Responses on Skilled Nursing Facility Level of Care:

Comment: The commenter makes four criticisms of the proposed criteria for skilled nursing facility level of care:

1. That the criteria exceeds what is required by Medicaid and Medicare law.
2. That it duplicates decisions already made by the Social Security Administration in determining whether the child is disabled.
3. That it contains requirements not contained in federal or state Medicaid law or Medicare law (e.g., assistance with ADLs).
4. That there is no need to require that the child has a plan of care.

Response: Vermont Medicaid disagrees with the commenter's assessments of the proposed level of care criteria for skilled nursing care (SNF), but to be responsive to the commenter's concerns and recommendations, the agency has revised the criteria to align more closely with Medicare's level of care criteria for short-term SNF stays for adults who are 65 or older or disabled, to the extent that doing so is appropriate.

Medicaid law does not define pediatric SNF level of care criteria; therefore, it is up to state Medicaid agencies to establish this criterion for DCHC eligibility. By contrast, both Medicaid and Medicare law define SNF level of care criteria for adults (for Medicaid, this means individuals age 21 or older, and for Medicare, it means adults who are disabled or age 65 or older). Federal Medicaid law largely adopts Medicare adult SNF level of care criteria and other requirements by providing that that services must be "[n]eeded on a daily basis and required to be provided on an inpatient basis" pursuant to Medicare law at 42 CFR 409.31 through 409.35.

While Vermont Medicaid has revised the SNF criteria to align more closely with Medicare criteria, the agency is not simply incorporating Medicare requirements at 42 CFR 409.31 through 409.35 into its SNF criteria, as recommended by the commenter. Such wholesale incorporation is inappropriate because Medicare criteria, unlike DCHC, is designed for elderly and disabled adults who require a short-term SNF stay before returning home or being moved to a lower level of care.[1] By contrast, DCHC beneficiaries are children (under 19 years old) who, in addition to being disabled, have such severe chronic health care needs that they require long-term skilled services on a daily basis, i.e., but for the receipt of these skilled services in the home, the child would only be able to get the needed services in an institution like a SNF. For these reasons, it is not appropriate to incorporate all of Medicare's requirements into the DCHC criteria.

Pursuant to Vermont Medicaid's revised criteria, a child meets SNF level of care criteria if:

1. The child has a disabling medical condition with functional limitations, comorbidities, or is medically fragile such that there is a need for skilled nursing and/or skilled rehabilitation services on a daily basis.

[1] Medicare beneficiaries who meet SNF level of care are only covered for a maximum of 100 days in a benefit period, and only if they have entered an SNF within 30 days of being discharged from an inpatient acute hospital stay of at least three consecutive days. 42 CFR 409.30

   a. Skilled nursing services may include skilled observation and assessment of the patient's changing condition, IV infusions, IM injections, IV feeding, enteral feeding, nasopharyngeal and tracheostomy aspiration, suprapubic catheter care, dressing changes using prescription medications and aseptic technique, treatment of decubitus ulcers and skin disorders, heat treatments, initial phases of administering medical gases, rehab nursing procedures, and more.
   b. Skilled rehabilitation services include physical, occupational and speech therapies.
2. These skilled services are prescribed by the child's licensed physician, in an ongoing direct treatment relationship with the child, within their scope of practice.
3. The prescribed services would typically only be provided in a skilled nursing facility and not in an acute care institution or an institution for mental disease.

These terms, used in the criteria, are defined in the endnotes to the tool: daily basis, ongoing direct treatment relationship, and skilled observation and assessment.

The revised criteria eliminates original criteria two through six from the proposed SNF level of care criteria, thus resolving many of the commenter's concerns.[2] Vermont Medicaid retained criteria one, which the commenter states is supported by the law, but revised it to align with Medicare law more closely. Criteria one now permits level of care to be met based on the receipt of not only skilled nursing care, but also skilled rehabilitative care.

The originally proposed tool required that the child's care be prescribed by a licensed medical professional. This requirement has been largely retained in new criteria two except that now the prescriber must be a licensed physician, as is required by Medicare law, and the physician must be acting within their scope of practice and must have an ongoing treatment relationship with the child. These latter requirements, as described in the response related to the hospital level of care, are required for all four institutional levels of care, to ensure that care is prescribed by someone who is qualified and in an ongoing relationship with the child.

