Submitter : Ms. Erica Jackson **Date:** 10/12/2007

Organization : Barton Child Law & Policy Clinic

Category : Academic

Issue Areas/Comments

GENERAL

GENERAL

See Attachment

Submitter : Mr. David Elsbury **Date:** 10/12/2007

Organization : Kanza Mental Health and Guidance Center, Inc.

Category : Comprehensive Outpatient Rehabilitation Facility

Issue Areas/Comments

Background

Background

My comments are focused on the requirements of restorative versus habilitative services.

Collections of Information Requirements

Collections of Information Requirements

I am the director of a community mental health center in rural Kansas and my agency serves a population area of 4,500 persons. We are involved in a new state plan for Medicaid in which we are required to apply the CMS regulation that apply. We are noticing significant reactions to the changes in his plan that result from the defining of rehabilitation services as "restorative" no habilitative. What we are seeing in the trend by our consumers to experience a reduction in their ability to handle the pressures of living in the community when they have been in what is called habilitation when services are removed. They are experiencing a psychiatric crisis resulting in moving through the system that was not going to occur prior to the prohibition against providing habilitative services.

GENERAL

GENERAL

Thank you for your consideration. I apologize for the briefness of my comments today but the briefness does not reduce the importance of the impact on severely mentally ill persons in our area of Northeast Kansas and the family and loved ones these illnesses impact.

David Elsbury, LMLP
Licensed Masters Level Psychologist
Chief Executive Officer
Kanza Mental Heath and Guidance Center, Inc.
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Hiawatha, Ks 66434
785-742-7113
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Provisions of the Proposed Rule

Provisions of the Proposed Rule

I request that CMS place a temporary halt on the implementation of this restorative requirement and consider rescinding it to allow the provision of such community focused services to persons who are experiencing severe and persistent mental illness in ways that would allow for continued services to address the cyclical and chronic pattern of severe mental illness. Persons need not be excluded from services beeause they are stable at an acceptable level versus continually showing progress towards a higher level of functioning.

Submitter : **Mr. Fredrick Erlich** **Date: 10/12/2007**

Organization : **Living Resources Corporation**

Category : **Other Health Care Provider**

Issue Areas/Comments

Background

Background

The rule, issued in August, would make changes to the so-called "state rehab option" and preclude many programs from qualifying for Federal Medicaid dollars and shifting all costs of those programs to the states.

Regulatory Impact Analysis

Regulatory Impact Analysis

On balance, we oppose this rule as a restriction on delivery of services to people with disabilities. The Medicaid rehabilitation option has been an essential tool in designing service delivery systems that result in individuals experiencing increased access to community living and a departure from inefficient and outdated institutional services. At the same time, the option serves the critical purpose of helping states help residents lead more independent lives while becoming more integrated into their communities.

Current rules have indeed seen growth in the use of the rehabilitation option. While we understand that growth leads to increased Federal expenditures, we would suggest that the growth is a strong indicator of the need for services and the importance of providing services to meet that need.

Thus, we believe scaling back the rehabilitation option is the precise opposite of what is needed. Put another way, we do not see sound policy in changing a rule on the basis that it is too useful.

We oppose final adoption of the rule as it is currently drafted. We believe that reduced Federal Financial Participation (FFP) that would be realized by this rule would serve to 1) eliminate services to individuals whose needs necessarily rely on those services; and 2) ultimately lead to higher costs as un-served individuals seek to access programs at other points.

Submitter : **Kristin Ahrens** **Date: 10/12/2007**

Organization : **Kristin Ahrens**

Category : **Individual**

Issue Areas/Comments

Background

Background

It is imperative that CMS withdraw, revise and re-issue the regulations proposed under Section 441.45(b)(2), with greater clarity as to the implications for children and adolescents with special needs who are currently receiving necessary medical services here in Pennsylvania.

As written, these proposed regulations raise questions as to whether the federal government will use them to force Pennsylvania to restrict these vital services for our children.

It is also urged that CMS provide opportunity for public comment.

Submitter : Ms. Sally Cameron **Date:** 10/12/2007

Organization : The Coalition

Category : Consumer Group

Issue Areas/Comments

GENERAL

GENERAL

THE COALITION represents thirty-eight statewide, non-profit organizations that advocate for persons needing services and supports for mental health, developmental disabilities, and addictive diseases. The Coalition was formed in 1991.

Services for persons with mental illness, development disabilities and substance abuse problems need to support models of both recovery and maintenance - including conditions that are considered chronic were people can receive services and supports, but not necessarily be 'cured or recover' but are provided to maintain a level of function. The payment system needs to include those who are working to maintain their status, not just those who can 'recover'.

Maintenance of current functioning needs to be maintained as a goal of service provision.
We would propose that language read:

Services and supports that provide assistance in maintaining functioning are considered rehabilitation when necessary to prevent regression based on history and severity or to help an individual achieve a rehabilitation goal defined in the rehabilitation plan.

Substance abuse is a chronic and often relapsing health condition like diabetes that requires flexible client-centered services that may be long term. Limits to services can result in incomplete treatment and dangerous outcomes for clients and families.

There are significant structural problems as a result of any decision to not treat mental health, developmental disabilities and substance abuse conditions as chronic or to exclude services and supports which promote maintenance. There are conditions in these disabilities that are acute in nature and require short term interventions, but they are not conditions that would require rehabilitation services. The majority of persons need services based on a rehabilitation model.

The member organizations of the Coalition are:

Addiction Professionals of North Carolina
Alcohol/Drug Council of North Carolina
The Arc of North Carolina
Association of Self Advocates of North Carolina
Autism Society of NC
Brain Injury Association of NC
Carolina Legal Assistanee
Coalition for Persons Disabled by Mental Illness
Developmental Disabilities Consortium
Easter Seals UCP North Carolina
Family Alternatives, Inc.
Governor's Institute on Alcohol & Substance Abuse
Licensed Professional Counselors of NC
Mental Health Association in North Carolina
Mental Retardation Association of NC
National Alliance on Mental Illness North Carolina
National Association of Social Workers - NC Chapter
NC Association of Alcohol Residential Facilities
NC Association for Marriage & Family Therapy
NC Association of Rehabilitation Facilities
NC Association of the Deaf
NC Association of Developmental Day Directors
NC Assoc. of Persons in Supported Employment
North Carolina Council for Community Programs
NC Council on Developmental Disabilities
NC Counseling Association
North Carolina Guardianship Association
NC Interagency Coordinating Council
North Carolina International Association of
Psychosocial Rehabilitation Services
NC Mental Health Consumers' Organization
North Carolina Nurses Association
North Carolina Providers Council
North Carolina Psychiatric Association
North Carolina Psychological Association
NC Psychological Foundation
North Carolina School Psychology Association

RHA Health Services
Substance Abuse Federation

Submitter : Dr. Gwynne Kell **Date:** 10/12/2007

Organization : Dr. Gwynne Kell

Category : Individual

Issue Areas/Comments

GENERAL

GENERAL

see attachment

CMS-2261-P-936-Attach-1.DOC

#936

October 10, 2007

Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-2261-P
P.O. Box 8018
Baltimore, MD 21244-8018

Dear Sir(s) or Madam(s):

The Council for Exceptional Children (CEC) is the largest professional organization of teachers, administrators, parents, and others concerned with the education of children with disabilities, gifted and talents, or both. As a member of CEC, I am writing in response to the August 13, 2007 *Federal Register* announcement requesting public comment on the Notice for Proposed Rule Making for Coverage for Rehabilitative Services under the Medicaid program.

I am deeply concerned about the devastating impact that the proposed CMS regulations for the rehabilitation services option will have on the welfare of children with disabilities. The elimination of these reimbursements would inevitably shift the financial responsibility for rehabilitation claims to individual school districts and early childhood providers across the nation. The Administration estimates that the elimination of the reimbursement for the Medicaid rehabilitation services option will provide a savings of $2.29 billion over the next five years. However, there is no corresponding increase in funding for the federal special education law, the Individuals with Disabilities Education Act (IDEA), that will enable schools and early childhood providers to make up for the reduction in Medicaid reimbursements for rehabilitation services option provided to children with disabilities.

Major Issues and Concerns

CEC has major issues with the proposed rule. We believe it is fatally flawed and should be withdrawn. We recognize that the proposed rule, in some cases, seeks to address legitimate policy issues. We welcome the opportunity to work in partnership with the Congress and the Administration to achieve consensus on appropriate policies and procedures to ensure that Medicaid beneficiaries receive the highest quality rehabilitative services, consistent with Title XIX of the Social Security Act, and to ensure that states operate their Medicaid programs to achieve the best clinical outcomes and in the most publicly accountable manner. We believe that this proposed rule prevents a necessary dialogue between federal officials, state Medicaid officials, other state officials (including individuals responsible for programs for people with mental illness, developmental disabilities, and child welfare), rehabilitative services providers, and representatives of affected Medicaid populations. We are not aware of any meaningful effort by the Secretary of Health and Human Services or the Centers for Medicare and Medicaid Services (CMS) to work with affected stakeholders to address current policy concerns. Indeed, we have been troubled by dubious enforcement actions and audits by the HHS Office of the Inspector General (OIG) that have appeared more focused on limiting federal expenditures than improving the appropriateness or effective administration of services under the rehabilitative services (rehab) option. To the extent that policy changes are needed, we believe that the legislative process is the appropriate arena for addressing these issues. The following are major concerns:

1) Unjustified and unnecessary, the proposed rule would not further the purposes of Title XIX of the Social Security Act.

A central purpose of the Medicaid law is to provide rehabilitative services. Section 1901 of the Social Security Act reads,

> "For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish...(2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this title."

Not only does the proposed rule not further this core goal of Medicaid, it erects new obstacles for Medicaid beneficiaries to receive medically necessary rehabilitative services. It does not justify the need for new rules and it does not provide a reasonable description of the impact of the proposed rule on Medicaid beneficiaries or rehabilitative services providers. The Regulatory Impact Analysis makes numerous assertions that are contradictory and appear intended to mask the impact of the proposed rule. For example, it states that, "the Secretary certifies that this major rule would not have a direct impact on providers of rehabilitative services that furnish services pursuant to section 1905(a)(13) of the Act." In reality, the proposed rule would narrow the scope of services that providers have been providing under Medicaid, and imposes requirements that will have a significant financial and administrative impact on providers. The proposed rule also states that, "...because FFP [Federal financial participation] will be excluded for rehabilitative services that are included in other Federal, State, and local programs, it is estimated that Federal Medicaid spending on rehabilitative services would be reduced by approximately $180 million in FY 2008 and would be reduced by $2.2 billion between FY 2008 and FY 2012. This would impose substantial increased costs on states that must change many of their administrative practices and that must either limit access to medically necessary services or increase state spending to provide services that were previously eligible for Medicaid FFP.

