

Submitter : Dr. Barbara D'Incau

Date: 11/06/2007

Organization : Dr. Barbara D'Incau

Category : Individual

Issue Areas/Comments

GENERAL

GENERAL

See Attachment.

CMS-2287-P-867-Attach-1.DOC

Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-2287-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, gifts and talents, or both. As a member of CEC, I am writing in response to the September 7, 2007 *Federal Register* announcement requesting public comment on the Notice for Proposed Rule Making for the elimination of school administration expenditures and transportation for Medicaid-eligible children who receive services under Part B and Part C of the Individuals with Disabilities Education Act.

Introduction

I am deeply concerned about the devastating impact that the proposed Centers for Medicare and Medicaid Services (CMS) regulations for the elimination of reimbursements for transportation and administrative claiming under Medicaid will have on the welfare of children with disabilities. The elimination of these reimbursements would inevitably shift the financial responsibility for these claims to individual school districts and early childhood providers across the nation. The Administration estimates that the elimination of these reimbursements will provide a savings of \$635 million in the first year and \$3.6 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 to schools and early childhood providers.

Major Issues and Concerns

I have major issues with the proposed rule to eliminate the Medicaid reimbursement for transportation and administrative claiming. I believe it is flawed and should be withdrawn. I recognize that the proposed rule, in some cases, seeks to address legitimate policy issues. However, according to the background for the proposed regulations, "school-based administrative activities do not meet the statutory test under section 1903(a)(7) of being 'necessary...for the proper and efficient administration of the State plan.'" I strongly disagree with this statement. The provision of transportation services and administrative claiming under Medicaid are indeed necessary for carrying out state Medicaid plans. Many medically provided services under Medicaid are provided at the school and early childhood settings where Medicaid-eligible children attend, whether or not those services are provided by employees of the state or the local Medicaid agency. This is particularly relevant because the background to the proposed regulations also states that, "CMS recognizes that schools are valid settings for the delivery of Medicaid services", yet the proposed rules would still not recognize the need for transportation to

and from school for Medicaid-eligible children who take advantage of these services at school and early childhood settings.

In addition, the proposed regulations state that they were drafted, “Due to inconsistent application of Medicaid requirements by schools to the types of administrative activities conducted in the school setting...” However, the studies that conclude that the misfeasance conducted by some schools in claiming Medicaid reimbursements only took into account an insignificant number of schools. CMS should rightly impose sanctions on those schools and early childhood providers that improperly or illegally misrepresent claims for Medicaid reimbursement; punishing every school and early childhood provider nationwide is not the proper course of action to take in this instance.

I believe that Congress and the Administration should work together to achieve consensus on appropriate policies and procedures to ensure that Medicaid beneficiaries receive the highest quality services, consistent with Title XIX of the Social Security Act, and to ensure that states operate their Medicaid programs to achieve the best outcomes and in the most publicly accountable manner. I 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 illnesses, developmental disabilities, and child welfare), services providers, and representatives of affected Medicaid populations. I am not aware of any meaningful effort by the Secretary of HHS or CMS to work with affected stakeholders to address current policy concerns. Indeed, I am 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 Medicaid.

Legal Basis for Providing Transportation and Administrative Claiming

The proposed CMS regulations to eliminate Medicaid transportation and administrative claiming contradict current law. There is firm legal standing for the allowable use of Medicaid claiming for transportation and administration.

First, Section 1903(c) of the Title XIX of the Social Security Act states that “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 C of such Act.” Clearly the proposed regulations would be in direct conflict with this provision of law and would not further the purposes of Title XIX of the Social Security Act.

Second, school-based claiming was protected in the courts in the 1987 *Bowen* case, when the appellate court ruled that school-based Medicaid claims were reimbursable, and the Supreme Court elected to let that decision stand by denying cert.

Third, the proposed rules would not comply with Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services. Under current law, states must provide EPSDT services to all children who are eligible for the Medicaid program. This is one of the mandates that states must meet in order to operate a Medicaid program. Through EPSDT, Medicaid-eligible children must be seen periodically by health care professionals. In 1989 the law was amended to mandate that states provide any necessary Medicaid service that a child requires regardless of whether the state specifically covers the service as part of its regular Medicaid program. A state cannot restrict the services that it provides under the EPSDT mandate; it must make all types of services available, including the services children with disabilities require.

Fourth, under the Medicare Catastrophic Coverage Act of 1988, states are permitted to obtain limited funds for Individualized Education Program-related services and for early intervention/family support services as defined in the individualized family service plan (IFSP). The proposed regulations would deny legally allowable claims to provide services under IEPs and IFSPs.

Finally, the proposed rules would go beyond the regulatory scope and power of the Executive Branch and is inconsistent with Medicaid law. To the extent that policy changes are needed, I believe that the legislative process is the appropriate arena for addressing these issues.