The third and last criteria functions like a definition of SNF level of care. It requires that the prescribed services are ones that would typically only be provided in a SNF. This criterion is closely aligned with the Medicare requirement that the daily skilled services are ones that, as a practical matter, can only be provided in an SNF. 42 CFR 409.35

The revisions to the SNF level of care criteria that are described above address the commenters concerns including that the original criteria was too strict, that it included inappropriate considerations (e.g.,

[2] Revision eliminates the following from the proposed SNF level of care criteria:

- Criterion 2: The child's daily routine is significantly altered by the need to complete medical treatment and skilled interventions.
- Criterion 3: The child needs restorative and rehabilitative or other specialized treatment requiring complex case management.
- Criterion 4: The child needs daily direct care that significantly exceeds age-appropriate assistance.
- Criterion 5: The child's impairment significantly interferes with their ability to engage in everyday activities and perform age-appropriate activities, daily living at home and in the community, these include but are not limited to bathing, dressing, toileting, feeding, and walking/mobility.
- Criterion 6: There is a plan of care which includes nursing goals, objectives, and planned interventions.

related to alteration of routine, activities of daily living, requirement of restorative or rehabilitative care, and considerations of age appropriateness), and that it required that the child have a plan of care. The commenter's only remaining critique, that all references to the child having a "medical condition" should be eliminated "because that has already been determined using the Social Security regulations, including the listings," is without merit; therefore, a reference to "medical condition" remains in criteria one. This reference does not require the reviewer to make a new disability determination; it only requires a determination that the child's disabling medical condition causes functional limitations, comorbidities, or that the child is medically fragile, such that there is a need for skilled nursing and/or skilled rehabilitation services on a daily basis.

Finally, the commenter's proposed SNF level of care criteria[3] is flawed in that it would be met if a child needed any daily skilled services as long as the parent or an undefined service provider could provide the care in the home. The commenter again conflates a child's receipt of any skilled services with the separate concept of level of care, i.e., that the required skilled services are ones that can ordinarily only be provided in a SNF. The receipt of any skilled service, even if delivered on a daily basis, is not sufficient to meet SNF level of care. No physician, for example, would prescribe care in an SNF to a child who is disabled and whose sole skilled daily need is an IM injection. To meet level of care, the child would have to have other skilled nursing and therapy needs. Further, Medicare law explicitly states that SNF level of care requires that the services are ones that are so inherently complex that they can only be safely and effectively performed by, or under the supervision of, professional or technical personnel (e.g., RN, physical therapist). 42 CFR 409.32(a) As stated above, whether a particular skilled service can be provided by a trained parent, caretaker, or a "service provider," is irrelevant to determining institutional level of care.

Comments and Responses on Intermediate Care Facility Level of Care:

Comments: The commenter makes these criticisms of the proposed criteria:

1. That it exceeds requirements in the law (e.g., need for daily active treatment and criteria related to functional deficits and ADLs).
2. That some of the criteria repeat determinations already made in the disability decision.
3. That the criteria doesn't cover children with "related conditions."
4. That it requires a plan of care.

Response: The commenter mistakenly states that intermediate care facility (ICF) level of care is established in 42 CFR 440.150(a)(5), 435.1010 and 483.440(b)(1). 42 CFR 440.150(a)(5) is a Medicaid covered services rule that provides the definition of an ICF/IID. 42 CFR 435.1010 sets forth criteria for federal financial participation by Medicaid and defines terms related to institutional status, including defining an Institute for Individuals with Disabilities or Persons with Related Conditions, among other terms. 483.440(b)(1) sets forth conditions of participation for ICFs including that they provide active treatment to its residents. Contrary to the commenter's assertion, none of the regulations purport to

[3] The commenter proposes this as the SNF level of care standard: The child needs daily skilled nursing care or skilled therapy as defined at 42 C.F.R. §§ 409.31- 409.35 and 440.40, which can be provided by a service provider or by parent or other family member in the home or community due to patient education or training provided.

establish a level of care for ICF/IIDs. Federal Medicaid law does not establish a level of care for ICF/IIDs; therefore, it must be defined by the state Medicaid agency.

Pursuant to Vermont Medicaid's revised criteria, a child meets ICF/IID level of care criteria if:

1. The child has EITHER of the following:
    a. A developmental disability as defined by HCAR 7.100 Section 7.100.3, "Criteria for determining developmental disability," OR
    b. A related condition: a severe, chronic disability that is attributable to cerebral palsy, epilepsy, or any other condition, other than mental illness, found to be closely related to Intellectual Disability because this condition results in impairment of general intellectual functioning or adaptive behavior resulting in substantial functional limitation in three or more of the following: self-care, understanding and use of language, learning, mobility, self-direction, capacity for independent living.
2. As a result of this disability, the child requires daily active treatment and supervision above and beyond typical age-appropriate care to address functional deficits in areas such as bathing, dressing, toileting, feeding, mobility, communication, social/interpersonal activities, and self-direction, to maximize function and maintain health and safety of the child. Specifically excluded from the definition of ICF/IID inpatient level of care are intensive behavioral services which, by definition, are meant to be provided in the child's natural environment.
3. Necessary services are prescribed by the child's licensed prescribing physician, within their scope of practice, in a direct treatment relationship with the patient.
4. These prescribed services would typically only be provided in a facility whose primary purpose is to furnish services to individuals with intellectual or developmental disability or related condition as described in criterion #1. In this situation the child does not meet criteria for either hospital inpatient or skilled nursing facility level of care.