2) Contradicts Title XIX of the Social Security Act and exceeds the regulatory authority vested in the Executive Branch.

In several instances, we believe that the proposed rule exceeds the Executive's regulatory authority and is inconsistent with Medicaid law.

a. The proposed rule would hinder access to prevention services.

We are troubled that the proposed rule could interfere with states' ability to deliver preventive services, authorized by section 1905(a)(13) of the Social Security Act, as defined by 42 C.F.R. § 440.130(c). Although the proposed rule ostensibly amends only 42 C.F.R. § 440.130(d), it creates the clear impression that numerous preventive services would be prohibited under section 1905(a)(13), even if they could be covered as preventive services.

Any revised rule should make clear that states can continue to cover preventive services including habilitation services and other services for people with intellectual and other developmental disabilities that meet the requirements of 42 C.F.R. § 440.130(c).

b. The proposed rule illegally imposes an intrinsic element test.

Therefore, we also worry that this proposal could lead to increased Medicaid spending if individuals are forced to get more costly, but less effective or appropriate services. In particular, we are concerned that the proposed rule could lead to increased hospitalizations that would be otherwise preventable, through the provisioning of community-based rehabilitative services.

It should be noted that given the high proportion of Medicaid beneficiaries receiving rehab option services that have mental illness, all of the harms and concerns and raised in these comments should be considered to apply to people with mental illness.

b. The proposed rule would harm people with intellectual and other developmental disabilities

The proposed rule would severely harm people with intellectual disabilities (formerly called mental retardation) and other developmental disabilities in two major ways: it eliminates longstanding programs for providing day habilitation services to people with developmental disabilities, and it imposes a discriminatory and arbitrary exclusion from receiving many rehabilitative services for people with mental retardation and related conditions (a statutory term for people with intellectual and other developmental disabilities).

Elimination of FFP for habilitation services provided under the rehab and clinic options: In 2006, roughly $808 million was spent on Medicaid clinic and rehab option services for persons with intellectual and other developmental disabilities. In the same year, it has been estimated that approximately 52,000 people with intellectual and other developmental disabilities received day habilitation services through the clinic and rehab options (Unpublished estimates, David Braddock, Coleman Institute for Cognitive Disabilities, University of Colorado). We believe that this proposed restriction contravenes the intent of the Congress to protect access to day habilitation services for people with developmental disabilities when it enacted Section 6411(g) of the Omnibus Budget Reconciliation Act of 1989 (OBRA '89, P.L. 101-239). This section reads:

In enacting this provision of law, the Congress was clearly intending to protect access to day habilitation programs for people with mental retardation and related conditions. In fact, a House of Representatives Committee Report accompanying this legislation stated, "In the view of the Committee, HCFA [Health Care Financing Administration, predecessor to CMS] should be encouraging states to offer community-based services to this vulnerable population, not restricting their efforts to do so." It establishes that the Secretary may not deny FFP for habilitation services unless the Secretary promulgates a final regulation that *"specifies the types of day habilitation and related services that a State may cover...on behalf of persons with mental retardation or with related conditions."*

In contradiction to the plain language of Section 6411(g) of OBRA '89, the proposed rule **does not** specify which day habilitation services that a state may cover. Instead, the proposed regulation would prohibit the provisioning of *any* habilitation services under paragraphs (9) and (13) of section 1905(a) of the Social Security Act. We believe that this NPRM exceeds the regulatory authority granted by the Congress and must be withdrawn. At a minimum, since the regulation does not comply with the OBRA '89 language, the Secretary would not have authority to deny FFP for habilitation services provided in those states with approved state plan coverage prior to June 30, 1989.

We also oppose the prohibition of coverage for habilitation services as a component of the clinic and rehab options on policy grounds. We believe the proposed rule represents a missed opportunity for the Secretary to specify the types of services that may be provided in a way that ensures that individuals receive the highest quality habilitative and rehabilitative services according to current standards of treatment. The preamble of the proposed rule states that the rehab option is not a "custodial" benefit. We agree with the Secretary that state programs operated under the rehab and clinic options should set high standards for delivering active treatment and for innovating to develop programs for people with intellectual and other developmental disabilities that maximizes their ability to attain, maintain, and retain their maximum ability to function, consistent with the original conception of rehabilitation, as found in section 1901 of the Social Security Act.

The preamble to the proposed rule also states that the Secretary intends "to work with those states that have habilitation programs under the clinic services or rehabilitative services benefits under their state plans to transition to appropriate Medicaid coverage authorities, such as section 1915(c) waivers or the Home and Community-Based Services State plan option under section 1915(i)." We take issue with the assertion that these are more appropriate coverage authorities. In particular, waiver programs operate as discretionary alternatives to their core Medicaid programs, which operate under their state plan. We believe that states should have the flexibility to continue operating habilitation programs under the longstanding options as part of their state plans.

Further, section 1915(c) waivers and the section 1915(i) option are not equivalent to the rehab or clinic options. Section 1915(c) waiver programs require individuals to meet a nursing facility level of care requirement, something that is not required for rehab or clinic option services. Further, the 1915(c) and 1915(i) coverage authorities have different financial eligibility standards. Most significantly, these coverage authorities do not extend an enforceable entitlement to services. Indeed, the disability community opposed aspects of section 1915(i) in the Deficit Reduction Act that permit enrollment caps and that do not extend an entitlement to services. Also, the Secretary has not issued regulations on this coverage authority, so it is not clear to us that additional constraints on the use of the

option will not arise in the future. Nonetheless, this option was enacted to give states added flexibility and was not intended to supplant the rehab and clinic options by requiring states to shift to more restrictive coverage authorities. It should also be observed that the 1915(c) waiver programs are notable for their long and large waiting lists, something that is not permitted for clinic or rehab option services. In 2004, more than 206,000 people were on Medicaid waiting lists for community services, an increase of roughly 50,000 people in just two years. In some cases, average wait times to receive waiver services are more than two years (Kaiser Commission on Medicaid and the Uninsured, 2006). Shifting habilitation services to 1915(c) and 1915(i) coverage authorities will make access to habilitation services less secure and reliable.

We strongly recommend that the proposed exclusion of FFP for habilitation services under the clinic and rehab options not be implemented.

Discriminatory and arbitrary exclusion from receiving many rehabilitative services for people with mental retardation and related conditions : We strongly oppose the proposed rule's definition of habilitation services [see section 441.45(b)(2)] as including "services provided to individuals with mental retardation and related conditions." Coupled with the prohibition on habilitation services, this effectively excludes a population from services in violation of a fundamental principle of Medicaid, that medical assistance provided to one Medicaid beneficiary shall not be less in amount, duration, and scope than the medical assistance made available to any other Medicaid beneficiary [see section 1902(a)(10(B) of the Social Security Act].

The proposed rule also states that, "Most physical impairments, and mental health and/or substance related disorders, are not included in the scope of related conditions, so rehabilitative services may be appropriately provided." This policy would, at a minimum, create uncertainty that states can receive FFP for medically necessary rehab option services for people with mental retardation and related conditions. CMS policy appears to be that these individuals should receive services only through waiver programs (or the related 1915(i) option), and this is nonsensical in circumstances such as where a person with an intellectual disability has a knee replacement and needs services to regain physical functioning of the knee or where a person with epilepsy develops a substance abuse disorder. Further, this policy is likely to increase federal and state costs, as benefits for home- and community-based services (HCBS) waiver programs tend to be far more extensive than is generally provider under the rehab option.

Additionally, this population exclusion exposes a false premise that persons with intellectual disabilities and those with "related conditions" have achieved no prior capacity to function for which a rehabilitative service would be appropriately furnished under the rehab option. That sweeping assumption includes those defined by CMS elsewhere in regulations as having "related conditions" – people who have cerebral palsy, epilepsy, or any other conditions, other than mental illness, found to be closely related to mental retardation because it results in impairment of general intellectual functioning or adaptive behavior similar to that of people with mental retardation, with similar treatment needs; which manifests before age 22; is likely to continue indefinitely; and results in substantial functional limitations in three or more of the following areas of major life activities: self care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living. This policy was not the result of Congressional action and preceded a period of significant progress in advancing the civil rights of people with disabilities.

While the Americans with Disabilities Act (ADA) does not apply to federal administration of Medicaid, we believe that this policy violates, at a minimum, the spirit of the ADA, wherein the Congress was intending to impose a comprehensive national prohibition against discrimination on the basis of disability.

We urge the Secretary to rescind this constraint on rehab option services that is so blatantly stigmatizing and discriminatory to people with intellectual and other developmental disabilities.

4) Challenges efforts by states, school districts, and early intervention providers to effectively deliver health care services to children with disabilities in school/early childhood settings.

The civil rights law, the Individuals with Disabilities Education Act (IDEA), entitles children with disabilities to a free, appropriate public education and early intervention services in conformity with an individualized education program (IEP) and an individualized family service plan (IFSP). An IEP/IFSP is developed for eligible individuals with disabilities and describes the range of services and supports needed to assist individuals in benefiting from and maximizing their educational/developmental opportunities. The types of services provided under an IEP/IFSP include services such as speech pathology and audiology services, and physical, psychological and occupational therapies. While IDEA confers rights to individuals and obligations on the part of school systems/early intervention providers, it is not directly tied to a specific program or an automatic funding source. For years, the Federal government has failed to provide anywhere near the level of funding promised in the IDEA statute. States' ability to appropriately rely on Medicaid funds for Medicaid services provided to Medicaid-eligible children pursuant to an IEP/IFSP helps defray some of the state and local costs of implementing IDEA. This, in turn, helps assure that children receive all of the services they have been found to need in order to meet their full potential.

The sources of funding available to fund services under IEPs/IFSPs have been a contentious issue in the past. Some time ago, HCFA attempted to limit the availability of Medicaid funding for services under IDEA. In 1988, the Congress addressed the issue in enacting the Medicare Catastrophic Coverage Act of 1988 (Public Law 100-360) in which it clarified that Medicaid coverage is available for Medicaid services provided to Medicaid-eligible children under an IEP/IFSP. Under current law, the Social Security Act at section 1903 (c) reads,

> "Nothing in this title shall be construed as prohibiting or restricting, or authorizing the Secretary to prohibit or restrict, payment under subsection (a) for medical assistance for covered services furnished to a child with a disability because such services are included in the child's individualized education program established pursuant to part B of the Individuals with Disabilities Education Act or furnished to an infant or toddler with a disability because such services are included in the child's individualized family service plan adopted pursuant to part H of such Act."

