

Administrative Procedures – Final Proposed Rule Filing

Instructions:

In accordance with Title 3 Chapter 25 of the Vermont Statutes Annotated and the “Rule on Rulemaking” adopted by the Office of the Secretary of State, this filing will be considered complete upon filing and acceptance of these forms with the Office of the Secretary of State, and the Legislative Committee on Administrative Rules.

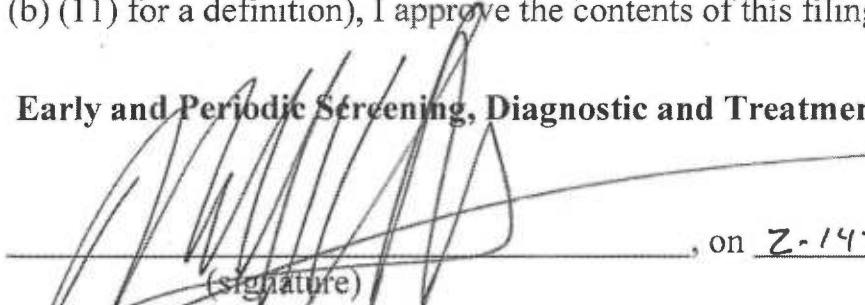
All forms requiring a signature shall be original signatures of the appropriate adopting authority or authorized person, and all filings are to be submitted at the Office of the Secretary of State, no later than 3:30 pm on the last scheduled day of the work week.

The data provided in text areas of these forms will be used to generate a notice of rulemaking in the portal of “Proposed Rule Postings” online, and the newspapers of record if the rule is marked for publication. Publication of notices will be charged back to the promulgating agency.

PLEASE REMOVE ANY COVERSHEET OR FORM NOT REQUIRED WITH THE CURRENT FILING BEFORE DELIVERY!

Certification Statement: As the adopting Authority of this rule (see 3 V.S.A. § 801 (b) (11) for a definition), I approve the contents of this filing entitled:

Early and Periodic Screening, Diagnostic and Treatment (EPSDT)


_____, on 2-14-2020.
(signature) (date)

Printed Name and Title:

Michael K. Smith, Secretary of the Agency of Human Services

RECEIVED BY: _____

RECEIVED
FEB 20 2020

BY:

- Coversheet
- Adopting Page
- Economic Impact Analysis
- Environmental Impact Analysis
- Strategy for Maximizing Public Input
- Scientific Information Statement (if applicable)
- Incorporated by Reference Statement (if applicable)
- Clean text of the rule (Amended text without annotation)
- Annotated text (Clearly marking changes from previous rule)
- ICAR Minutes
- Copy of Comments
- Responsiveness Summary

1. TITLE OF RULE FILING:

Early and Periodic Screening, Diagnostic and Treatment (EPSDT)

2. PROPOSED NUMBER ASSIGNED BY THE SECRETARY OF STATE

19P-078

3. ADOPTING AGENCY:

Agency of Human Services (AHS)

4. PRIMARY CONTACT PERSON:

(A PERSON WHO IS ABLE TO ANSWER QUESTIONS ABOUT THE CONTENT OF THE RULE).

Name: Linda Narrow McLemore

Agency: Agency of Human Services

Mailing Address: 280 State Drive, Center Building,
Waterbury, VT 05671-1000

Telephone: 802 779 - 3258 Fax: 802 241 - 0450

E-Mail: linda.mclemore@vermont.gov

Web URL *(WHERE THE RULE WILL BE POSTED)*:

<http://humanservices.vermont.gov/on-line-rules>

5. SECONDARY CONTACT PERSON:

(A SPECIFIC PERSON FROM WHOM COPIES OF FILINGS MAY BE REQUESTED OR WHO MAY ANSWER QUESTIONS ABOUT FORMS SUBMITTED FOR FILING IF DIFFERENT FROM THE PRIMARY CONTACT PERSON).

Name: Jessica Ploesser

Agency: Agency of Human Services

Mailing Address: 280 State Drive, NOB 1 South, Waterbury,
VT 05671-1000

Telephone: 802 244 - 0454 Fax: 802 241 - 0450

E-Mail: jessica.ploesser@vermont.gov

6. RECORDS EXEMPTION INCLUDED WITHIN RULE:

(DOES THE RULE CONTAIN ANY PROVISION DESIGNATING INFORMATION AS CONFIDENTIAL; LIMITING ITS PUBLIC RELEASE; OR OTHERWISE EXEMPTING IT FROM INSPECTION AND COPYING?) No

IF YES, CITE THE STATUTORY AUTHORITY FOR THE EXEMPTION:

PLEASE SUMMARIZE THE REASON FOR THE EXEMPTION:

7. LEGAL AUTHORITY / ENABLING LEGISLATION:

(THE SPECIFIC STATUTORY OR LEGAL CITATION FROM SESSION LAW INDICATING WHO THE ADOPTING ENTITY IS AND THUS WHO THE SIGNATORY SHOULD BE. THIS SHOULD BE A SPECIFIC CITATION NOT A CHAPTER CITATION).