Vermont Medicaid has revised the ICF/IID level of care criteria by eliminating original criteria one and two and replacing them with a requirement that the child has a developmental disability as defined by HCAR 7.100.3, "Criteria for determining developmental disability," or, the child has a related condition as defined by Medicaid law, as recommended by the commenter. 42 CFR 435.1010 This revision aligns the criteria with federal law that requires that ICF/IIDs treat individuals with intellectual disabilities and those with related conditions. 42 CFR 440.150 The tool also aligns with Vermont Medicaid's recently revised Disability Services- Developmental Services rule. HCAR 7.100 This criterion does not duplicate decisions made in the disability determination, as alleged by the commenter; instead, it ensures that the reason the child requires an ICF/IID level of care is due to a diagnosis that aligns with federal legal requirements for treatment in an ICF/IID.

Criteria two and four work together. Criteria two describes the care and treatment that the child must receive to qualify for an institutional level of care, and criteria four ensures that the services that the child needs are ones that would typically only be provided in an ICF/IID. Criteria two also specifically

excludes from consideration of whether institutional level of care is met, intensive behavioral services that are, by definition, meant to be provided to a child in their natural environment.

Criteria three and four have been revised as indicated above. Vermont Medicaid strongly disagrees with the commenter that it is inappropriate, in determining whether ICF/IID level of care is met, to consider the child's functional deficits, or need for ADL assistance or supervision. Most individuals living in ICF/IIDs have severe to profound intellectual disabilities and, according to CMS, "[m]any of the individuals are non-ambulatory, have seizure disorders, behavior problems, mental illness, visual or hearing impairments, or a combination of the above."[4] Federal Medicaid law specifically requires that ICF/IIDs provide residents with a continuous active treatment program that includes the acquisition of behaviors for the person to function as independently as possible, and that prevents the deceleration of regression or loss of current optimal functional status. 42 CFR 440.150(a)(4) It is indisputable that part of the reason these individuals are in an institutional setting is due to their functional deficits and need for ADL assistance or supervision.

The commenter also alleges that the criteria wrongly establishes a "daily" standard for the provision of active treatment. 42 CFR 483.440(a) provides that for Medicaid to pay for care in an ICF/IID, each individual "must receive a continuous active treatment program." It is reasonable and appropriate for the criteria to require that active treatment be provided, on a daily basis, to individuals who are living in an ICF/IID.

As required for the other three institutional levels of care, criteria four requires that necessary services are prescribed by the child's treating physician, within a direct treatment relationship with the child, working within their scope of practice.

Finally, as it has done for the other three institutional levels of care measured by the tool, Vermont Medicaid has eliminated the plan of care requirement. As previously mentioned, medical documentation requirements are addressed separately at question five on the tool.

Comments and Responses on Inpatient Psychiatric Hospital Level of Care:

Comments: The commenter makes these criticisms of the proposed criteria:

1. That it is not aligned with federal and state law.
2. That it duplicates decisions made during the disability decision making process.

Response: Federal Medicaid law does not define level of care for this setting; therefore, state Medicaid agencies must define it for DCHC purposes. In their statement, the commenter again conflates level of care with what services can be covered by Medicaid in a hospital setting. 42 CFR 440.10 is a definition

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[4] CMS.gov. Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs/IID). https://www.cms.gov/medicare/provider-enrollment-and-certification/certificationandcomplianc/icfiid

of inpatient hospital services and Vermont Medicaid Rule 7201 describes the inpatient hospital services that Medicaid will pay for if they are medically necessary. Neither law purports to set criteria for level of care. Inpatient psychiatric hospital level of care is not a coverage decision.

Criteria one and two do not duplicate determinations made by the Social Security Administration in finding disability. Criteria one, in part, ensures that the child's need for an institutional level of care is a result of a disabling mental health condition. Social Security law does not require the findings described in criteria two, that a child requires daily support, comprehensive treatment, and close supervision to stabilize symptoms, provide safety, prevent deterioration, and worked toward improved functioning, to find disability. These findings are critical for determining institutional level of care.

The commenter's proposed criteria described in their written comments, would find that a child requires psychiatric hospital level of care if they require any of the services described at Vermont Medicaid Rule 7201 which includes services such as, "supplies, appliances, and equipment," or if the child requires diagnosis, treatment, or care for a mental health condition. The commenter's two recommended criteria would, in effect, qualify every child with a disability due to a mental health diagnosis for inpatient psychiatric hospital level of care on a long-term basis, a result that would not align with the requirements of Medicaid law.