Our concern here is that, while the proposed rule does not explicitly restrict access to rehabilitative services in school and early childhood settings, new requirements of this rule could be disruptive and could make it more difficult to use the school and early childhood environments to assure that children with disabilities receive the rehabilitative services that they need. In particular, we are concerned with new provider qualification standards that could restrict the ability of certain providers of services to serve children in schools and early childhood settings. While we share the

goal of ensuring that all rehabilitative services are of the highest quality and are only provided by providers who meet state credentialing standards, we are concerned that this rule would limit state flexibility to establish provider qualification requirements in school and early childhood settings. Further, we are concerned that the any willing provider requirement could be disruptive to efforts to serve children. We believe that the existing free choice of provider which guarantees parents the right to access medically necessary therapy and other services by other providers—outside of the school/early childhood environment—is an appropriate way to protect parents' right to access the Medicaid qualified provider of their choice. Again, the Secretary has not provided a policy justification for this new requirement, and we believe the net impact will be to make it less desirable for Medicaid programs to use school/early childhood settings to provide essential rehabilitative services to children. The Congress could not have been clearer in its intent that it wants Medicaid to support the goals of IDEA; we believe that these narrow interpretations of the law are inconsistent with that intent.

For these and other reasons, we urge the Secretary to withdraw the proposed rule.

Thank you for allowing the public to provide comments on the Notice for Proposed Rule Making for Coverage for Rehabilitative Services under the Medicaid Program and for considering CEC's recommendations.

Dr. Gwynne Kell
Assistant Superintendent of Pupil Support Services
Round Lake Area School District 116
gkell@rlas-116.org

Submitter : Mrs. Kathleen Thompson **Date:** 10/12/2007

Organization : Dougherty County School System

Category : Local Government

Issue Areas/Comments

GENERAL

GENERAL

See Attachment

CMS-2261-P-937-Attach-1.DOC

#937

October 12, 2007

Centers for Medicare and Medicaid Services
U. S. Department of Health and Human Services
Attention: CMS-2261-P
P. O. Box 8018
Baltimore, MD 21244-8018

Dear Sir(s) or Madam(s):

I am Co-Director of the Exceptional Students Program in the Dougherty County School System in Albany, Georgia and a member of the Council for Exceptional Children (CEC), the largest professional organization of teachers, administrators, parents, and others concerned with the education of children with disabilities, gifted and talents, or both. I am writing in response to the August 13, 2007 *Federal Register* announcement requesting public comment on the Notice for Proposed Rule Making for Coverage for Rehabilitative Services under the Medicaid program.

I am deeply concerned about the devastating impact that the proposed CMS regulations for the rehabilitation services options will have on the welfare of children with disabilities. The elimination of these reimbursements would inevitably shift the financial responsibility for rehabilitation claims to individual school districts and early childhood providers across the nation. The Administration estimates that the elimination of the reimbursement for the Medicaid rehabilitation services option will provide a savings of $2.29 billion over the next five years. However, there is no corresponding increase in funding for the federal special education law, the Individuals with Disabilities Education Act (IDEA), that will enable schools and early childhood providers to make up for the reduction in Medicaid reimbursements for rehabilitation services option provided to children with disabilities.

Under IDEA, school systems are required to provide services to eligible students with disabilities at no cost to the parents. The cost of providing these services continues to grow as more and more students with disabilities require specialized programming and therapies. State and local funding cannot meet this demand. Our school system receives around $600,000 annually in Medicaid reimbursement. These funds are used to meet the cost of educating students with disabilities. Without these dollars, we would have great difficulty meeting all the needs of students with disabilities.

I am in total agreement with the letter submitted by the Council for Exceptional Children and join them in urging the Secretary to withdraw the proposed rule.

Thank you for allowing the public to provide comments on the Notice for Proposed Rule Making for Coverage for Rehabilitative Services under the Medicaid Program and for considering CEC's recommendations.

Sincerely,
Kathleen G. Thompson, Co-Director
Exceptional Students Program
Dougherty County School System
P. O. Box 1470
Albany, Georgia 31701

Submitter : Cindy Birkness **Date:** 10/12/2007

Organization : Cindy Birkness

Category : Individual

Issue Areas/Comments

GENERAL

GENERAL

I have a child with special needs who relies on wraparound services. Before we got wraparound, he was having frequent temper tantrums and engaging in self-injurious behaviors like poking his eyes with his fingers up to fifty times in a fifteen minute period. My son was actually at a residential school for 6 months because we felt we could not manage his behaviors at home. I don't know what we would do without wraparound services.

Submitter : Mrs. Constance Bruce **Date:** 10/12/2007

Organization : Public Health/Early Intervention

Category : State Government

Issue Areas/Comments

Background

Background

Elimination of rehabilitative services for Medicaid-eligible children with disabilities

Collections of Information Requirements

Collections of Information Requirements

As an administrator of a ten county Part C (IDEA) program (home-based service delivery - literal interpretation of Natural Environments)I have seen first hand what it means to shift financial responsibility from Medicaid. We are currently in danger of closing shop in Georgia or switching Lead Agencies (if OSEP comes soon enough). In the mid-1990s our Part C program was led down the path of managed care (contracting to develop provider networks) with Medicaid as a major funding stream. In 2006 Georgia's Medicaid agency gave $3 Billion to three Care Management Organizations (CMOs which are for profit with shareholders) to serve 80% of their members. This has had a huge negative impact on all of healthcare (hospitals, physicians, therapists, etc) in Georgia, particularly Public Health programs. Since 68% of the infants and toddlers in our program are covered by Medicaid, our program has had to assume the cost of service coordination (increased by 61% in 9 months) and rehab services. Since the local Board of Health (legal entity) has no taxing power they cannot support an entitlement program if we go over budget. Yet we cannot capitate services as per IDEA. Kids with disabilities have high needs and once again bear the burden of inadequate funding for services they need. This will be repeated in the schools if this passes.

Submitter : Mrs. Rosemary Olender **Date:** 10/12/2007

Organization : OCM BOCES

Category : Speech-Language Therapist

Issue Areas/Comments

Background

Background

The Federal Regulations and corresponding State regulations make the provision of speech and language services specific, intensive and in many cases extremely expensive to deliver. The reimbursement to school districts for these services is critical to the delivery of quality services.

At this point, the Federal and/or State funding to assist districts with these costs is a mere fraction of what the delivery amounts to. If the reimbursement from Medicaid for these services ends, it is very likely that districts will need to either raise school taxes significantly to cover costs, or drastically change the way they deliver services by either lobbying for major changes in mandates or grouping speech services inappropriately. Either way, children lose.

I find it appalling that the government would constantly raise the demands for service in educational settings and then slowly take away the funding to support the mandates. IDEA was supposed to cover 40% of the costs and here we are 30+ years later having reached less than 20%.

As a service provider, I implore you to maintain the reimbursement for rehabilitative services to schools. Otherwise, I can foresee children having their services significantly altered...and not in a good way. Inclusion of students with severe disabilities is finally at the point where these children can stay at home and go to school with their peers. If schools can't afford to keep them in their home school (because clustering them in a setting with heavy services would be cheaper), then the unintended consequence of abolishing reimbursement in schools for their services is to destroy the fabric of inclusion.

How can the United States Government hold it's head up when it is doing so much to hurt it's children and it's families? The rich can secure private therapies. What do the majority of families do?

Submitter : Mrs. Mavis Howard **Date:** 10/12/2007

Organization : Mrs. Mavis Howard

Category : Other

Issue Areas/Comments

GENERAL

GENERAL

see attachment

CMS-2261-P-941-Attach-1.DOC

#941

October 10, 2007

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention CMS-2261-P
P.O. Box 8018
Baltimore, MD 21244-8018

Re: File Code CMS-2261-P. Proposed Regulations on Coverage for Rehabilitative Services.

Dear Sir or Madam:

Thank you for providing opportunities for individuals living with mental illness and their family members to provide comments on the proposed rule regarding coverage for rehabilitative services under the Medicaid program. I am writing as a member of The National Alliance on Mental Illness (NAMI), the nation's largest grassroots organization representing individuals living with serious mental illnesses and their families. As members of NAMI, we have lived experience with mental illness and bring that unique perspective to our comments on these rules.

We know from personal experience that access to rehabilitative services can make all the difference in a person's life. We have seen people get services to help them recover from their illness. With services and support, individuals with serious mental illness can and do live very well in the community and have strong relationships with family and friends. We have also seen those who can't get help and have seen the pain and trauma from untreated mental illness for the individual and his or her family. Often the person will have multiple stays in hospitals and jails.

NAMI conducted a survey of the 50 state mental health agencies for our *Grading the States* report and found what individuals with mental illness and their family members already know – in all the states, there are gaps in services and many people with serious mental illnesses are not getting the help that they need. The average state grade was a D. So we know that there is much work to be done to ensure that people can get the treatment they need when they need it. NAMI members know that treatment works, if you can get it.

As a result, we are very troubled by the estimate in the proposed regulation that these rules would save the federal government 2.2 billion dollars. Our experiences tell us that creating barriers to vital services will not save money in the long run. Rather, it will increase the costs from hospitalization, incarceration and other bad outcomes that result from a failure to get needed treatment.

We appreciate the emphasis on recovery in the rules. All individuals with mental illness and their families want the system to make it easier to recover. We also like the provisions about the participation of the individual and their family in the rehabilitative

plan and receiving copies of the plan so we can hold the system accountable. We would like to see some flexibility to make sure that providers can still do outreach and provide crisis care, but we very much appreciate the agency's intent to encourage communication between providers, the individual and family members.

However, we have a few areas of deep concern where we hope the agency will reconsider its rules. We would like to see services provided to help prevent deterioration of an individual. We also would like to see other systems encouraged, not discouraged, from providing help to adults and children with serious mental illnesses.

Section 440.130(d)(1)(v) and 440.130(d)(3) Rehabilitation Plan:

The proposed regulations require that a written rehabilitation plan set out the services that will be provided. The plan is to be written with the involvement of the individual and the family. We very much applaud the agency for including the person and the family in the planning and for encouraging person centered planning.

We would like to see some flexibility in the rules to allow providers to conduct outreach to individuals who may not be ready to be part of a formal treatment planning process. Sometimes, it takes repeated visits before a person is ready and understands how treatment will be a benefit to him or her.

In addition, there are times when a person is in crisis and needs help. At that point, they might not be able to be part of a planning process. If they are new to a community or have recently been in the hospital or jail, they also may not have a treatment plan on record. The rules should allow treatment in these narrow circumstances.