3 V.S.A. § 801(b)(11); 33 V.S.A. § 1901(a)(1)

8. EXPLANATION OF HOW THE RULE IS WITHIN THE AUTHORITY OF THE AGENCY:

AHS's authority to adopt rules is identified above. The statutes authorize AHS as the adopting authority for administrative procedures and afford rulemaking authority for the administration of Vermont's medical assistance programs under Title XIX (Medicaid) of the Social Security Act.

9. THE FILING HAS CHANGED SINCE THE FILING OF THE PROPOSED RULE.

10. THE AGENCY HAS INCLUDED WITH THIS FILING A LETTER EXPLAINING IN DETAIL WHAT CHANGES WERE MADE, CITING CHAPTER AND SECTION WHERE APPLICABLE.

11. SUBSTANTIAL ARGUMENTS AND CONSIDERATIONS WERE RAISED FOR OR AGAINST THE ORIGINAL PROPOSAL.

12. THE AGENCY HAS INCLUDED COPIES OF ALL WRITTEN SUBMISSIONS AND SYNOPSES OF ORAL COMMENTS RECEIVED.

13. THE AGENCY HAS INCLUDED A LETTER EXPLAINING IN DETAIL THE REASONS FOR THE AGENCY'S DECISION TO REJECT OR ADOPT THEM.

14. CONCISE SUMMARY (150 WORDS OR LESS):

The rule sets forth criteria for Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services for Medicaid beneficiaries under 21 years old. This rule is being promulgated as part of the sequential adoption of Health Care Administrative Rules designed to improve public accessibility and comprehension of the numerous rules concerning the operation of Vermont's Medicaid program.

15. EXPLANATION OF WHY THE RULE IS NECESSARY:

The rule is necessary to clarify requirements for Early and Periodic Screening, Diagnostic and Treatment (EPSDT) for persons under age 21. The rule includes clarification of the informing, screening, diagnostic,

Final Proposed Coversheet

treatment and scope of EPSDT services requirements. It also clarifies that medical necessity is met for EPSDT services when it is determined that a service is needed to correct or ameliorate an eligible beneficiary's diagnosis or health condition.

16. EXPLANATION OF HOW THE RULE IS NOT ARBITRARY:

The rule is required to implement state and federal health care guidance and laws. Additionally, the rule is within the authority of the Secretary, is within the expertise of AHS, and is based on relevant factors including consideration of how the rule affects the people and entities listed below.

17. LIST OF PEOPLE, ENTERPRISES AND GOVERNMENT ENTITIES AFFECTED BY THIS RULE:

Medicaid beneficiaries; Agency of Human Services including its Departments; Hospitals; Health law, policy, and related advocacy and community-based organizations and groups including the Office of Health Care Advocate; and health care providers.

18. BRIEF SUMMARY OF ECONOMIC IMPACT (150 WORDS OR LESS):

The rule does not increase or lessen an economic burden on any person or entity including no impact on the State's gross annualized budget. The changes and amendments conform the rule with current practice and federal laws that have already been implemented.

19. A HEARING WAS HELD.

20. HEARING INFORMATION

(THE FIRST HEARING SHALL BE NO SOONER THAN 30 DAYS FOLLOWING THE POSTING OF NOTICES ONLINE).

IF THIS FORM IS INSUFFICIENT TO LIST THE INFORMATION FOR EACH HEARING PLEASE ATTACH A SEPARATE SHEET TO COMPLETE THE HEARING INFORMATION.

Date: 12/11/2019

Time: 02:00 PM

Street Address: Waterbury State Office Complex, Ash
Conference Room- A213, 280 State Drive, Waterbury, VT

Zip Code: 05671

Date:

Final Proposed Coversheet

Time: AM

Street Address:

Zip Code:

Date:

Time: AM

Street Address:

Zip Code:

Date:

Time: AM

Street Address:

Zip Code:

21. DEADLINE FOR COMMENT (NO EARLIER THAN 7 DAYS FOLLOWING LAST HEARING):

12/18/19

KEYWORDS (PLEASE PROVIDE AT LEAST 3 KEYWORDS OR PHRASES TO AID IN THE SEARCHABILITY OF THE RULE NOTICE ONLINE).

Medical Necessity

Early Periodic Screening Diagnostic and Treatment

EPSDT

Medicaid

Health Care Administrative Rules

HCAR



State of Vermont
Agency of Human Services
280 State Drive
Waterbury, VT 05671-1000
www.humanservices.vermont.gov

Michael K. Smith, Secretary

Date: January 24, 2020

RE: Final Proposed Rule: List of Changes Made to Proposed Rule HCAR 4.101 on Early Periodic Screening Diagnostic and Treatment (EPSDT)

1. HCAR 4.106.1 Introduction

- **Proposed Rule:** Vermont Medicaid covers as EPSDT services those services that are within the scope of the category of services listed in 1905(a) of the Social Security Act (42 USC 1396d(a)) and that are medically necessary “to correct or ameliorate a defect, physical or mental illness, or a condition identified by screening,” whether or not the service is covered by the Vermont Medicaid State Plan.
- **Final Proposed Rule:** Vermont Medicaid covers as EPSDT services those services that are within the scope of the category of services listed in Section 1905(a) of the Social Security Act (42 USC 1396d(a)) and that are medically necessary, whether or not the service is covered by the Vermont Medicaid State Plan.

