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Jenney Samuelson, Secretary
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Date: January 22, 2024

Re: Response to Public Comments for Global Commitment Register notice GCR 23-091: Health Care Administrative Rules Update – Filing 11

Comments on this rulemaking were received from Vermont Legal Aid, Inc.

Responsiveness Summary

HCAR 4.105 General

Summary of comment: The commenter states that they have no opposition to the proposed rule's clarification of current practice, i.e., that the exception request process is not available to enrollees under 21 years old. The commenter also states that Medicaid notices of decision to enrollees under 21, that are sent outside of the exception request process, should be in plain language, explain EPSDT coverage, and provide appeal rights.

Response: Vermont Medicaid appreciates the commenter's support for this rule that recognizes that Medicaid enrollees under 21 years old are already entitled to all mandatory and optional services that may be covered by Medicaid; therefore, their coverage is already broader than what is permitted by the exception request process.
The commenter's recommendations regarding EPSDT notices to enrollees are outside of the scope of this rulemaking.

HCAR 4.105.2 Criteria

Summary of comment: The commenter makes three points:

- That HCAR 4.105.2(B)(7) should permit coverage if a less expensive, medically appropriate alternative service is available but is "contraindicated for the individual,"
- That HCAR 4.105.2(B)(2) is duplicative of 4.105.2(A)(1), and
- That the criteria at proposed HCAR 4.105.2(B)(4), i.e., that there be "no rational basis" for excluding the coverage, should be revised.

Response:

Comment that HCAR 4.105.2(B)(7) permits coverage if less expensive and medically appropriate alternatives are "contraindicated for the individual"

Vermont Medicaid agrees with the commenter that if an alternative treatment is contraindicated for the enrollee, that an enrollee should not be required to undergo a trial of that treatment. The final proposed rule at (B)(7) includes the commenter's suggested revision.

Comment that HCAR 4.105.2(B)(2) is duplicative of 4.105.2(A)(1)

The criteria at HCAR 4.105.2(B)(2) and HCAR 4.105.2(A)(1) are similar but not the same, and both are needed; therefore, Vermont Medicaid will be retaining both criteria.

The criteria listed in subsection (A) are mandatory. If any of these criteria are not met, then the service is denied and the criteria at subsection (B) are not considered. By contrast, the criteria listed at subsection (B) are not all required but are instead considered in combination by the agency in determining whether an exception request should be approved.

The mandatory criteria at subsection(A)(1) provides that the requested service must be one that can be covered under one of the categories or subcategories described as an optional or mandatory service in the Medicaid Act. 42 USC 1396d(a) 42 USC 1396d(a) contains a list of the broadest potential coverage of services under Medicaid, a description of services that a Medicaid agency must cover and those that may be covered at state option. To be approved for a coverage exception, the requested service must be one that can be covered under the Medicaid Act as either a mandatory or optional service. If it cannot, then the service requested will be denied.

If the criteria at subsection (A) are met, then there will be a determination whether the criteria at subsection (B) can be met. The criteria at (B)(2), like the one at (A)(1), requires that the requested service fit in a category or subcategory of mandatory or optional services, but, unlike (A)(1), also requires that the service be one that is within a mandatory or optional category of services that is *offered by Vermont Medicaid for adults*.

In summary, the two criteria at issue are not duplicative; therefore, Vermont Medicaid will not be revising the rule in this regard.

Comment opposing the criteria that there be "no rational basis" for excluding the coverage

Vermont Medicaid is striking the "no rational basis" text that the commenter opposes and replacing it with text that a denial of the service would be arbitrary.

HCAR 4.105.4 Approvals

Summary of comment: The commenter opposes Vermont Medicaid's proposal to publish, on its website, a list of approved exception requests on an annual basis instead of a semiannual basis (twice a year).

Response: Vermont Medicaid has been publishing a list of exception request approvals, including details about the reason for the approval, on its website on an annual basis for the last several years. The change from publishing it twice annually was a result of increasingly limited staff resources at DVHA. Vermont Medicaid continues to have limited staff resources and, for this reason, is not revising this rule in the way proposed by the commenter.

HCAR 4.105.5 Adverse Decisions

Summary of comment: The commenter makes three points regarding adverse decisions on an exception request:

- That the regulation and the notice of decision should state that the enrollee may have a right to an expedited appeal,
- That the rule should not provide the standard of review in fair hearings, and
- That there should not be a 12 month restriction on resubmitting the same exception requests.

Response:

Comment on right to expedited appeal

HCAR 8.100 provides that Medicaid enrollees that receive an adverse decision from Vermont Medicaid, including those who receive one in the exception request process, have a right to an expedited fair hearing if they meet required criteria, but do not have a right to an expedited internal appeal. All notices of decision that deny an exception request have been revised to include a description of the right to an expedited fair hearing.

Because the rule at HCAR 8.100 already provides for the right to an expedited fair hearing, Vermont Medicaid is not revising the text of this proposed rule to include the text suggested by the commenter.

Comment on standard of review

The proposed rule at HCAR 4.105.5(B) simply codifies in rule the standard of review applied by the Human Services Board (hereinafter "the Board") in all exception request appeals. The Board recognizes that the standard of review for the exception request process, in which an enrollee seeks coverage of a service that is not covered by Vermont Medicaid, provides greater discretion to Vermont Medicaid than the standard of review that is applied in appeals related to Medicaid covered services. Over the lifetime of the exception request rule, the Board has consistently held that exception request decisions will not be overturned unless there is a determination that the agency abused its discretion. As recently as 2023, the Board stated the following in a decision (Fair Hearing No. B-07/23-501) upholding the agency's decision to deny an exceptions request for weight loss medication:

> The Board has consistently held that decisions regarding Rule 7104 fall within the discretion of the Department and will not be overturned absent an abuse of discretion. The abuse of discretion standard is a "difficult burden" to overcome for the party who

must demonstrate that abuse. In re John L. Norris Trust, 143 Vt. 325, 327 (1983)(citing State vs. Savo, 141 Vt. 203, 208 (1982)). Abuse of discretion arises when the Department totally withholds its discretion, or exercises its discretion on untenable or unreasonable grounds. Turner v. Roman Catholic Diocese, 2009 VT 101, paragraph 10, 186 Vt. 396. If the Department has a reasonable basis for its decision, the Board must defer to that decision even if another result might have been supportable or a different conclusion reached. In re L.R.R., 143 Vt. 560, 562-63 (1983)(internal citations omitted). Thus, in a case involving the Medicaid exception process, a decision will not be reversed unless the Department has clearly abused its discretion by either failing to consider and address all of the pertinent medical evidence under each criterion set forth above or by reaching a result that cannot be reasonably supported by the evidence or that is otherwise "arbitrary." See, e.g., Fair Hearing No. B-10/12-617; Fair Hearing No. M-03/14-216, Fair Hearing No. J-03/14-209, Fair Hearing No. T-11/10-595.

Comment on resubmission of the same exception request within 12 months

The limitation on resubmitting an exception request on a service for which an enrollee has received a denial in the last twelve months is not new; it has existed in rule since at least 1999. This limitation ensures a reasonable balance between the need for administrative finality, i.e., that the same issue is not repeatedly relitigated within a short time frame, with the need for an enrollee to renew a request when relevant circumstances have changed. The proposed rule, like the current rule, provides the circumstances in which an enrollee can request the same service within a year period (new documentation not previously available, a material change in the enrollee's condition, new and material medical evidence, or a material change in technology). Vermont Medicaid is not revising this rule in the way recommended by the commenter.