Recommendation:

Clarify the provisions in the regulation to allow payment for outreach and emergency services.

Section 440.130(d)(1) Rehabilitation and Restorative Services:

Under the proposed regulations and the preamble, rehabilitative goals have to be targeted at progress. They can't be used to maintain stability unless that is linked to another goal where they are still working on improvement. But mental illness does not work in a straight line upward. For many of us and our loved ones, the path to recovery is not straight up or down. It is often a process with periods of progress and periods where symptoms may have to be closely managed to prevent deterioration. The changing course of serious mental illness must be factored into the proposed regulations governing rehabilitative services.

For some of us and our family members who have been hospitalized or in jail, staying stable and in housing is not easy and is an achievement. It also requires services so we

do not deteriorate and get worse. We hope the agency will adjust its regulations to take into account the nature of our illnesses and those of our family members and allow services to prevent deterioration of the illnesses.

Recommendation:

Revise the proposed rule to allow payment for rehabilitative services to prevent deterioration as well as to restore functioning.

Section 441.45(b) Exclusion of services, including those that are an "intrinsic element" of other programs:

Many adults and children with mental illness and their families are also part of other service systems– including criminal justice, juvenile justice, education, housing, and child welfare. In my community, people with mental illness are overrepresented in these systems and we face major challenges to make sure that people with mental illness do not fall through the cracks.

The proposed regulations could make that challenge much more difficult. We are just starting to see some of these other systems provide the help that people with mental illness need. If these regulations are a barrier to getting federal dollars for some of the costs, then other systems will either stop providing the care or they will stop serving people with mental illness. Either way, people with mental illness and their family members are the ones who will get hurt.

We have reviewed this proposed regulation and the preamble and we do not know how to determine whether something is "intrinsic" to another system. We urge the agency to use terms and factors that are easily understandable by those who use these services and their families as well as state policymakers.

Finally, Medicaid is a program that people rely upon to pay for their care. If Medicaid is required to pay for healthcare services, then it should not matter whether the service is "intrinsic" to another system. It is important that Medicaid remain a reliable source of payment for people.

Recommendation:

Delete all references to other systems and pay for rehabilitative services for individuals with serious mental illnesses when they need them and where they need them.

Section 441.45(b) Exclusions for therapeutic foster care and classroom aides:

Many children with mental illnesses rely upon therapeutic foster care. This is a service that works well and creates good outcomes such as going to school more, staying out of trouble with law enforcement, and living in a stable place. The proposed regulations

should give states the ability to get federal resources to support this effective service as long as the services are rehabilitative.

The proposed regulations say that the federal government will not provide resources for recess aides or classroom aides. We believe that the rule also needs to clearly inform schools that Medicaid will pay for behavior aides and other mental health providers who are giving services to a particular child. Children with mental illnesses and their families have been fighting a long battle to get mental heath services provided to children in schools and this regulation should support that effort by clearly encouraging school based mental health services.

Recommendation:

Amend the proposed rule to allow therapeutic foster care and let states combine the services in one rate if that works best for them. The federal government can meet its goals by making sure that the rate only includes rehabilitative services.

Amend the regulation to say that the exclusion does not include behavior aides or other related service providers who are providing services to a particular child.

Section 441.45(b)(2) Exclusion for Mental Retardation and other conditions and Habilitation Services:

The proposed regulations appear to prohibit people with mental retardation or related conditions, like cerebral palsy, from receiving rehabilitation services. As advocates for one group – people with mental illness – we do not support the exclusion of any other group on the basis of their disability.

We also understand that Congress asked the federal agency to determine which habilitation services to cover. It did not give the agency the option to ban all habilitation services.

Recommendation:

The proposed rules should not exclude people with mental retardation and related conditions and habilitation services.

Conclusion:

Rehabilitation services can change the course of a person's life. Our experiences tell us what a difference they can make. The research data confirms what we already know – services are very effective at reducing symptoms, keeping people out of hospitals, and allowing people to live better lives in the community.

We know what works. But we also know that too many people can't access these treatments. And the terrible consequences are seen in every jail and prison in America.

The federal government should be doing everything possible to encourage states to provide better and more effective services for people living with mental illnesses. We do not want to see billions of dollars taken out of the Medicaid funded system of care for people with mental illnesses. We do not want to see adults and children ignored and left behind in school, work, and life.

We ask that you revise these regulations to make it clear that the federal government encourages any state system to do all they can to provide effective treatments to people with serious mental illnesses.

Thank you,

Submitter : Ms. Crystal Chen-Sang **Date:** 10/12/2007

Organization : QSAC

Category : Social Worker

Issue Areas/Comments

GENERAL

GENERAL

I urge you to withdraw the proposed regulations regarding habilitative services for people with developmental disabilities. The regulations would eliminate critical services that enable people with intellectual disabilities and related conditions to improve or maintain basic life skills. The regulations impose discriminatory and arbitrary criteria to exclude people with developmental disabilities from receiving these essential services.

Submitter : **Date: 10/12/2007**

Organization :

Category : **Social Worker**

Issue Areas/Comments

Provisions of the Proposed Rule

Provisions of the Proposed Rule

Re 441.45(b) -- while there are several troubling aspects to the proposed rules, I finally am most concerned about the "intrinsic element" part of this rule. It seems morally wrong and maybe illegal to deny "system" kids access to medically necessary care because of their very involvement in the system (i.e., probation, welfare, special schooling) that is supposed to protect them when the adults fail. It is absolutely not correct to think that there is funding in the system that will pick up and provide the clinical and case management services currently provided by MRO.

Please eliminate this part of the rules in its entirety.

Thank you.

Submitter : Mr. Gabriel Farias **Date:** 10/12/2007

Organization : QSAC

Category : Health Care Professional or Association

Issue Areas/Comments

GENERAL

GENERAL

I urge you to withdraw the proposed regulations regarding habilitative services for people with developmental disabilities. The regulations would eliminate critical services that enable people with intellectual disabilities and related conditions to improve or maintain basic life skills. The regulations impose discriminatory and arbitrary criteria to exclude people with developmental disabilities from receiving these essential services.

Submitter : Ms. Tova Levin **Date:** 10/12/2007

Organization : QSAC

Category : Individual

Issue Areas/Comments

GENERAL

GENERAL

I urge you to withdraw the proposed regulations regarding habilitative services for people with developmental disabilities. The regulations would eliminate critical services that enable people with intellectual disabilities and related conditions to improve or maintain basic life skills. The regulations impose discriminatory and arbitrary criteria to exclude people with developmental disabilities from receiving these essential services.

Submitter : **Ms. Tania Reyna** **Date: 10/12/2007**

Organization : **Qsac, Inc.**

Category : **Other Practitioner**

Issue Areas/Comments

GENERAL

GENERAL

I urge you to withdraw the proposed regulations regarding habilitative services for people with developmental disabilities. The regulations would eliminate critical services that enable people with intellectual disabilities and related conditions to improve or maintain basic life skills. The regulations impose discriminatory and arbitrary criteria to exclude people with developmental disabilities from receiving these essential services.

Regulatory Impact Analysis

Regulatory Impact Analysis

I urge you to withdraw the proposed regulations regarding habilitative services for people with developmental disabilities. The regulations would eliminate critical services that enable people with intellectual disabilities and related conditions to improve or maintain basic life skills. The regulations impose discriminatory and arbitrary criteria to exclude people with developmental disabilities from receiving these essential services.

Submitter : Mr. James Magalee **Date:** 10/12/2007

Organization : Queens Parent Resource Center

Category : Consumer Group

Issue Areas/Comments

GENERAL

GENERAL

As a family member of a person with developmental disabilities, I urge you to withdraw the proposed regulations regarding habilitative services for people with developmental disabilities. The regulations would eliminate critical services that enable people with intellectual disabilities and related conditions to improve or maintain basic life skills. The regulations impose discriminatory and arbitrary criteria to exclude people with developmental disabilities from receiving these essential services.

Submitter : Ms. Rosanna Espinal **Date:** 10/12/2007

Organization : Qsac,Inc.

Category : Other Practitioner

Issue Areas/Comments

GENERAL

GENERAL

I urge you to withdraw the proposed regulations regarding habilitative services for people with developmental disabilities. The regulations would eliminate critical services that enable people with intellectual disabilities and related conditions to improve or maintain basic life skills. The regulations impose discriminatory and arbitrary criteria to exclude people with developmental disabilities from receiving these essential services.

Regulatory Impact Analysis

Regulatory Impact Analysis

I urge you to withdraw the proposed regulations regarding habilitative services for people with developmental disabilities. The regulations would eliminate critical services that enable people with intellectual disabilities and related conditions to improve or maintain basic life skills. The regulations impose discriminatory and arbitrary criteria to exclude people with developmental disabilities from receiving these essential services.

Submitter : Mrs. Madelyn Wolfin **Date:** 10/12/2007

Organization : QSAC

Category : Social Worker

Issue Areas/Comments

Regulatory Impact Analysis

Regulatory Impact Analysis

I urge you to withdraw the proposed regulations regarding habilitative services for people with developmental disabilities. The regulations would eliminate critical services that enable people with intellectual disabilities and related conditions to improve or maintain basic life skills. The regulations impose discriminatory and arbitrary criteria to exclude people with developmental disabilities from receiving these essential services.

Submitter : Mr. Gary Gaddy **Date:** 10/12/2007

Organization : Club Nova Community Incorporated

Category : Other Health Care Provider

Issue Areas/Comments

GENERAL

GENERAL

See Attachment

Submitter : **Date: 10/12/2007**

Organization : **Enable**

Category : **Health Care Provider/Association**

Issue Areas/Comments

GENERAL

GENERAL

See Attachment

Submitter : Mr. Gabriel Park **Date:** 10/12/2007

Organization : QSAC, Inc.

Category : Intermediate Care Facility for the Mentally Retarded

Issue Areas/Comments

GENERAL

GENERAL

I urge you to withdraw the proposed regulations regarding habilitative services for people with developmental disabilities. The regulations would eliminate critical services that enable people with intellectual disabilities and related conditions to improve or maintain basic life skills. The regulations impose discriminatory and arbitrary criteria to exclude people with developmental disabilities from receiving these essential services.