2. HCAR 4.106.2 Definitions

- **Proposed Rule:** “Ameliorate” means to improve or maintain a beneficiary’s health in the best condition possible, compensate for a health problem, prevent it from worsening, or prevent the development of additional health problems.
- **Final Proposed Rule:** This definition is removed.

3. HCAR 4.106.5(b) Diagnostic and Treatment

- **Proposed Rule:** For EPSDT eligible beneficiaries, a determination of medical necessity includes a case by case determination that a service is needed to correct or ameliorate a beneficiary’s diagnosis or health condition.
- **Final Proposed Rule:** This sentence is removed.

4. HCAR 4.106.5(b)(3) Diagnostic and Treatment

- **Proposed Rule:** For EPSDT eligible beneficiaries, medical necessity includes a determination that a service is needed to achieve proper growth and development or prevent the onset or worsening of a health condition.
- **Final Proposed Rule:** This sentence is removed.

Administrative Procedures – Adopting Page

Instructions:

This form must accompany each filing made during the rulemaking process:

Note: To satisfy the requirement for an annotated text, an agency must submit the entire rule in annotated form with proposed and final proposed filings. Filing an annotated paragraph or page of a larger rule is not sufficient. Annotation must clearly show the changes to the rule.

When possible, the agency shall file the annotated text, using the appropriate page or pages from the Code of Vermont Rules as a basis for the annotated version. New rules need not be accompanied by an annotated text.

1. TITLE OF RULE FILING:

Early and Periodic Screening, Diagnostic and Treatment (EPSDT)

2. ADOPTING AGENCY:

Agency of Human Services (AHS)

3. TYPE OF FILING (*PLEASE CHOOSE THE TYPE OF FILING FROM THE DROPDOWN MENU BASED ON THE DEFINITIONS PROVIDED BELOW*):

- **AMENDMENT** - Any change to an already existing rule, even if it is a complete rewrite of the rule, it is considered an amendment as long as the rule is replaced with other text.
- **NEW RULE** - A rule that did not previously exist even under a different name.
- **REPEAL** - The removal of a rule in its entirety, without replacing it with other text.

This filing is **AN AMENDMENT OF AN EXISTING RULE** .

4. LAST ADOPTED (*PLEASE PROVIDE THE SOS LOG#, TITLE AND EFFECTIVE DATE OF THE LAST ADOPTION FOR THE EXISTING RULE*):

Renumbering and Restructuring of Vermont Rules includes 7410 Early and Periodic Screening, Diagnostic and Treatment (last revised November 1, 1981).

INTERAGENCY COMMITTEE ON ADMINISTRATIVE RULES (ICAR) MINUTES

Meeting Date/Location: October 14, 2019, Pavilion Building, 5th floor conference room, 109 State Street, Montpelier, VT 05609
Members Present: Chair Brad Ferland, Dirk Anderson, Diane Bothfeld, John Kessler, Matt Langham, Steve Knudson, Clare O'Shaughnessy and (via phone) Jennifer Mojo
Members Absent: Ashley Berliner
Minutes By: Melissa Mazza-Paquette

- 2:00 p.m. meeting called to order.
- Review and approval of minutes from the September 9, 2019 meeting.
- Added notes:
 - Louise Corliss in the Secretary of State's office will be out of the office from October 17-22 and on the 28th, therefore there will be limited coverage during that time. Please plan accordingly and contact Louise with any concerns.
 - Shayla Livingston from the Agency of Human Services will be serving as an active committee member in Ashley Berliner's absence from November through February.
- Agenda approved as drafted.
- No public comments made.
- Presentation of Proposed Rules on pages 2-6 to follow.
 1. Chemicals of High Concern in Children's Products Rule, Agency of Human Services, Department of Health, page 2
 2. Medical Necessity for Covered Services, Agency of Human Services, page 3
 3. Early and Periodic Screening, Diagnostic and Treatment (EPSDT), Agency of Human Services, page 4
 4. Non-Emergency Medical Transportation, Agency of Human Services, page 5
 5. Ambulance Services, Agency of Human Services, page 6
- Next scheduled meeting is Wednesday, November 13, 2019 at 2:00 p.m.
- 2:40 p.m. meeting adjourned.

**Proposed Rule: Early and Periodic Screening, Diagnostic and Treatment (EPSDT), Agency of
Human Services
Presented by Linda McLemore**

Motion made to accept the rule by Matt Langham, seconded by Dirk Anderson, and passed unanimously with the following recommendations:

1. Proposed Rule Coversheet, page 4, #12: Remove 'in fiscal year 2019'.
2. Proposed Rule Coversheet, page 4, #14: Clarify room location by including the word 'conference room' and be consistent with all proposed rules submitted at this hearing.
3. Adopting Page, page 1, #4: Update if necessary.
4. Public Input, page 1, #3: Update.

Administrative Procedures – Economic Impact Analysis

Instructions:

In completing the economic impact analysis, an agency analyzes and evaluates the anticipated costs and benefits to be expected from adoption of the rule; estimates the costs and benefits for each category of people enterprises and government entities affected by the rule; compares alternatives to adopting the rule; and explains their analysis concluding that rulemaking is the most appropriate method of achieving the regulatory purpose.