Federal Cost Shifting and Reduced Levels of Service

The proposed rules for the elimination of the Medicaid transportation and administrative claiming will be a huge financial hit to already cash-strapped schools and early childhood providers. The federal government has not even provided half of the promised funds for the IDEA, and denying schools and early childhood providers in this country an additional \$635 million will only make a bad situation worse. This in turn will shift the financial burden to state and local governments to pay a greater share for required services under IEPs and IFSPs, and the frequency and/or intensity of those services may be reduced.

Conclusion

The proposed CMS rules to eliminate the transportation and administrative claiming for schools and early childhood providers under Medicaid are both misguided and contrary to existing legal precedent. For the reasons stated here, I urge the Secretary of Health and Human Services to withdraw the proposed rule.

Thank you for allowing the public to provide comments on the Notice for Proposed Rule Making for the elimination of school administration expenditures and transportation for school-age children under the Medicaid program, and thank you for considering my comments and recommendations.

Sincerely,
Barbara D'Incau, Ph.D.

Submitter : Kathryn Fernandes
Organization : Santa Cruz County Office of Education
Category : Individual
Issue Areas/Comments

Date: 11/06/2007

GENERAL

GENERAL

I am opposed to CMS-2287-P. It s bad policy, and could result in increased costs through missed opportunities to get kids covered by health insurance and connected to services they need before health issues become catastrophic.

CMS-2287-P-869

Submitter : Mrs. Joey Schaffer
Organization : Guadalupe Union School District
Category : Social Worker

Date: 11/06/2007

Issue Areas/Comments

GENERAL

GENERAL

See Attachment

CMS-2287-P-869-Attach-1.DOC

**Guadalupe Union School District**

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4681 Eleventh St.
Guadalupe, CA. 93434
(805) 343-1194

November 7, 2007

Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Attention: CMS-2287-P,
Mail Stop S3-14-22
7500 Security Boulevard
Baltimore, MD 21244

Re: Opposition to proposed rule CMS-2287-P

Dear Center for Medicare and Medicaid Services,

I am writing today to let you know that I am opposed to CMS-2287-P, I feel that it is a bad policy and could result in increased cost through missed opportunities to get kids covered by health insurance and connected to services they need before health issues become catastrophic.

Further, contrary to CMS' statement that school-based MAA is "not necessary for the proper and efficient administration of the State plan," today's schools and their staff are *the* primary source of information and referral for families on a wide range of services including those covered by the Medicaid program. Parents trust and depend on school staff for information on everything from housing to food to health services and since virtually all children attend school it is absolutely a "proper and efficient" system to utilize.

In their proposed rule, CMS tries to make the case that all activities and services performed by school district staff simply support educational programs, overlap with educational programs, or are required by IDEA, and therefore don't directly or specifically benefit the Medicaid program. In fact, we know that every day school staff assists students in extraordinary ways that go above and beyond educational programs. For example, in our small Guadalupe Union School District, we enrolled 358 children into MediCal, Healthy Families and Healthy Kids Programs this year alone. In addition, we provide free dental screenings for 1200 children per year and then connect them with insurance programs and dental providers. We are able to provide translation at IEP, SST Meetings where we have numerous opportunities to provide outreach to parents who otherwise be unaware of the health services and programs available to them. We are able to connect numerous children to Mental Health program, arrange transportation, etc. etc.. And lastly, with our Medical reimbursement funds were able to fund a Licensed Counselor, who is able to see our students on site.

In the area of specialized transportation, CMS justifies that "students receive transportation from home to school and back regardless of whether or not they are determined eligible for special education services." Therefore, specialized transportation services should not be reimbursable through the LEA program. However, the cost of providing specialized transportation – either in a wheel chair accessible vehicle or litter van – is significantly more expensive than transportation provided to regular education students.

Sincerely,
Joey Schaffer, QMHW



**AMERICAN
PUBLIC
TRANSPORTATION
ASSOCIATION**

November 6, 2007

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attn: CMS-2287-P
Post Office Box 8017
Baltimore, Maryland 21244-8017

RE: Comments to Docket Number CMS-2287-P

Administrator McClellan:

On behalf of the more than 1,500 member organizations of the American Public Transportation Association (APTA), I write to provide comment on the Centers for Medicare and Medicaid Services' (CMS) Notice of Proposed Rulemaking (NPRM) concerning Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School, published September 7, 2007, at 72 FR 51397.

About APTA

APTA is a non-profit international trade association of more than 1,500 public and private member organizations, including transit systems; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than ninety percent of Americans who use public transportation are served by APTA member transit systems.

The Proposed Rule Will Force States to Splinter Coordinated Transportation Plans or Lose Federal Funding

The determination that transportation is "only necessary for the proper and efficient administration of the State plan when conducted by employees of the State or local Medicaid agency" flies in the face of the concept of coordinated transportation planning dictated by Executive Order 13330 (EO 13330), *Human Services Transportation Coordination*, issued February 24, 2004. That Executive Order directs the Secretary of Health and Human Services to promote interagency cooperation in the provision of transportation services. To determine that transportation is only necessary when performed 'in-house' directly contradicts EO 13330 and fails to recognize the efficiencies available when transportation is a coordinated undertaking. Moreover, it is unlikely that most local agencies could economically or practically substitute 'in-house' services for those available through partnership with local public transportation agencies.