Provisions of the Proposed Rule

Provisions of the Proposed Rule

Submitter : Ms. Cynthia Civille **Date:** 10/12/2007

Organization : Shiawassee Regional Education Service District

Category : Other Association

Issue Areas/Comments

GENERAL

GENERAL

see attachment

CMS-2261-P-953-Attach-1.TXT

CMS-2261-P-953-Attach-2.TXT

#9531

October 10, 2007

Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-2261-P
P.O. Box 8018
Baltimore, MD 21244-8018

Dear Sir(s) or Madam(s):

The Council for Exceptional Children (CEC) is the largest professional organization of teachers, administrators, parents, and others concerned with the education of children with disabilities, gifted and talents, or both. As a member of CEC, I am writing in response to the August 13, 2007 *Federal Register* announcement requesting public comment on the Notice for Proposed Rule Making for Coverage for Rehabilitative Services under the Medicaid program.

I am deeply concerned about the devastating impact that the proposed CMS regulations for the rehabilitation services option will have on the welfare of children with disabilities. The elimination of these reimbursements would inevitably shift the financial responsibility for rehabilitation claims to individual school districts and early childhood providers across the nation. The Administration estimates that the elimination of the reimbursement for the Medicaid rehabilitation services option will provide a savings of $2.29 billion over the next five years. However, there is no corresponding increase in funding for the federal special education law, the Individuals with Disabilities Education Act (IDEA), that will enable schools and early childhood providers to make up for the reduction in Medicaid reimbursements for rehabilitation services option provided to children with disabilities.

Major Issues and Concerns

CEC has major issues with the proposed rule. We believe it is fatally flawed and should be withdrawn. We recognize that the proposed rule, in some cases, seeks to address legitimate policy issues. We welcome the opportunity to work in partnership with the Congress and the Administration to achieve consensus on appropriate policies and procedures to ensure that Medicaid beneficiaries receive the highest quality rehabilitative services, consistent with Title XIX of the Social Security Act, and to ensure that states operate their Medicaid programs to achieve the best clinical outcomes and in the most publicly accountable manner. We believe that this proposed rule prevents a necessary dialogue between federal officials, state Medicaid officials, other state officials (including individuals responsible for programs for people with mental illness, developmental disabilities, and child welfare), rehabilitative services providers, and representatives of affected Medicaid populations. We are not aware of any meaningful effort by the Secretary of Health and Human Services or the Centers for Medicare and Medicaid Services (CMS) to work with affected stakeholders to address current policy concerns. Indeed, we have been troubled by dubious enforcement actions and audits by the HHS Office of the Inspector General (OIG) that have appeared more focused on limiting federal expenditures than improving the appropriateness or effective administration of services under the rehabilitative services (rehab) option. To the extent that policy changes are needed, we believe that the legislative process is the appropriate arena for addressing these issues. The following are major concerns:

1) **Unjustified and unnecessary, the proposed rule would not further the purposes of Title XIX of the Social Security Act.**

A central purpose of the Medicaid law is to provide rehabilitative services. Section 1901 of the Social Security Act reads,

> "For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish...(2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this title."

Not only does the proposed rule not further this core goal of Medicaid, it erects new obstacles for Medicaid beneficiaries to receive medically necessary rehabilitative services. It does not justify the need for new rules and it does not provide a reasonable description of the impact of the proposed rule on Medicaid beneficiaries or rehabilitative services providers. The Regulatory Impact Analysis makes numerous assertions that are contradictory and appear intended to mask the impact of the proposed rule. For example, it states that, "the Secretary certifies that this major rule would not have a direct impact on providers of rehabilitative services that furnish services pursuant to section 1905(a)(13) of the Act." In reality, the proposed rule would narrow the scope of services that providers have been providing under Medicaid, and imposes requirements that will have a significant financial and administrative impact on providers. The proposed rule also states that, "...because FFP [Federal financial participation] will be excluded for rehabilitative services that are included in other Federal, State, and local programs, it is estimated that Federal Medicaid spending on rehabilitative services would be reduced by approximately $180 million in FY 2008 and would be reduced by $2.2 billion between FY 2008 and FY 2012. This would impose substantial increased costs on states that must change many of their administrative practices and that must either limit access to medically necessary services or increase state spending to provide services that were previously eligible for Medicaid FFP.

2) **Contradicts Title XIX of the Social Security Act and exceeds the regulatory authority vested in the Executive Branch.**

In several instances, we believe that the proposed rule exceeds the Executive's regulatory authority and is inconsistent with Medicaid law.

a. The proposed rule would hinder access to prevention services.

We are troubled that the proposed rule could interfere with states' ability to deliver preventive services, authorized by section 1905(a)(13) of the Social Security Act, as defined by 42 C.F.R. § 440.130(c). Although the proposed rule ostensibly amends only 42 C.F.R. § 440.130(d), it creates the clear impression that numerous preventive services would be prohibited under section 1905(a)(13), even if they could be covered as preventive services.

Any revised rule should make clear that states can continue to cover preventive services including habilitation services and other services for people with intellectual and other developmental disabilities that meet the requirements of 42 C.F.R. § 440.130(c).

b. The proposed rule illegally imposes an intrinsic element test.

The proposed rule would deny FFP for services furnished, through a non-medical program as either a benefit or administrative activity, including services that are intrinsic elements of programs other than Medicaid, such as foster care, child welfare, education, child care, vocational and prevocational training, housing, parole and probation, juvenile justice, or public guardianship." This so-called "intrinsic element test" presents a barrier that could prevent Medicaid beneficiaries from receiving medically necessary Medicaid covered services that is not authorized by Title XIX of the Social Security Act. Indeed, we understand that the Administration proposed such a test in the legislative debate leading up to the enactment of the Deficit Reduction Act of 2005 (DRA, P.L. 109-171) and this test was explicitly rejected by the Congress (See July 7, 2006 letter to CMS Administrator Mark McClellan from Senators Harkin, Bingaman, and others). We oppose an intrinsic element test because it goes beyond the third party liability requirements of the Medicaid law as established by the Congress; we believe it is vague and could be applied to restrict services that are appropriately covered; and, it is arbitrary and could restrict access to Medicaid services even if no other program is available to provide coverage for otherwise Medicaid coverable services to Medicaid beneficiaries. This test has the potential to cause great harm to Medicaid beneficiaries who need timely and reliable access to Medicaid rehabilitative services.

c. The proposed rule does not fully comply with the EPSDT mandate for children.

We are very troubled by the potential impact of the proposed rule on children who are Medicaid beneficiaries. In particular, as drafted, we do not believe that the proposed rule complies with Medicaid's Early and Periodic, Screening, Diagnostic and Treatment Services (EPSDT) requirements. The EPSDT mandate requires that all Medicaid beneficiaries under age 21 must receive all necessary services listed in section 1905(a) of the Social Security Act to correct or ameliorate physical or mental illnesses and conditions, regardless of whether those services are covered under a state's Medicaid plan. We believe that the proposed rule must be re-drafted to include a restatement of the EPSDT requirement.

3) Implementation of the proposed rule would severely harm several Medicaid populations.

We believe that the proposed rule could severely restrict access to services and cause significant harm to several Medicaid populations:

a. The proposed rule would harm people with mental illness.

People with mental illness are primary recipients of Medicaid rehab option services. A recent report by the Kaiser Commission on Medicaid and the Uninsured found that in 2004, 73% of Medicaid beneficiaries receiving rehab option services had a mental health diagnosis, and they were responsible for 79% of rehab option spending. To the extent that the proposed rule significantly reduces federal spending on rehab option services, this results in a direct cut in services for beneficiaries with mental illness. By limiting access to effective community-based rehabilitative services, the proposed rule would place Medicaid beneficiaries with mental illness at risk for poorer health outcomes and this could lead to relapse or new episodes of illness. Such incidents typically result in increased utilization of high cost services such as emergency room care and inpatient care. The proposed rule does not alter Medicaid eligibility, it would simply restrict access to certain services—often those that are most effective and the least costly.

Therefore, we also worry that this proposal could lead to increased Medicaid spending if individuals are forced to get more costly, but less effective or appropriate services. In particular, we are concerned that the proposed rule could lead to increased hospitalizations that would be otherwise preventable, through the provisioning of community-based rehabilitative services.

It should be noted that given the high proportion of Medicaid beneficiaries receiving rehab option services that have mental illness, all of the harms and concerns and raised in these comments should be considered to apply to people with mental illness.

b. The proposed rule would harm people with intellectual and other developmental disabilities

The proposed rule would severely harm people with intellectual disabilities (formerly called mental retardation) and other developmental disabilities in two major ways: it eliminates longstanding programs for providing day habilitation services to people with developmental disabilities, and it imposes a discriminatory and arbitrary exclusion from receiving many rehabilitative services for people with mental retardation and related conditions (a statutory term for people with intellectual and other developmental disabilities).

Elimination of FFP for habilitation services provided under the rehab and clinic options: In 2006, roughly $808 million was spent on Medicaid clinic and rehab option services for persons with intellectual and other developmental disabilities. In the same year, it has been estimated that approximately 52,000 people with intellectual and other developmental disabilities received day habilitation services through the clinic and rehab options (Unpublished estimates, David Braddock, Coleman Institute for Cognitive Disabilities, University of Colorado). We believe that this proposed restriction contravenes the intent of the Congress to protect access to day habilitation services for people with developmental disabilities when it enacted Section 6411(g) of the Omnibus Budget Reconciliation Act of 1989 (OBRA '89, P.L. 101-239). This section reads:

(g) DAY HABILITATION AND RELATED SERVICES-

(1) PROHIBITION OF DISALLOWANCE PENDING ISSUANCE OF REGULATIONS- Except as specifically permitted under paragraph (3), the Secretary of Health and Human Services may not--

(A) withhold, suspend, disallow, or deny Federal financial participation under section 1903(a) of the Social Security Act for day habilitation and related services under paragraph (9) or (13) of section 1905(a) of such Act on behalf of persons with mental retardation or with related conditions pursuant to a provision of its State plan as approved on or before June 30, 1989, or

(B) withdraw Federal approval of any such State plan provision.

(2) REQUIREMENTS FOR REGULATION- A final regulation described in this paragraph is a regulation, promulgated after a notice of proposed rule-making and a period of at least 60 days for public comment, that--

(A) specifies the types of day habilitation and related services that a State may cover under paragraph (9) or (13) of section 1905(a) of the Social Security Act on behalf of persons with mental retardation or with related conditions, and

(B) any requirements respecting such coverage.

(3) PROSPECTIVE APPLICATION OF REGULATION- If the Secretary promulgates a final regulation described in paragraph (2) and the Secretary determines that a State plan under title XIX of the Social Security Act does not comply with such regulation, the Secretary shall notify the State of the determination and its basis, and such determination shall not apply to day habilitation and related services furnished before the first day of the first calendar quarter beginning after the date of the notice to the State.