Rules affecting or regulating schools or school districts must include cost implications to local school districts and taxpayers in the impact statement, a clear statement of associated costs, and consideration of alternatives to the rule to reduce or ameliorate costs to local school districts while still achieving the objectives of the rule (see 3 V.S.A. § 832b for details).

Rules affecting small businesses (excluding impacts incidental to the purchase and payment of goods and services by the State or an agency thereof), must include ways that a business can reduce the cost or burden of compliance or an explanation of why the agency determines that such evaluation isn't appropriate, and an evaluation of creative, innovative or flexible methods of compliance that would not significantly impair the effectiveness of the rule or increase the risk to the health, safety, or welfare of the public or those affected by the rule.

1. TITLE OF RULE FILING:

Early and Periodic Screening, Diagnostic and Treatment (EPSDT)

2. ADOPTING AGENCY:

Agency of Human Services (AHS)

3. CATEGORY OF AFFECTED PARTIES:

LIST CATEGORIES OF PEOPLE, ENTERPRISES, AND GOVERNMENTAL ENTITIES POTENTIALLY AFFECTED BY THE ADOPTION OF THIS RULE AND THE ESTIMATED COSTS AND BENEFITS ANTICIPATED:

Medicaid beneficiaries and their families; health care providers; the Agency of Human Services including its Departments; hospitals; and health law, policy and related advocacy and community-based organizations and groups including the Office of the Health Care Advocate.

Economic Impact Analysis

There are no additional costs associated with this rule because the amendments reflect existing practice and coverage policies for Medicaid in Vermont.

4. IMPACT ON SCHOOLS:

INDICATE ANY IMPACT THAT THE RULE WILL HAVE ON PUBLIC EDUCATION, PUBLIC SCHOOLS, LOCAL SCHOOL DISTRICTS AND/OR TAXPAYERS CLEARLY STATING ANY ASSOCIATED COSTS:

No impact

5. ALTERNATIVES: *CONSIDERATION OF ALTERNATIVES TO THE RULE TO REDUCE OR AMELIORATE COSTS TO LOCAL SCHOOL DISTRICTS WHILE STILL ACHIEVING THE OBJECTIVE OF THE RULE.*

Not applicable

6. IMPACT ON SMALL BUSINESSES:

INDICATE ANY IMPACT THAT THE RULE WILL HAVE ON SMALL BUSINESSES (EXCLUDING IMPACTS INCIDENTAL TO THE PURCHASE AND PAYMENT OF GOODS AND SERVICES BY THE STATE OR AN AGENCY THEREOF):

No impact

7. SMALL BUSINESS COMPLIANCE: *EXPLAIN WAYS A BUSINESS CAN REDUCE THE COST/BURDEN OF COMPLIANCE OR AN EXPLANATION OF WHY THE AGENCY DETERMINES THAT SUCH EVALUATION ISN'T APPROPRIATE.*

Not applicable

8. COMPARISON:

COMPARE THE IMPACT OF THE RULE WITH THE ECONOMIC IMPACT OF OTHER ALTERNATIVES TO THE RULE, INCLUDING NO RULE ON THE SUBJECT OR A RULE HAVING SEPARATE REQUIREMENTS FOR SMALL BUSINESS:

There is no economic impact for there to be a comparison.

9. SUFFICIENCY: *EXPLAIN THE SUFFICIENCY OF THIS ECONOMIC IMPACT ANALYSIS.*

There are no additional costs associated with this rule because the amendments reflect existing practice and coverage policies for Medicaid in Vermont. There are no alternatives to the adoption of the rule; it is necessary to ensure continued alignment with federal and state guidance and law for covered services and benefits within Vermont's Medicaid program.

Administrative Procedures – Environmental Impact Analysis

Instructions:

In completing the environmental impact analysis, an agency analyzes and evaluates the anticipated environmental impacts (positive or negative) to be expected from adoption of the rule; compares alternatives to adopting the rule; explains the sufficiency of the environmental impact analysis.

Examples of Environmental Impacts include but are not limited to:

- Impacts on the emission of greenhouse gases
- Impacts on the discharge of pollutants to water
- Impacts on the arability of land
- Impacts on the climate
- Impacts on the flow of water
- Impacts on recreation
- Or other environmental impacts

1. TITLE OF RULE FILING:

Early and Periodic Screening, Diagnostic and Treatment (EPSDT)

2. ADOPTING AGENCY:

Agency of Human Services (AHS)

3. GREENHOUSE GAS: *EXPLAIN HOW THE RULE IMPACTS THE EMISSION OF GREENHOUSE GASES (E.G. TRANSPORTATION OF PEOPLE OR GOODS; BUILDING INFRASTRUCTURE; LAND USE AND DEVELOPMENT, WASTE GENERATION, ETC.):*
No impact

4. WATER: *EXPLAIN HOW THE RULE IMPACTS WATER (E.G. DISCHARGE / ELIMINATION OF POLLUTION INTO VERMONT WATERS, THE FLOW OF WATER IN THE STATE, WATER QUALITY ETC.):*
No impact

5. LAND: *EXPLAIN HOW THE RULE IMPACTS LAND (E.G. IMPACTS ON FORESTRY, AGRICULTURE ETC.):*
No impact

6. RECREATION: *EXPLAIN HOW THE RULE IMPACT RECREATION IN THE STATE:*
No impact

7. CLIMATE: *EXPLAIN HOW THE RULE IMPACTS THE CLIMATE IN THE STATE:*
No impact

Environmental Impact Analysis

8. OTHER: *EXPLAIN HOW THE RULE IMPACT OTHER ASPECTS OF VERMONT'S ENVIRONMENT:*
No impact

9. SUFFICIENCY: *EXPLAIN THE SUFFICIENCY OF THIS ENVIRONMENTAL IMPACT ANALYSIS.*
This rule has no impact on the environment.

