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Date: May 19, 2021

RE: Responses to comments received from the public for the following proposed Health Care Administrative Rules:

- 4.209 Durable Medical Equipment
- 4.208 Medical Supplies

Comments were received from Vermont Legal Aid, Inc., Disability Law Project. The comments received and the Agency of Human Services' responses to those comments is included below.

Rule 4.209 Durable Medical Equipment

Comment: 4.209.3 Qualified Providers and Vendors

The proposed rule states that "*a physician or other licensed provider.... working within the scope of their practice*" may order durable medical equipment. The rule further states that any "*licensed provider acting within their scope of practice*" may perform and document the face-to-face encounter required by the rule. The stated intent of the rule is to align with changes in section 3708 of the CARES Act. However, section 3708 specifically limits the provision of these medical services to nurse practitioners, clinical nurse specialists and physician assistants. This language also conflicts with the changes in 4.231 Home Health Services which aligns with the CARES Act by limiting the ordering of Home Health Services and the performance of the face-to face encounter to nurse practitioners, clinical nurse specialists and nurse practitioners. We are concerned that allowing other licensed providers "working within the scope of their practice" and other licensed providers "acting within their scope of practice" could be interpreted to allow employees of DME providers, who are not qualified to do so, to order DME and perform and document the face-to-face encounter. We recommend removing this language from the rule and replacing it with language that reflects that found in section 3708 of the CARES Act.

Response:

Section 3708 of the CARES Act expands upon the provider types who can order home health services and conduct the face-to-face encounter. The CARES Act did not change the Medicaid provider types who may order durable medical equipment and supplies as specified in the federal Medicaid regulations at 42 CFR §440.70(a)(3).

The proposed amendment to HCAR rule 4.209.3(c) mirrors the federal Medicaid regulations at 42 CFR §440.70(f)(3)(vi) allowing a licensed practitioner of the healing arts acting within the scope of practice to perform the face-to-face encounter for medical equipment and supplies.

Rule 4.208 Medical Supplies

Comment: 4.208.3 Qualified Providers.

We have the same comment as to proposed HCAR 4.209.3 above. This rule allows licensed providers other than nurse practitioners, clinical nurse specialists and physician assistants to perform the face-to-

face encounter and to order supplies that are subject to the face-to-face requirement under Medicare. However, section 3708 of the CARES Act. specifically limits the provision of these medical services to nurse practitioners, clinical nurse specialists and physician assistants. This language also conflicts with the language in 4.231 Home Health Services which likewise limits the ordering of home health services and the performance of the face-to-face encounter to nurse practitioners, clinical nurse specialists and physician assistants. We recommend removing 4.208.4 (c) and replacing it with language that reflects that found in section 3708 of the CARES Act.

Response:

See previous response. The federal Medicaid requirements found in 42 CFR §440.70(f)(3)(vi) are the same for durable medical equipment and supplies. The authorized ordering provider for durable medical equipment and supplies are not limited to those who may order home health services.

Comment:

Additionally, we recommend adding a link to the pre-approved supplies and quantity limits under 4.208.2 (c) to ensure that this information is readily accessible.

Response:

The list of pre-approved supplies and quantities limits, and the link to that list, are subject to change and it is not appropriate for inclusion in administrative rule. The list is made publicly available on the Department of Vermont Health Access website.

Comment: Finally, relating to both proposed rules, if DVHA has its own broader criteria for face-to-face encounters and issuing of prescriptions that is inconsistent with Medicare criteria, it will create problems with providers following one set of rules for Medicaid clients and another for Medicare clients. This will result in confusion as to who has the authority to do what and under what circumstances, coverage requests will be denied, and the entire access process will be delayed.

Response: The rule amendments reflect the federal regulations and requirements for Medicaid found at 42 CFR §440.70. The face-to-face encounter only applies to items that are also subject to the face-to-face requirement under Medicare. Medical providers are responsible for delivering services within their scope of practice. Vermont Medicaid's coverage of DME and supplies mirrors Medicare when appropriate. DVHA will not implement face-to-face encounter criteria that is more limited than federal regulations for the sole purpose of being consistent with Medicare.