In enacting this provision of law, the Congress was clearly intending to protect access to day habilitation programs for people with mental retardation and related conditions. In fact, a House of Representatives Committee Report accompanying this legislation stated, "In the view of the Committee, HCFA [Health Care Financing Administration, predecessor to CMS] should be encouraging states to offer community-based services to this vulnerable population, not restricting their efforts to do so." It establishes that the Secretary may not deny FFP for habilitation services unless the Secretary promulgates a final regulation that *"specifies the types of day habilitation and related services that a State may cover...on behalf of persons with mental retardation or with related conditions."*

In contradiction to the plain language of Section 6411(g) of OBRA '89, the proposed rule **does not** specify which day habilitation services that a state may cover. Instead, the proposed regulation would prohibit the provisioning of *any* habilitation services under paragraphs (9) and (13) of section 1905(a) of the Social Security Act. We believe that this NPRM exceeds the regulatory authority granted by the Congress and must be withdrawn. At a minimum, since the regulation does not comply with the OBRA '89 language, the Secretary would not have authority to deny FFP for habilitation services provided in those states with approved state plan coverage prior to June 30, 1989.

We also oppose the prohibition of coverage for habilitation services as a component of the clinic and rehab options on policy grounds. We believe the proposed rule represents a missed opportunity for the Secretary to specify the types of services that may be provided in a way that ensures that individuals receive the highest quality habilitative and rehabilitative services according to current standards of treatment. The preamble of the proposed rule states that the rehab option is not a "custodial" benefit. We agree with the Secretary that state programs operated under the rehab and clinic options should set high standards for delivering active treatment and for innovating to develop programs for people with intellectual and other developmental disabilities that maximizes their ability to attain, maintain, and retain their maximum ability to function, consistent with the original conception of rehabilitation, as found in section 1901 of the Social Security Act.

The preamble to the proposed rule also states that the Secretary intends "to work with those states that have habilitation programs under the clinic services or rehabilitative services benefits under their state plans to transition to appropriate Medicaid coverage authorities, such as section 1915(c) waivers or the Home and Community-Based Services State plan option under section 1915(i)." We take issue with the assertion that these are more appropriate coverage authorities. In particular, waiver programs operate as discretionary alternatives to their core Medicaid programs, which operate under their state plan. We believe that states should have the flexibility to continue operating habilitation programs under the longstanding options as part of their state plans.

Further, section 1915(c) waivers and the section 1915(i) option are not equivalent to the rehab or clinic options. Section 1915(c) waiver programs require individuals to meet a nursing facility level of care requirement, something that is not required for rehab or clinic option services. Further, the 1915(c) and 1915(i) coverage authorities have different financial eligibility standards. Most significantly, these coverage authorities do not extend an enforceable entitlement to services. Indeed, the disability community opposed aspects of section 1915(i) in the Deficit Reduction Act that permit enrollment caps and that do not extend an entitlement to services. Also, the Secretary has not issued regulations on this coverage authority, so it is not clear to us that additional constraints on the use of the

option will not arise in the future. Nonetheless, this option was enacted to give states added flexibility and was not intended to supplant the rehab and clinic options by requiring states to shift to more restrictive coverage authorities. It should also be observed that the 1915(c) waiver programs are notable for their long and large waiting lists, something that is not permitted for clinic or rehab option services. In 2004, more than 206,000 people were on Medicaid waiting lists for community services, an increase of roughly 50,000 people in just two years. In some cases, average wait times to receive waiver services are more than two years (Kaiser Commission on Medicaid and the Uninsured, 2006). Shifting habilitation services to 1915(c) and 1915(i) coverage authorities will make access to habilitation services less secure and reliable.

We strongly recommend that the proposed exclusion of FFP for habilitation services under the clinic and rehab options not be implemented.

Discriminatory and arbitrary exclusion from receiving many rehabilitative services for people with mental retardation and related conditions : We strongly oppose the proposed rule's definition of habilitation services [see section 441.45(b)(2)] as including "services provided to individuals with mental retardation and related conditions." Coupled with the prohibition on habilitation services, this effectively excludes a population from services in violation of a fundamental principle of Medicaid, that medical assistance provided to one Medicaid beneficiary shall not be less in amount, duration, and scope than the medical assistance made available to any other Medicaid beneficiary [see section 1902(a)(10(B) of the Social Security Act].

The proposed rule also states that, "Most physical impairments, and mental health and/or substance related disorders, are not included in the scope of related conditions, so rehabilitative services may be appropriately provided." This policy would, at a minimum, create uncertainty that states can receive FFP for medically necessary rehab option services for people with mental retardation and related conditions. CMS policy appears to be that these individuals should receive services only through waiver programs (or the related 1915(i) option), and this is nonsensical in circumstances such as where a person with an intellectual disability has a knee replacement and needs services to regain physical functioning of the knee or where a person with epilepsy develops a substance abuse disorder. Further, this policy is likely to increase federal and state costs, as benefits for home- and community-based services (HCBS) waiver programs tend to be far more extensive than is generally provider under the rehab option.

Additionally, this population exclusion exposes a false premise that persons with intellectual disabilities and those with "related conditions" have achieved no prior capacity to function for which a rehabilitative service would be appropriately furnished under the rehab option. That sweeping assumption includes those defined by CMS elsewhere in regulations as having "related conditions" – people who have cerebral palsy, epilepsy, or any other conditions, other than mental illness, found to be closely related to mental retardation because it results in impairment of general intellectual functioning or adaptive behavior similar to that of people with mental retardation, with similar treatment needs; which manifests before age 22; is likely to continue indefinitely; and results in substantial functional limitations in three or more of the following areas of major life activities: self care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living. This policy was not the result of Congressional action and preceded a period of significant progress in advancing the civil rights of people with disabilities.

While the Americans with Disabilities Act (ADA) does not apply to federal administration of Medicaid, we believe that this policy violates, at a minimum, the spirit of the ADA, wherein the Congress was intending to impose a comprehensive national prohibition against discrimination on the basis of disability.

We urge the Secretary to rescind this constraint on rehab option services that is so blatantly stigmatizing and discriminatory to people with intellectual and other developmental disabilities.

4) Challenges efforts by states, school districts, and early intervention providers to effectively deliver health care services to children with disabilities in school/early childhood settings.

The civil rights law, the Individuals with Disabilities Education Act (IDEA), entitles children with disabilities to a free, appropriate public education and early intervention services in conformity with an individualized education program (IEP) and an individualized family service plan (IFSP). An IEP/IFSP is developed for eligible individuals with disabilities and describes the range of services and supports needed to assist individuals in benefiting from and maximizing their educational/developmental opportunities. The types of services provided under an IEP/IFSP include services such as speech pathology and audiology services, and physical, psychological and occupational therapies. While IDEA confers rights to individuals and obligations on the part of school systems/early intervention providers, it is not directly tied to a specific program or an automatic funding source. For years, the Federal government has failed to provide anywhere near the level of funding promised in the IDEA statute. States' ability to appropriately rely on Medicaid funds for Medicaid services provided to Medicaid-eligible children pursuant to an IEP/IFSP helps defray some of the state and local costs of implementing IDEA. This, in turn, helps assure that children receive all of the services they have been found to need in order to meet their full potential.

The sources of funding available to fund services under IEPs/IFSPs have been a contentious issue in the past. Some time ago, HCFA attempted to limit the availability of Medicaid funding for services under IDEA. In 1988, the Congress addressed the issue in enacting the Medicare Catastrophic Coverage Act of 1988 (Public Law 100-360) in which it clarified that Medicaid coverage is available for Medicaid services provided to Medicaid-eligible children under an IEP/IFSP. Under current law, the Social Security Act at section 1903 (c) reads,

> "Nothing in this title shall be construed as prohibiting or restricting, or authorizing the Secretary to prohibit or restrict, payment under subsection (a) for medical assistance for covered services furnished to a child with a disability because such services are included in the child's individualized education program established pursuant to part B of the Individuals with Disabilities Education Act or furnished to an infant or toddler with a disability because such services are included in the child's individualized family service plan adopted pursuant to part H of such Act."

Our concern here is that, while the proposed rule does not explicitly restrict access to rehabilitative services in school and early childhood settings, new requirements of this rule could be disruptive and could make it more difficult to use the school and early childhood environments to assure that children with disabilities receive the rehabilitative services that they need. In particular, we are concerned with new provider qualification standards that could restrict the ability of certain providers of services to serve children in schools and early childhood settings. While we share the

goal of ensuring that all rehabilitative services are of the highest quality and are only provided by providers who meet state credentialing standards, we are concerned that this rule would limit state flexibility to establish provider qualification requirements in school and early childhood settings. Further, we are concerned that the any willing provider requirement could be disruptive to efforts to serve children. We believe that the existing free choice of provider which guarantees parents the right to access medically necessary therapy and other services by other providers—outside of the school/early childhood environment—is an appropriate way to protect parents' right to access the Medicaid qualified provider of their choice. Again, the Secretary has not provided a policy justification for this new requirement, and we believe the net impact will be to make it less desirable for Medicaid programs to use school/early childhood settings to provide essential rehabilitative services to children. The Congress could not have been clearer in its intent that it wants Medicaid to support the goals of IDEA; we believe that these narrow interpretations of the law are inconsistent with that intent.

For these and other reasons, we urge the Secretary to withdraw the proposed rule.

Thank you for allowing the public to provide comments on the Notice for Proposed Rule Making for Coverage for Rehabilitative Services under the Medicaid Program and for considering CEC's recommendations.

Sincerely,

Cynthia L. Civille, Ed. S.
Associate Superintendent of Special Education
Shiawassee Regional Education Service District

Submitter : **Ms. Rachel Mann** **Date: 10/12/2007**

Organization : **Disability Rights Network of Pennsylvania**

Category : **Attorney/Law Firm**

Issue Areas/Comments

GENERAL

GENERAL

See Attachment

CMS-2261-P-954-Attach-1.PDF

#954

COMMENTS ON REHABILITATION REGULATIONS

PROVISIONS OF PROPOSED RULE

The Disability Rights Network of Pennsylvania is the designation "protection and advocacy" organization for people with developmental disabilities, mental illness and other disabilities in Pennsylvania. Our Children's Project has spent years advocating for the improvement of behavioral health services for children, in their homes, schools and communities. It has long been recognized that in order for the state and local governments to make real progress in this endeavor, we need to provide a comprehensive array of services, and to coordinate and integrate these services with the multiple child-serving systems in which these children must thrive.

While we have many questions about the meaning of these regulations, we are concerned that they impermissibly narrow the scope of services that can be covered under the rehabilitation option, and will be a disservice to America's children.