Administrative Procedures – Public Input

Instructions:

In completing the public input statement, an agency describes the strategy prescribed by ICAR to maximize public input, what it did do, or will do to comply with that plan to maximize the involvement of the public in the development of the rule.

This form must accompany each filing made during the rulemaking process:

1. TITLE OF RULE FILING:

Early and Periodic Screening, Diagnostic and Treatment (EPSDT)

2. ADOPTING AGENCY:

Agency of Human Services (AHS)

3. PLEASE DESCRIBE THE STRATEGY PRESCRIBED BY ICAR TO MAXIMIZE PUBLIC INVOLVEMENT IN THE DEVELOPMENT OF THE PROPOSED RULE:

ICAR approved of the steps outlined below in the response to question 4.

4. PLEASE LIST THE STEPS THAT HAVE BEEN OR WILL BE TAKEN TO COMPLY WITH THAT STRATEGY:

Prior to the initial filing of the proposed rule, the Agency of Human Services (AHS) shared the rule with Vermont Legal Aid, the Vermont Medical Society, and the Medicaid Exchange and Advisory Board on August 14, 2019. Comments were received and considered in drafting this proposed rule.

A public hearing was held on December 11, 2019. There were no attendees. The public comment period closed on December 18, 2019. Comments were received from Vermont Legal Aid and Vermont Medical Society.

AHS provides notice and access to the rule through the Global Commitment Register whenever the rule is filed with the Office of the Secretary of State. The Global Commitment Register provides notification of policy changes and clarifications of existing Medicaid policy, including rulemaking, under Vermont's 1115 Global Commitment to Health waiver. Anyone can subscribe to

Public Input

the Global Commitment Register. The proposed, final proposed, and adopted rules and all public comments and responses to this rulemaking will be posted on the Register on the Agency of Human Services website.

Subscribers receive email notification of rule filings including hyperlinks to posted documents and an explanation of how to provide comment and be involved in the rulemaking.

5. BEYOND GENERAL ADVERTISEMENTS, PLEASE LIST THE PEOPLE AND ORGANIZATIONS THAT HAVE BEEN OR WILL BE INVOLVED IN THE DEVELOPMENT OF THE PROPOSED RULE:

Agency of Human Services,
Department of Vermont Health Access,
Department of Mental Health,
Department of Health;
Department of Disabilities, Aging and Independent Living,
Vermont Legal Aid, including the Office of the Health Care Advocate,
Vermont Medical Society,
Medicaid and Exchange Advisory Board.

Responsiveness Summary – Early Periodic Screening Diagnostic and Treatment (EPSDT)

Comment on HCAR 4.106.5: Cost effectiveness should not be achieved by placing additional burdens on beneficiaries and their families. This section should be amended to assure that beneficiaries will not be required to accept purportedly equally effective and available cost effective alternatives, where those alternatives will be more burdensome than the requested service. We suggest this paragraph be amended to read:

Vermont Medicaid may approve a cost effective alternative to the requested EPSDT service provided the alternative is equally effective and available, and does not impose burdens on the beneficiary or the beneficiary's family that are not present with the requested EPSDT service.

Response: There are circumstances in which there may be additional inconvenience to the beneficiary or his/her family due to the approval of a cost effective alternative; however, it is the obligation of Vermont Medicaid, as stewards of Medicaid state and federal funding, to be fiscally responsible by covering cost effective alternatives that are available and equally as effective as the one requested. If an inconvenience is directly related to the medical condition being treated and is so consequential as to impact the condition or treatment, then the agency would not pursue the alternative as one that is cost effective because it would be determined that it is not actually an equally effective alternative.

Coverage of equally effective and available cost effective alternatives is within Vermont Medicaid's authority, is appropriate, and is necessary in order to be fiscally responsible. The rule is not being revised.

VERMONT MEDICAL SOCIETY

TO: Ashley Berliner, Director of Medicaid Policy, AHS.MedicaidPolicy@vermont.gov

FROM: Jill Sudhoff-Guerin, Policy and Communications Manager, Vermont Medical Society

DATE: December 16, 2019

Re: Comments on Draft HCAR Rule 4.101 (Medical Necessity), Rule 4.106 (EPSDT) and Rule 4.225 (Non-Emergency Medical Transportation)

Thank you for accepting comments from the Vermont Medical Society regarding proposed HCAR Rules 4.101 (Medical Necessity), 4.106 (EPSDT) and 4.225 (Non-Emergency Medical Transportation). The Vermont Medical Society is submitting these comments on behalf of our 2000 physician and physician assistant members largely to reiterate what we submitted in August, as we did not see any changes made to the final proposed rule.