Vermont Medicaid has revised the level of care criteria for inpatient psychiatric hospital in two ways:

- Criterion one now requires that the child's disabling mental health condition must cause significant impairment in their ability to function at home, school, <u>and</u> in the community.
- As is required for the other institutional level of care standards, care for the child's mental health condition must be prescribed by a treating physician, within their scope of practice, in an ongoing treatment relationship with the child.

Comment: The commenter supports Vermont Medicaid implementing a standardized institutional level of care tool, but is concerned that some children will lose Medicaid eligibility because they do not require an institutional level of care and this loss will mean loss of access to important services, e.g., Children's Personal Care Services program and services received through a Designated Agency, and/or the family incurring new deductible and copay expenses through their commercial insurance. The commenter asks whether enrollees who are determined ineligible under the tool will be "grandfathered" in so that they may remain on Medicaid. Finally, the commenter requests that Vermont Medicaid consider the level of impact the tool will have on Vermont children and families, and that it include families in testing the tool.

Response: Vermont Medicaid appreciates the commenter's support of its efforts to implement a standardized tool to determine institutional level of care for the DCHC Medicaid eligibility pathway and agrees that it will result in more equitable and reliable determinations in these cases.

Beginning January 1, 2024, the assessment tool will be used to determine eligibility for new applicants and all current enrollees as they become due for review of their disability and institutional level of care eligibility. Enrollees will not be "grandfathered" into DCHC, including current enrollees who are determined ineligible for DCHC because they do not require an institutional level of care.

Vermont Medicaid appreciates that the loss of Medicaid to any enrollee, especially those with chronic and severe health conditions, like DCHC enrollees, can be a tremendous hardship; however, the agency is charged with administering the DCHC Medicaid pathway in a way that complies with federal Medicaid law which provides that only children who require an institutional level of care are eligible for DCHC.

To the extent that a current enrollee may be determined ineligible because they do not require an institutional level of care, Vermont Medicaid will determine if they qualify for Medicaid through another path. Vermont Medicaid is aware that these enrollees may not qualify for Dr. Dynasaur because their household income is more than 312% of the federal poverty level. For those enrollees who are ineligible for Medicaid through any pathway, their families will have to rely on other means, such as commercial health insurance, to cover their health care needs. Services not covered by commercial insurance would have to be paid for out of pocket. Designated agencies have some, but limited, funding for children who are not on Medicaid.

Enrollees determined ineligible for DCHC will be provided advance notice of the termination and notice of their right to appeal the decision to the Human Services Board. Parents or other caretakers who believe that their child still requires an institutional level of care may appeal and may keep their child's Medicaid pending the final decision in the appeal, as long as they timely request continuing benefits. Federal Medicaid law authorizes the state Medicaid agency to recover the cost of medical assistance provided during the pendency of an administrative fair hearing. 42 CFR 431.230(b) Accordingly, an enrollee may be liable for services continued because of their appeal. For current enrollees that appeal, Vermont Medicaid has the burden of proof, at the state fair hearing, to show that the child no longer requires an institutional level of care. Thus, enrollees will be given an opportunity to prove their eligibility to a neutral appeals tribunal before there is a final decision.

The above described process is what federal and state law require whenever Vermont Medicaid determines an enrollee is no longer eligible, whether it is because their circumstances have changed or because the prior decision was in error or did not align with the law.

Vermont Medicaid disagrees with the commenter about the appropriateness of having family members of DCHC enrollees test the assessment tool. The purpose of testing the tool is to ensure that children who meet the definition of institutional level of care are approved, and those who do not are not approved. The tool is tested against actual cases and the result is evaluated by clinical professionals who understand the details of institutional level of care. The purpose of the tool is to standardize these decisions based upon the medical requirements of applicants and enrollees, within the context of federal Medicaid law. This sort of testing is not something for which non-clinical personnel are qualified to do nor is it appropriate, due to HIPAA laws.

Vermont Medicaid places a high value on receiving input on the proposed tool from families who have children on DCHC and provided the means for broad public comment by sharing the proposed tool with about 430 organizations and individuals through the Global Commitment Register (GCR). The GCR was also posted on DVHA's public website. It is understood that the two sets of public comments that were received from Vermont Legal Aid and VFN are intended to represent the interests of DCHC enrollees and the families that support them. Vermont Medicaid also welcomed comments from families

of DCHC enrollees, either directly or through advocacy organizations or other efforts to share their input but did not receive any.

Vermont Medicaid’s primary goal in developing the assessment tool is to ensure individuals are accurately assessed for eligibility in compliance with federal law. Prior to implementing the assessment tool, Vermont Medicaid will be conducting community outreach and releasing educational materials for families, providers, and schools, regarding the DCHC Medicaid pathway and the new assessment tool, to ensure a widespread understanding among those who rely on and work with the program.