Proposed § 441.45(b)(2) – Habilitation Services

The proposed rule states that rehabilitation services do not include "habilitation", which they describe as services "provided to individuals with mental retardation or related conditions." This is an unacceptable definition. First, individuals with mental retardation can experience co-occurring mental illness or physical ailments requiring rehabilitation. To deny them all rehabilitation services is a clear violation of the amount, duration and scope provisions at 42 USC 1396a(a)(10) (B) and the regulations prohibiting a denial of services on the bases of diagnosis. 42 CFR § 440.230(c).

Perhaps what CMS meant to say was that "habilitation" services are services intended to treat a person's mental retardation or related condition. But this too would be inconsistent with even the narrowest possible reading of the statute. The behavioral aspects of mental retardation and related conditions, such as autism, can include functional losses that can be restored. If a child with autism, for example, is functioning acceptably in school one month, and is acting out inappropriately the next, he needs rehabilitative services to "restore" him to his "best possible functional level". It does not matter, under the statute, whether his outbursts were caused by his autism or were due to some unidentified stressor at home or in the classroom. He needs, and is entitled to receive under EPSDT, rehabilitative services. Moreover, by definition "mental retardation" can manifest itself anytime before the age of 18 years. Clearly there are cases of individuals who, as a result of the childhood or adolescent onset of mental retardation or related conditions, lost functional abilities and need rehabilitative services to restore those abilities.

Recommendation: Eliminate this section entirely.

Alternative: Eliminate the second sentence, and describe habilitation in terms of the service (e.g., to teach a new skill that will not help to address any functional loss or any inappropriate behaviors), rather than in terms of the individual to be served.

Proposed § 441.45(b)(1) – Services intrinsic to non-Medicaid programs

The proposed rule announces that services will not be provided if they are an "intrinsic element" of a program other than Medicaid, such as education, foster care and juvenile justice. 72 Fed. Reg. at 45212 (Proposed § 441.45(b)(1)). The term "intrinsic element" is not well defined, and will likely cause confusion for state Medicaid officials and providers and could cause erroneous denials of coverage for services. Since many children in schools, and the majority of children in the foster care and juvenile justice systems could benefit greatly from mental health rehabilitation services, it is particularly unwise to limit or complicate access to services in these systems, so long as the services are otherwise consistent with the requirements of Title XIX. It is particularly important with respect to services provided through another program that does not have a clear and enforceable obligation to provide the needed rehabilitation service but is willing/able to incorporate it into their existing programs with the help of MA funds.

In fact, this proposed limitation on funding rehabilitation services through non-medical programs is contrary to the best thinking in recent years about the mental health of our children. For example, the Center for Mental Health Services, Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services has stated that "The system of care approach to organizing service systems and providing services to children with serious emotional disturbance and their families has become widely accepted and continues to offer a framework for system reform." The Comprehensive Community Mental Health Services for Children and Their Families Program, Annual Report to Congress 2002-2003, at 49. They describe one of the eight "core system of care principles" as: "Interagency: The involvement and *partnership* of core agencies in multiple child-serving sectors, including child welfare, health, juvenile justice, education, and mental health." Id., at 5 (emphasis added)

Moreover, the proposal is inconsistent with the intent of Congress. Under the statutory definition of EPSDT, children are eligible for all covered services necessary to correct or ameliorate a physical or mental condition, even if they could be covered under another program. 42 U.S.C. § 1396d(r)(5). This was made explicit with respect to education-related services in 42 U.S.C. § 1396b(c) which provides that the Secretary cannot prohibit or restrict coverage of Medicaid services simply because the services are included in an individualized education plan for IDEA purposes. Finally, during consideration of the Deficit Reduction Act of 2005 (Pub. L. 109-171), Congress considered *but rejected* an "intrinsic element" test for rehabilitation services. *See* Jeff Crowley, Kaiser Commission on Medicaid and the Uninsured, *Medicaid's Rehabilitation Services Option: Overview and Current Policy Issues*, 1 (August 2007). This is indicative that the "intrinsic element" test does not reflect Congress' intent with regard to coverage of rehabilitation services.

Recommendation:

We concur with the recommendation of the Bazelon Center for Mental Health Law that § 441.45(b) should be omitted, because it conflicts with the EPSDT requirements and other parts of the Medicaid statute.

Proposed § 441.45(b)(6) - Room and Board

We have many clients who are placed in, and remain in, institutional facilities, despite prescription for smaller community based residential programs, due to the fact that there are few small community-based placements available. One primary reason they are not available is that MA will only pay for the room and board costs if the child is placed in an "inpatient psychiatric hospital" (i.e., an accredited Residential Treatment Facility).

A dozen years ago the Court of Appeals of the 5th Circuit, in deciding whether room and board is excluded from the rehabilitation option, stated that: " § 1396d(a)(13) is ambiguous and the legislative history of the section sheds no light." The Court therefore gave deference to HCFA's interpretation excluding room and board. State of Tex. v. U.S. Dept. of Health and Human Services 61 F.3d 438, 442 (5th Cir.1995). While the Court held that HCFA's interpretation was permissible, it did not hold that the interpretation was required. In light of the direction the nation has been going in recent years to move people from segregated institutional settings to integrated community based settings, we believe it is time to reconsider this interpretation.

Four years after the Texas decision, the United States Supreme Court, in Olmstead v. L.C. ex rel. Zimring 527 U.S. 581, 119 S.Ct. 2176 (U.S.Ga.,1999) held that "under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." 527 U.S. at 607. By only covering room and board in accredited RTFs, as opposed to smaller programs that are more integrated into the community, CMS makes it difficult for states to comply with their obligations under the Americans with Disabilities Act and the United States Supreme Court opinion in Olmstead to deinstitutionalize people with disabilities.

Under the EPSDT provisions, children are supposed to be provided all covered Medical assistance services, including "rehabilitation services", that are medically necessary. As the Texas Court noted, nothing in the MA statute explicitly excludes room and board from the definition of "rehabilitation services" (other than in IMDs). If a child needs, and a doctor prescribes, an out of home, community-based, residential mental health placement for rehabilitative purposes, the only thing preventing the coverage of that service is CMS's interpretation as expressed in these proposed regulations. Excluding room and board from the rehabilitation option does a great disservice to children and, while permissible (per the 5th Circuit), is not required by the statute.

Recommendation: Eliminate this section, and clarify that the full cost of residential programs smaller than 17 beds will be covered when prescribed by an appropriate licensed professional as medically necessary for rehabilitation.

Thank you for your consideration of these comments.

Submitter : **Date: 10/12/2007**

Organization :

Category : **Intermediate Care Facility for the Mentally Retarded**

Issue Areas/Comments

Background

Background

GENERAL

GENERAL

As a family member of a person with developmental disabilities, I urge you to withdraw the proposed regulations regarding habilitative services for people with developmental disabilities. The regulations would eliminate critical services that enable people with intellectual disabilities and related conditions to improve or maintain basic life skills. The regulations impose discriminatory and arbitrary criteria to exclude people with developmental disabilities from receiving these essential services.

Submitter : Mr. scott maldonado **Date:** 10/12/2007

Organization : qsac

Category : Health Care Professional or Association

Issue Areas/Comments

Background

Background

I urge you to withdraw the proposed regulations regarding habilitative services for people with developmental disabilities. The regulations would eliminate critical services that enable people with intellectual disabilities and related conditions to improve or maintain basic life skills. The regulations impose discriminatory and arbitrary criteria to exclude people with developmental disabilities from receiving these essential services.

Submitter : **Ms. Sheila Lehman** **Date: 10/12/2007**

Organization : **Cedar Rapids Community Schools**

Category : **Other Health Care Provider**

Issue Areas/Comments

Background

Background

See attachment

Collections of Information Requirements

Collections of Information Requirements

See attachment

GENERAL

GENERAL

See Attachment

Provisions of the Proposed Rule

Provisions of the Proposed Rule

See attachment

Provisions of the Proposed Rule

Provisions of the Proposed Rule

See attachment

Regulatory Impact Analysis

Regulatory Impact Analysis

See attachment

Response to Comments

Response to Comments

See attachment

CMS-2261-P-957-Attach-1.DOC

CMS-2261-P-957-Attach-2.DOC

#957

October 11, 2007

Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-2261-P
P.O. Box 8018
Baltimore, MD 21244-8018

Dear Sir(s) or Madam(s):

I am a Special Education Administrator for a local school district in Iowa. I am writing in response to the August 13, 2007 *Federal Register* announcement requesting public comment on the Notice for Proposed Rule Making for Coverage for Rehabilitative Services under the Medicaid program.

I am deeply concerned about the devastating impact that the proposed CMS regulations for the rehabilitation services option will have on the welfare of children with disabilities. The elimination of these reimbursements would inevitably shift the financial responsibility for rehabilitation claims to individual school districts and early childhood providers across the nation. The Administration estimates that the elimination of the reimbursement for the Medicaid rehabilitation services option will provide a savings of $2.29 billion over the next five years. However, there is no corresponding increase in funding for the federal special education law, the Individuals with Disabilities Education Act (IDEA), that will enable schools and early childhood providers to make up for the reduction in Medicaid reimbursements for rehabilitation services option provided to children with disabilities.

I have read that CMS is proposing the elimination of reimbursement for transportation because the program wasn't implemented correctly. I would encourage you to put your emphasis on correcting the implementation and not on eliminating this program. Doing this would be in keeping with the central purpose of the Medicaid law, which is to provide rehabilitative services.

Section 1901 of the Social Security Act reads,

> "For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish...(2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this title."

Not only does the proposed rule not further this core goal of Medicaid, it erects new obstacles for Medicaid beneficiaries to receive medically necessary rehabilitative services. It does not justify the need for new rules and it does not provide a reasonable description of the impact of the proposed rule on Medicaid beneficiaries or rehabilitative services providers. The Regulatory Impact Analysis makes numerous assertions that are contradictory and appear intended to mask the impact of the proposed rule. For example, it states that, "the Secretary certifies that this major rule would not have a direct impact on providers of rehabilitative services that furnish services pursuant to section 1905(a)(13) of the Act." This just isn't true. This proposed rule would have a significant impact in our district. We depend greatly on the revenue we receive from Medicaid reimbursements to provide for the needs of our very special students with medical needs.

For these and other reasons, I urge the Secretary to withdraw the proposed rule.

Thank you for allowing the public to provide comments on the Notice for Proposed Rule Making for Coverage for Rehabilitative Services under the Medicaid Program and for considering CEC's recommendations.

Sincerely,

Sheila Lehman
Associate Director, Special Services
Cedar Rapids Community School District
Cedar Rapids, Iowa

Submitter : Ms. Aimee Ossman **Date:** 10/12/2007

Organization : National Association of Children's Hospitals

Category : Health Care Provider/Association

Issue Areas/Comments

Background

Background

See attachment.