VMS has identified three areas of concern with the proposals:

1. HCAR Rule 4.101, Medical Necessity, Cost

VMS has concerns with the addition to the definition of "medically necessary" that the service be "the least costly, appropriate health care service that is available." The definition of "medically necessary" already incorporates that the service be "appropriate in terms of type, amount, frequency, level, setting and duration." Beyond those factors, the service should be clinically appropriate as further defined by items (C) (1), (2), (4) and (5). Adding cost to the list of defining characteristics of the service complicates interpretation of this section as the list now blends cost and clinical factors and because it is unclear if the service has met all of the other criteria but may be more expensive (for example, because the location of the service provider is closer to the location where the patient lives) does this make the service no longer "medically necessary?"

Further, the prior authorization process anticipates separate consideration of medical necessity and cost (prior authorization can weigh whether "the proposed health service is medically needed [and] that all appropriate, less-expensive alternatives have been given consideration..." (Previously Rule 7102). It makes interpretation difficult to incorporate both of these elements within the one definition and analysis of medically necessary.

2. HCAR Rule 4.106, Medical Necessity, EPSDT Services

VMS is concerned with the removal of weighing whether a service will help "achieve proper growth and development" from the definition of medical necessity for EPSDT services in 4.101.2 (b). The current rule for EPSDT services (7410) and proposed in 4.106.5 (b)(3) contain this phrase and VMS believes this is an important element of the EPSDT program. This phrase should be maintained in 4.101.2 (b).

3. HCAR Rule 4.225, Non-Emergency Medical Transportation

VMS is concerned that requiring prior authorization for all transportation coverage and deleting all exceptions of prior authorization in 4.225.5 (7408) will result in the ambulance being the only mode of Medicaid covered transportation, which is likely the most-costly alternative. VMS believes that by eliminating exceptions to prior authorizations for transportation, beneficiaries will be discouraged from

accessing less expensive transportation options, which runs counter to DVHA's goals of reducing health care costs. Also, what happens to a beneficiary if their prior authorization for transportation is denied? Can they appeal?

Thank you for considering our comments and we look forward to the further development of these rules.

VERMONT LEGAL AID, INC.

DISABILITY LAW PROJECT
57 NORTH MAIN STREET SUITE 2
RUTLAND, VERMONT 05701
(802) 775-0021 (VOICE AND TTY)
FAX (802) 775-0022
(800) 769-7459

OFFICES:

BURLINGTON
RUTLAND
ST. JOHNSBURY

OFFICES:

MONTPELIER
SPRINGFIELD

By email to: AHS.MedicaidPolicy@vermont.gov

December 18, 2019

Ashley Berliner, Director of Healthcare Policy and Planning
Agency of Human Services
280 State Drive, Center Building
Waterbury, VT
05671-1000

Re: Comments on HCAR 4.101, Medical Necessity for Covered Services; 4.106 Early and Periodic Screening, Diagnosis and Treatment; and 4.225, Non-Emergency Medical Transportation.

Dear Ashley:

Thank you for the opportunity to comment on AHS's proposed rules on "Medical Necessity for Covered Services," "Early and Periodic Screening, Diagnosis and Treatment," and "Non-Emergency Medical Transportation." Vermont Legal Aid submits the following comments and suggestions.

Medical Necessity for Covered Services

4.101.1(b) Generally accepted practice standards

- To make clear that "generally accepted practice standards" may be based on any of the three listed bases, (credible scientific evidence, physician specialty society recommendations, and prevailing opinions of providers practicing in the relevant clinical area), the word "or" should be inserted between sub (1) and sub (2).

4.101.1(c) Medically necessary

- 4.101.1(c)(1) and (2) Insert the words "*will or are reasonably expected to*" at the beginning of these paragraphs. When particular treatments or services are recommended they are done so in the hopes that the treatment or service will help restore or maintain a beneficiary's health, or prevent deterioration or palliate the beneficiary's condition. There is no guarantee that a recommended treatment or service will absolutely achieve the desired effect. Therefore, we suggest the addition of this language.

- 4.101.1(c)(3) This paragraph is new and constitutes an additional restriction on access to services. As such it should be deleted in its entirety.
- 4.101.1(c)(4) This paragraph is new and constitutes an additional restriction on access to services. As such it should be deleted in its entirety.
- 4.101.1(c)(5) This paragraph is confusing. What is meant by “documentation of medical evidence?”
- The proposed rule omits from the definition of medically necessary, health services that “prevent the reasonably likely onset of a health problem or detect an incipient problem.” This language is in the current definition of medically necessary health services at Rule 7103(C). As preventive care is a critical aspect of containing health care costs, this language should be retained in the proposed rule.

4.101.2 Conditions for Coverage

- 4.101.2(b) fails to include the full scope of EPSDT medical necessity as set forth in proposed HCAR 4.106 to include services that are “needed to achieve proper growth and development or prevent the onset or worsening of a health condition.” We suggest that this section be amended to read:

(b) For EPSDT eligible beneficiaries (see HCAR 4.106), a determination of medical necessity also includes a case by case determination that a services is needed to correct or ameliorate a diagnosis or health condition, to achieve proper growth and development, or prevent the onset or worsening of a health condition.

