VERMONT

VSH Futures Project *Agency of Human Services*
Division of Mental Health
Department of Health

Futures Brief

The Institute for Mental Disease Exclusion

The Futures project has identified different options for new inpatient programs. The preferred option is to create new inpatient programs in an integrated manner with general hospital program(s). Another option is to create a single, stand-alone hospital. Both approaches have different implications for Medicaid reimbursement that are summarized here.

IMD Definition

IMD stands for Institution for Mental Disease and is defined as: a hospital, nursing facility, or other institution of more than 16 beds that is **primarily** engaged in providing diagnosis, treatment, or care of persons with mental diseases (42 C.F.R. §435.1009). There are two IMDs in Vermont: the Vermont State Hospital and the Brattleboro Retreat.

IMD Medicaid Exclusion

Federal Medicaid law prohibits Medicaid payments to IMDs for services provided to patients between the ages of 21 and 65 (42 U.S.C. §1369d). However, federal law allows Medicaid payments for psychiatric care in general hospitals as long as the general hospital facility is not classified as an IMD.

Criteria for Determining Whether a Facility is an IMD

The federal agency that administers the Medicaid program, CMS, uses the following criteria to evaluate whether the overall character of an institution is that of an IMD.

- The facility is licensed as a psychiatric facility.
- The facility is accredited as a psychiatric facility.
- The facility is under the jurisdiction of the State's mental health authority.
- The facility specializes in providing psychiatric/psychological care and treatment; and
- The current need for institutionalization for more than 50 percent of all the patients in the facility results from mental diseases.
- Other factors that CMS deems to be "relevant" may also be considered. (*State Medicaid Manual (SMM)* at §4390(c)).

A final determination of a facility's classification as an IMD depends on whether the **overall character** is that of a facility established and/or maintained primarily for the care and treatment of individuals with mental diseases (*SMM* at §4390(C)).

Applying the IMD Criteria to a Hospital Providing Psychiatric Services Only

A hospital or facility that is 17-beds or larger and only provides psychiatric care would likely be ruled an IMD and therefore could not receive Medicaid payments.

Applying the IMD Criteria to a Facility that has Multiple Components or Programs

An existing general hospital could expand its psychiatric program and avoid IMD classification if no more than 50% of the patients at the hospital were admitted for the treatment of mental illness, alcoholism or other chemical dependency syndromes. In such an arrangement CMS would have to determine whether to apply the IMD criteria to the psychiatric program separately or to the larger hospital as a whole.

If CMS determines that the psychiatric program (whether physically integrated or standing alone) constitutes a **separate and distinct** facility or institution, the psychiatric program would be likely ruled an IMD. The standards generally relate to the requirement that the psychiatric program be integrated with and clearly part of the main provider and not an organizational artifact created to maximize federal reimbursement.

In making the determination whether two or more components constitute one institution, CMS will analyze the physical, financial, clinical and legal relationship between the two components. CMS has issued the following guidelines to assist in determining whether more than one component constitutes an "institution" for purposes of an IMD analysis:

1. Are all components controlled by one owner or one governing body?
2. Is one chief medical officer responsible for the medical staff activities in all components?
3. Does one chief executive officer control all administrative activities in all components?
4. Are any of the components separately licensed?
5. Are the components so organizationally and geographically separate that it is not feasible to operate as a single entity?
6. If two or more of the components are participating under the same provider category, can each component meet the conditions of participation independently? *(SMM* at §4390(B)).

If the answers to questions 1, 2 and 3 are "yes," CMS may determine that the components are, in fact, one institution and therefore be eligible for federal payments provided that fewer than 50% of the patients are treated for mental and/or substance abuse disorders. If the answers to questions 4, 5 and 6 are "yes," the determination may be that each component is an independent institution, thereby classifying the psychiatric service an IMD.

Importantly, the guidelines contain a broad caveat: "CMS may also use other guidelines that it finds relevant in a specific situation." *Id.* If CMS determines that the components are distinct, then IMD analysis outlined above will be applied to the distinct psychiatric unit.

Applying the IMD Criteria to a Hospital Which has Off-Campus Programs

Separate from the question of whether a provider is an IMD is the question of whether facilities in different geographic locations can be considered part of a single organizational entity. Often referred to as **"provider-based status,"** the criteria that CMS uses to determine whether an off-campus program is part of a main provider include:

- license arrangement
- integration of clinical services
- financial integration
- public awareness (e.g. is the off campus program understood to be part of the main provider)
- ownership and control
- administration and supervision
- location and distance from the main provider.

In the case of an off-campus psychiatric program, the IMD criteria still apply. For purposes of the Futures analysis, even if an off-campus psychiatric component and the general hospital are certified by CMS as a single provider that fact alone will not overcome evidence that the psychiatric program itself is an IMD.

Case Law Review

A review of administrative appeals and federal court decisions relative to the application of the IMD exclusion provide insight as to how CMS applies the statutory and regulatory guidelines.