GENERAL

GENERAL

See attachment.

CMS-2261-P-958-Attach-1.DOC

#958

October 12, 2007

Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attn: CMS-2261-P
7500 Security Boulevard
Mail Stop C4-26-05
Baltimore, MD 21244-1850

Attn: CMS—2261--P
Medicaid Program; Coverage for Rehabilitative Services

Dear Centers for Medicare and Medicaid Services:

The National Association of Children's Hospitals (N.A.C.H.) is pleased to provide comments to the Centers for Medicare and Medicaid Services (CMS) on its proposed rule, "Medicaid Program; Coverage for Rehabilitative Services," published in the August 13th *Federal Register*. The changes proposed in this regulation would have a negative impact on children's hospitals and the children they serve. We ask that you make necessary changes to the proposed rule to ensure that children with special health care needs continue to receive critical rehabilitation services.

Medicaid is the single largest payer for children's hospitals and the single largest insurer for children. Children's hospitals devote more than half of their care to children insured by Medicaid and more than three-fourths of their care to children with chronic or congenital conditions. More than one-fourth of all children and one-third of all children with disabilities are insured by Medicaid. The rehabilitation service category has ensured that children with chronic conditions have access to an array of physical and mental health services required for their conditions.

Although Medicaid is the major insurer for children and in particular children with disabilities, the proposed regulation fails to consider how the changes would affect children facing cerebal palsy, spina bifida, or other significant health care challenges. The regulation does not address the repercussions of these policy changes on children in foster care dealing with physical and/or mental trauma. The proposed regulation does not acknowledge the unique needs of these very vulnerable children, but attempts to make broad policy for all groups without considering how it could specifically affect children.

N.A.C.H's largest concern with the proposed rule is that it threatens the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) benefit for children. EPSDT guarantees that children insured by Medicaid receive all medically necessary services as determined by their health care provider. Absent a clarification that children would not be affected because of EPSDT, the proposed rule would limit the definition of rehabilitation services and therefore threaten the health care of children. N.A.C.H. recommends that CMS add language into the regulation to clarify that children will continue to receive all medically necessary care, including all necessary rehabilitation services, as required by EPSDT.

N.A.C.H. also has the following specific objections to the rule:

- **The proposed regulation asserts that rehabilitation services would not include services that are "intrinsic elements" of programs other than Medicaid, such as foster care, child welfare, education, and child care.** Since many of the programs highlighted in the regulation focus on children, this would have a disproportionate impact on children, specifically children in foster care or receiving other social or educational services. The regulation does not provide the criteria for what constitutes an "intrinsic element" of another program. Traditionally, Medicaid has worked closely with a multitude of programs to ensure that children get the services that they need. This new requirement would not allow federal match for services that are determined to be part of another program. Due to a lack of resources, the other programs will not be able to pay for these services without Medicaid as a partner.

  We recommend that this requirement be removed from the regulation. In order to implement such a change, the U.S. Department of Health and Human Services would need to identify other funding sources that would be able to sustain services without federal Medicaid funding. Most of the programs specified in the regulation would not have adequate resources to provide the needed services without additional funding. The result would be children not receiving medically necessary physical or mental health services.

- **The regulation does not clearly state that rehabilitation services could be provided to retain or maintain function.** In many cases, children with neuromuscular conditions, such as spina bifida or muscular dystrophy, and those with serious hearing problems or development delays require rehabilitation services that help them retain or maintain a certain function level. Many of these children would experience deterioration of their conditions without rehabilitation services.

  The preamble to the regulation does state that services could be provided to retain or maintain function if necessary to help an individual achieve a certain rehabilitation goal as outlined in their rehabilitation plan. The regulation does not include any details on what constitutes a rehabilitation goal.

  N.A.C.H. recommends adding regulatory language to clarify that rehabilitation services would include services needed to retain or maintain function. In addition, we would suggest that CMS add a definition of a rehabilitation goal for children that would include retaining or maintaining function.

- In the preamble to the regulation, CMS says that rehabilitation focuses on restoring individuals to their best functional levels. This requirement would be particularly troublesome for children because some functions may not have been possible (or age appropriate) at an earlier date. Once again, the proposed regulation fails to recognize that children have unique needs that need to be addressed.

We recommend adding language to specify that children need not demonstrate that they were once capable of performing a specific task in the past if it was not age appropriate for the children to have done so.

- The regulation states that federal matching funds for rehabilitation services are not available for room and board. Several children's hospitals, particularly specialty children's hospitals, provide inpatient rehabilitation services to children with serious health care conditions.

  We recommend that the regulation be revised to allow room and board as an appropriate rehabilitation service for children who require that level of care.

We appreciate the opportunity to present our comments and would be pleased to discuss them further. For additional information, please contact Aimee Ossman at 703-797-6023 or aossman@nachri.org. Thank you for your consideration.

Sincerely,

Peters D. Willson
Vice President, Public Policy
National Association of Children's Hospitals

Submitter : Mr. James Notter **Date:** 10/12/2007

Organization : School Board of Broward County

Category : Academic

Issue Areas/Comments

GENERAL

GENERAL

See Attachment

CMS-2261-P-959-Attach-1.PDF

#959

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

600 SOUTHEAST THIRD AVENUE • FORT LAUDERDALE, FLORIDA 33301-3125

JAMES F. NOTTER
Superintendent of Schools

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October 12, 2007

Leslie V. Norwalk
Acting Administrator
U.S. Department of Health and Human Services
7500 Security Boulevard
Baltimore, Maryland 21244

Re: Comment on CMS Proposed Rule Change: 2261-p

Dear Ms. Norwalk:

The School Board of Broward County, Florida is strongly opposed to the Center for Medicaid and Medicare Services' (CMS) proposed rule 2261-p, which alters the Federal Medicaid policy specifically as it relates to rehabilitation services. This rule, which precludes reimbursement for services that are "intrinsic elements" of programs other than Medicaid such as education, is a bad public policy. The rule is philosophically unsound, legally flawed and logistically unmanageable.

Philosophically unsound: The proposed rule reflects an old CMS philosophy that health services to children under the Individuals with Disabilities Education Act (IDEA) are not reimbursable by Medicaid. This philosophy serves no one but CMS and certainly does not serve the children in need of services. The rule attempts to make an arbitrary and artificial separation of health and education needs, when in fact, children's health cannot and should not be separated from education. Research consistently shows that healthy children learn better. If this administration truly believes that *no child should be left behind*, then the health care needs of all children must be addressed.

Legally flawed: The proposed rule contradicts existing law that allows Medicaid to be the primary payer for Medicaid students under IDEA. In 1988, the Supreme Court ruled that Medicaid is a responsible party for medically necessary health services provided to Medicaid eligible students under IDEA (Bowen vs. Massachusetts, 487 U.S. 879). In fact, Congress amended Title XIX of the Social Security Act to prohibit the Secretary of Health and Human Services from excluding Federal Medicaid assistance payments for covered benefits furnished to Medicaid eligible children whose treatment is specified in an IDEA Individualized Education Plan (IEP).

Logistically unmanageable: The rule requires a written rehabilitation plan with no less than 17 separate requirements for each student receiving rehabilitation services. This plan purportedly ensures that these services are medically necessary and designed and coordinated to lead to maximum reduction of physical or mental disability. Instead, the requirements for provider certification, comprehensive assessment, recovery goals, timelines, anticipated outcomes, etc. result in a cumbersome plan that is frequently contrary to state approved Medicaid plans. This plan as described in the rule would be similar to, but not the same as, an IEP. As such, schools would be required to either develop two plans with two different sets of standards for developing treatment plans and providing services, which is clearly a redundant activity; or develop one plan trying to incorporate elements of both, which could result in compliance issues and denial of Medicaid reimbursements.

Medicaid was legislatively designed to work along side of other programs that address the health, social and educational needs of high-risk children. This proposed rule attempts to undermine this intent by creating unreasonable requirements and exclusions in keeping neither with the letter of the law nor the spirit of the law.

We urge CMS to reconsider and withdraw this proposed rule and continue to reimburse for rehabilitation services provided to Medicaid and IDEA eligible children in school settings.

Respectfully submitted,

James F. Notter

Submitter : Ms. Kim May-Zelle **Date:** 10/12/2007

Organization : Ms. Kim May-Zelle

Category : Academic

Issue Areas/Comments

GENERAL

GENERAL

The purpose of this coment is to express my deep concern regarding the impact of the proposed regs for rehab services. Without an increase in funding for IDEA, school districts would not be capable of delivering appropriate health care services.

Submitter : Ms. Nicole Dorsey **Date:** 10/12/2007

Organization : QSAC

Category : Health Care Professional or Association

Issue Areas/Comments

Background

Background

I urge you to withdraw the proposed regulations regarding habilitative services for people with developmental disabilities. the regulations would eliminate critical services that enable people with intellectual disabilities and related conditions to improve or maintain basic life skills. the regulations impose discriminatory and arbitrary criteria to exclude people with developmental disabilities from receiving these essential services.

GENERAL

GENERAL

Submitter : **Ms. Estelle Richman** **Date: 10/12/2007**

Organization : **Pennsylvania Department of Public Welfare**

Category : **State Government**

Issue Areas/Comments

GENERAL

GENERAL

See Attachment

CMS-2261-P-962-Attach-1.DOC

Finally, the proposed regulations appear to controvert the provisions of OBRA 1989 as it related to Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services. EPSDT services are Medicaid's comprehensive and preventive child health program for individuals under the age of 21. EPSDT requires states to provide Medicaid-eligible children with periodic screening, vision, dental, and hearing services. It also requires states to provide any medically necessary health care that falls within the scope of services listed at 42 U.S.C. § 1396d(e) to a child, even if the service is not available under the State's Medicaid plan to adults. Further clarification is needed to ensure that section 441.45 (a)(5) does not apply to services delivered under the EPSDT benefit to beneficiaries under the age of 21.

rehabilitation be provided. Specifically, does rehabilitation include the

#963

Department of Health and Human Services
Centers for Medicare & Medicaid Services
Office of Strategic Operations & Regulatory Affairs

The attachment cited in this document is not included because of one of the following:

- The submitter made an error when attaching the document. (We note that the commenter must click the yellow "Attach File" button to forward the attachment.)
- The attachment was received but the document attached was improperly formatted or in provided in a format that we are unable to accept. (We are not are not able to receive attachments that have been prepared in excel or zip files).
- The document provided was a password-protected file and CMS was given read-only access.

Please direct any questions or comments regarding this attachment to (800) 743-3951.