Early and Periodic Screening, Diagnostic and Treatment (EPSDT)

4.106.5 Diagnostic and Treatment Services

- 4.106.5(c). Cost effectiveness should not be achieved by placing additional burdens on beneficiaries and their families. This section should be amended to assure that beneficiaries will not be required to accept purportedly equally effective and available cost effective alternatives, where those alternatives will be more burdensome than the requested service. We suggest this paragraph be amended to read:

(c) Vermont Medicaid may approve a cost effective alternative to the requested EPSDT service provided the alternative is equally effective and available, and does not impose burdens on the beneficiary or beneficiary’s family that are not present with the requested EPSDT service.

Non-Emergency Medical Transportation

4.225.4 Conditions for Coverage

- 4.225.4(a) Add “reasonably” to this clause. “Transportation is not otherwise *reasonably* available to the Medicaid beneficiary.” Also the rule should define what constitutes “reasonably available”

- 4.225.4(c)
- The 30 mile radius should be changed to 75 miles. For some parts of Vermont there are very few providers and a 30 mile radius does not give beneficiaries an adequate choice of providers. What is the Agency's factual and legal basis for setting the limit at 30 miles? We object to the 30 mile radius limit and believe it arbitrarily denies needed Medicaid transportation to beneficiaries living in Vermont's many rural communities. In addition, the distance requirement for out of area transports discussed on p. 22 of NEMT manual should also be increased from 60 miles to 75 miles.
- "nearest available qualified provider" should be revised to "*nearest medically appropriate provider who is accepting patients and where the beneficiary can get an appointment within a reasonable time period*" Many providers, both specialists and PCPs, have significant wait times both for accepting new patients and scheduling appointments. It is critical that beneficiaries are actually able to access providers in a timely manner.
- Add a clause establishing an exception process for the radius requirement. "Beneficiaries shall be able to apply for an exception to the mileage requirement if they can show that they cannot find a medically appropriate provider within the radius, with appointments available in a reasonable time period."
- Add a clause providing that if a Medicaid beneficiary has a long standing relationship with the a provider outside the radius requirement, Medicaid will provide transportation for 6 months while the beneficiary looks for a medically appropriate provider who is accepting patients, and further allowing for this period to be extended upon request where the beneficiary has shown reasonable but unsuccessful efforts to locate a medically appropriate provider accepting new patients.

Additional Suggestions:

- Add a clause making it clear that Medicaid beneficiaries are entitled to ask for a Reasonable Accommodation (RA) to any of the conditions set out in 4.225.4. Transportation brokers shall be responsible for giving beneficiaries written notice that that they can request an RA, and written notice on the decision regarding the RA and contact person in the event the RA is not being implemented. Brokers shall also be responsible for giving Medicaid beneficiaries information about any other transportation program for which they may be eligible.
- Add a clause establishing an exception process and stating that DVHA has the authority to grant exceptions to any of the conditions set out in 4.225.4 based on individual need.

- Add a clause indicating any denial or reduction of services is governed by the Medicaid notice and appeal rules set out in HCAR Rule 8.100. Also add a specific clause that internal coverage appeals will be conducted by DVHA.

Thank you for considering our comments.

Sincerely,

Nancy Breiden, Project Director, Disability Law Project
Marjorie Stinchcombe, Staff Attorney, the Office of the Health Care Advocate
Michael Benvenuto, Project Director, Elder Law Project

Early and Periodic Screening, Diagnosis and Treatment (EPSDT)

~~7410~~ ~~Early and Periodic Screening, Diagnosis and Treatment (EPSDT)~~ ~~(11/01/1981, 81-74)~~

Section 403(g) of the Social Security Act and 45 CFR 249.10 (b)(4)(iii) require the state agency for Medicaid to develop a program of Screening, Diagnosis and Treatment (EPSDT) in three basic areas:

- Informing all Reach-Up families of the availability of child health screening services; and
- Providing or arranging for the provision of such screening services in all cases where they are requested; and
- Arranging for further diagnosis and corrective treatment, the need for which is disclosed by screening services.

7410.1 ~~Informing~~ (11/01/1981, 81-74)

Reach-Up families are informed of EPSDT services by means of the following:

- District Office staff explanation of EPSDT to each family during initial determination and each re-determination of eligibility; and
- A mailing piece outlining EPSDT enclosed with all Reach-Up checks at least once during each calendar year; and
- Informational brochures about EPSDT are displayed at each District Office and distributed throughout the State for use in hospitals, physicians' offices, day care centers, and other appropriate locations; and
- Outreach activities to enlist participation of Medicaid eligibles in EPSDT performed by staff employed by the Department of Health under a special agreement with OVHA.

~~Screening and Outreach~~ (11/01/1981, 81-74)

Under the terms of the special agreement, the Department of Health makes available the complete EPSDT screening package through its Well-Child Conferences. In addition, OVHA reimburses physicians, clinics, and other appropriate providers directly through its fiscal agent for screening services they may furnish to EPSDT eligibles.

~~Corrective Treatment~~ (11/01/1981, 81-74)

The family receives information about the health care resources available in the community that furnish further diagnostic and treatment services. Department of Health staff offers assistance, when requested, in securing services from these providers. At suitable intervals, follow-up contacts are made with the family to encourage them to pursue treatment plans to completion.