In ***New York v. Shalala*** **(**1997 WL 610771 (S.D.N.Y.), No.95 Civ. 10258 JSM) the US District Court upheld two decisions of the Health and Human Services Departmental Appeals Board ("Appeals Board") disallowing federal reimbursement that New York claimed was due under Title XIX of the Social Security Act. This disallowance was the result of two psychiatric facilities being deemed sufficiently distinct from the general acute care hospitals they were a part of. Both were subsequently identified as IMDs. The state argued that the Westchester facilities were psychiatric units of the general hospitals located in New York City (about 25 miles away). The state supported its argument by demonstrating each of the two facilities was licensed by the State as a psychiatric unit of a general hospital, they had common ownership, common medical direction, shared a CEO and board of trustees, and had an integrated staff. However, the Court found that the Appeals Board had properly determined that these facilities were free-standing psychiatric hospitals and as such, were properly characterized as IMDs. The Court affirmed the Appeals Board's analysis which gave significant weight to the fact the administration of the facilities and the state consistently treated the facilities as independent of one another. For example, the facilities were separately licensed and accredited, were certified as psychiatric hospitals for Medicare purposes, filed separate Medicare and Medicaid cost reports, and were

paid at different rates from the general hospital. The Court also affirmed the Appeals Board's finding that just because the state licensed the facilities as units of the general hospital, they were not precluded from finding that the facilities were "sufficiently distinct" from the New York City Hospitals.

In *Shalala*, the Court made clear that even if a facility is a distinct-part of a general acute care hospital, it is not immune from being separately assessed for IMD status. Psychiatric facilities must be sufficiently integrated with a general hospital to be identified as a psychiatric wing of the general hospital. This case did not make a clear indication of what will constitute sufficient integration, but it makes quite clear that a mere administrative relationship (i.e., common ownership and control) alone will not be enough. This case also illustrates that when there is a question as to whether two or more facilities are sufficiently integrated, the Court may look to the qualities of the facility providing mental health services to see if it looks like an IMD rather than a psychiatric wing of a general acute care hospital.

In ***California Department of Health Services,*** DAB No. 1495 (1994), available at www.hhs.gov/dab/decisions/dab1495.html, the Appeals Board came to a similar conclusion. The California Department of Health Services (the State) appealed, among other things, the determination by HCFA (precursor to CMS) that the East Valley Pavilion (EVP) was a "free-standing facility" which had the overall character of an IMD. The State argued that EVP was a distinct part of a general acute care hospital, located nine miles away, and the general hospital was the relevant institution to be assessed for IMD status. The Appeals Board disagreed. They said that they were "sufficiently distinct" even though both facilities were owned and operated by the County and had a consolidated license. The Appeals Board considered the facts that EVP was operated on a daily basis by the Bureau of Mental Health and residents of EVP were not furnished food or shelter by the general hospital as evidence that the two facilities were not sufficiently integrated.[1] In rejecting the State's assertion that EVP was an integral part of the general acute care hospital because they were both owned by the county and operated under a consolidated license, the Appeals Board stated: "To view such an arrangement as sufficient to remove a facility like EVP, which is otherwise clearly an IMD, from the scope of the IMD exclusion, would contravene congressional intent by inadvertently encouraging states to evade the FFP exclusion for IMDs by administratively linking their IMDs to larger institutions." *Id.* at 16.

In a different kind of IMD case, ***Indiana Department of Public Welfare,*** the Appeals Board looked at a psychiatric unit that changed in character overtime and concluded that even if the federal government has certified an institution as a hospital, if it had been operating as an IMD, the state bears the risk for any improper payments to the provider. In this case, in 1984 Kingwood Hospital was certified as an 89 bed general hospital with a 36 bed distinct part psychiatric unit. In 1986, Kingwood increased the number and percentage of psychiatric beds to 79 out of 89 total hospital beds. Although Kingwood notified the state of its intention to increase the percentage and number of psychiatric beds, the state did not notify the federal government. In 1989, HCFA retroactively reclassified Kingwood Hospital as psychiatric hospital and sought

[1] The Code of Federal Regulations defines an institution as "an establishment that furnishes (in single or multiple facilities) food, shelter, and some treatment or services to four or more persons unrelated to the proprietor." 42 C.F.R. §435.1009.

reimbursement for payments made during the three year period. HCFA based the reclassification primarily on the fact that 79 psychiatric beds out of 89 total hospital beds gives the facility the “overall character” of a facility that is “established and maintained primarily for the care and treatment of individuals with mental disease.”

CONCLUSION

Overcoming the IMD exclusion will be a hurdle for the primary VSH replacement facility whether it is physically integrated with a general hospital, located on the campus of a general hospital or a stand alone facility. The criteria are not black and white and CMS’ IMD assessment is based on a subjective review.

However it is safe to say that the more integrated, physically, clinically and operationally, the replacement facility is with a general hospital, the greater the likelihood that the facility will not be deemed an IMD and will receive Medicaid reimbursement for services provided to eligible patients.