7410.4 ~~Rates of Payment~~ (11/01/1981, 81-74)

Early and Periodic Screening, Diagnosis and Treatment (EPSDT)

The Department of Health is reimbursed pursuant to the agreement. Other providers furnishing EPSDT services are reimbursed in accordance with the appropriate section of these regulations; e.g., physicians are reimbursed as per rule 7301.

4.106 Early and Periodic Screening, Diagnostic and Treatment (EPSDT) (03/10/2020; GCR # 19-060)**4.106.1 Introduction**

Vermont Medicaid covers Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services for Medicaid beneficiaries under 21 years old pursuant to Section 1905(r) of the Social Security Act (42 USC 1396d(r)). Vermont Medicaid covers as EPSDT services those services that are within the scope of the category of services listed in Section 1905(a) of the Social Security Act (42 USC 1396d(a)) and that are medically necessary, "to correct or ameliorate a defect, physical or mental illness, or a condition identified by screening," whether or not the service is covered by the Vermont Medicaid State Plan.

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4.106.2 Definitions

- (a) ~~"Ameliorate" means to improve or maintain a beneficiary's health in the best condition possible, compensate for a health problem, prevent it from worsening, or prevent the development of additional health problems.~~
- (a) **"EPSDT eligible beneficiaries"** means Medicaid beneficiaries (not including beneficiaries with limited Medicaid coverage) under 21 years old.
- (b) **"EPSDT services"** means services that are within the scope of category of services described as "medical assistance" at Section 1905(a) of the Social Security Act (42 USC 1396d(a)), regardless of whether the service is listed in the Medicaid State Plan or administrative rule, and regardless of whether the service is covered or has limitations for Medicaid beneficiaries 21 years old and older.

4.106.3 Informing

- (a) Vermont Medicaid will:
- (1) Inform EPSDT eligible beneficiaries of the availability of EPSDT services within 60 days of a beneficiary being enrolled in Medicaid, and
 - (2) Annually inform EPSDT eligible beneficiaries who have not used EPSDT services within the prior year of the availability of EPSDT services.
- (b) When informing EPSDT eligible beneficiaries of the availability of EPSDT services, Vermont Medicaid will inform the beneficiary:
- (1) The benefits of preventive health care,
 - (2) The services that are available under EPSDT,
 - (3) How to access EPSDT services, and
 - (4) The availability of transportation and scheduling assistance if necessary to access EPSDT services.

4.106.4 Screening

- (a) Vermont Medicaid covers medical, vision, dental, and hearing screenings for EPSDT eligible beneficiaries, at intervals based on medical/dental practice standards determined in consultation with recognized medical and dental organizations involved in child health care, and on an interperiodic basis, as needed, in order to identify

Early and Periodic Screening, Diagnosis and Treatment (EPSDT)

and treat health conditions early.

(1) Vermont Medicaid will implement a periodicity schedule for screening services that specifies screening services applicable at each stage of the EPSDT eligible beneficiary's life, beginning with neonatal examination, up to the age that a beneficiary is no longer eligible for EPSDT.

(b) Vermont Medicaid covers medical screenings that include a comprehensive health and developmental history that assesses for physical, mental and developmental health and substance use disorders, a comprehensive physical examination, appropriate immunizations and laboratory tests (including lead blood level tests), and health education for both the EPSDT eligible beneficiary and, where appropriate, their caregiver.

4.106.5 Diagnostic and Treatment Services

(a) Vermont Medicaid covers diagnostic services without delay to an EPSDT eligible beneficiary when a screening indicates a need for further evaluation.

(b) Vermont Medicaid covers EPSDT services that are medically necessary, as defined by Rule 4.101. For EPSDT eligible beneficiaries, a determination of medical necessity includes a case by case determination that a service is needed to correct or ameliorate a beneficiary's diagnosis or health condition.

(1) Vermont Medicaid covers all medically necessary services for EPSDT eligible beneficiaries without regard to service limitations otherwise specified in these Health Care Administrative Rules.

(2) Vermont Medicaid will determine medical necessity on a case by case basis, based on the needs of the EPSDT eligible beneficiary.

(3) For EPSDT eligible beneficiaries, medical necessity includes a determination that a service is needed to achieve proper growth and development or prevent the onset or worsening of a health condition.

(c) Vermont Medicaid may approve a cost effective alternative to the requested EPSDT service provided the alternative is equally effective and available.

4.106.6 Qualified Providers

(a) EPSDT services may be delivered by a variety of providers. The provider must be:

(1) Enrolled in Vermont Medicaid,

(2) Within the limits established by Section 1905(r) of the Social Security Act (42 USC 1396d(r)), and

(3) Working within the scope of their practice.

4.106.7 Prior Authorization

Fee Schedules, including for EPSDT services covered by the Agency of Human Services, contain detailed lists of covered procedures and services and indicate which of these require prior authorization. Fee Schedules can be found on the Department of Vermont Health Access website.

4.106.8 Non-covered Services

Early and Periodic Screening, Diagnosis and Treatment (EPDST)

- (a) Services that cannot be covered as a category of services pursuant to Section 1905(r) of the Social Security Act (42 USC 1396d(r)) are not covered.
- (b) See HCAR 4.104 for additional Medicaid non-covered services.

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Early and Periodic Screening, Diagnosis and Treatment (EPSDT)

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