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Research and Technology
Jeanne Krieg
Human Resources
Angela Iannuzziello
Canadian Members
Hugh A. Moss
Small Operations
David Solow
Commuter and Intercity Rail

President
William W. Miller

The proposed rule should be withdrawn and the matter submitted to the Interagency Transportation Coordinating Council, created by EO 13330, to ensure any future CMS rulemaking remains consistent with the United We Ride Program and the Executive Order.

The Proposed Rule Abandons Long-Standing Practices Without Authority

As recognized in the NPRM itself, this rule abandons CMS' own guidance, specifically the May 2003 "Medicaid School-Based Administrative Claiming Guide," CMS' May 21, 1999 letter to State Medicaid Directors, and the 1997 guidance in "Medicaid and School Health: A Technical Assistance Guide." Although the underlying statutory basis for transportation services has not changed in any significant aspect and no change in underlying facts is cited, CMS seeks to reinterpret that statutory basis as it applies new definitions of necessity. With at least ten years of guidance issued by CMS and intervening reauthorization of the program, it is clear that Congress believes the long standing practices were consistent with Congressional intent. We believe it is beyond CMS' authority to make this drastic alteration in the program without specific legislative direction.

The Proposed Rule is a Poor Response to Perceptions of Abuse

The NPRM discusses, in section I.D., CMS' concerns with fraud, abuse, and improper allocation of costs. Rather than address specific concerns or allegations, CMS has elected to eliminate virtually all reimbursement for school transportation, without regard to necessity. We suggest this draconian response is not only unwise but, as explained above, effected without legislative authority and should be immediately rescinded. CMS' admitted inability to adequately regulate or oversee its program does not justify ending the program.

This Proposed Rule Would Effectively Transfer the Costs of Transporting Children to Local Public Transportation Agencies

The result of this proposed rule is inescapable – the \$3.6 billion dollars cited in the NPRM would amount to a \$3.6 billion burden on state and local authorities. Public transportation agencies, already overtaxed by the most extensive ridership in 50 years would find themselves responsible for unreimbursed expenses of transporting thousands of students in complementary paratransit services designed for persons whose disabilities limit them from using fixed route transit services.

Taken together with CMS' August 24, 2007 proposal to severely limit reimbursement for non-emergency medical transportation services provided by public transportation agencies (Notice of Proposed Rulemaking, Non-Emergency Medical Transportation, 72 FR 48604, docket number CMS-2234-P, this amounts to a major abdication of CMS responsibility and an unprecedented shift of financial burdens from CMS to state and local authorities and their public transportation agencies. Clearly, CMS' analysis under the *Unfunded Mandates Reform Act* and otherwise is substantially flawed. To conclude that local government *always* had the responsibility to pay these massive costs but that CMS has somehow gratuitously provided funding over the years

Docket Management Facility
November 1, 2007
Page 3

is disingenuous, at best. This NPRM represents an unfunded mandate and violates the *Unfunded Mandates Reform Act*.

Moreover, stressing the state and local governments with the additional financial burden of this proposed rule threatens the ability to provide paratransit services to the ever growing population of seniors and persons with disabilities. In attempting to reduce federal outlays, the proposed rule would damage the availability of transportation services to the seniors and persons with disabilities most reliant on those services. This insufficiently explored impact on state and local governments is an additional reason this proposed rule should be withdrawn in favor of additional study and coordination.

We greatly appreciate the opportunity to assist CMS in coordinating human services based transportation services and stand ready to provide information, research, or other assistance necessary in fully exploring the consequences of proposed strategies. For additional information, please contact James LaRusch of APTA's Executive Office at (202) 496-4808 or jlarsch@apta.com.

Sincerely yours,

A handwritten signature in black ink, appearing to read "William W. Millar".

William W. Millar
President

WWM/cbo

Submitter : Mrs. Kimberly Fox
Organization : Oak Park School
Category : Congressional

Date: 11/06/2007

Issue Areas/Comments

GENERAL

GENERAL

Why is it that we always try to hurt the people who need it the most. Schools are suffering enough with NCLB. These children need these services. NCLB has already left so many children behind and teachers burn-out. Is this just a ploy to destroy the whole American Education System? Well you are all doing a good job of it. Teachers could already use secretaries to keep up with the paper work. Now lets stick another knife in and tell teachers they are accountable to fix it. I just read a study saying that a child's home life affects the quality of what they are capable of learning. HELLO, have you guys just figured this out? Get with the program! Quit trying to deny these students a fair education.

Submitter : Mr. Art Dowell
Organization : Kim School, Kim, Colorado
Category : Congressional

Date: 11/06/2007

Issue Areas/Comments

GENERAL

GENERAL

CMS-2287-P - Medicaid Program; Elimination of Reimbursement under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children between Home and School.

Congress continues to make cuts where the people suffering from the reductions do not have the ability or influence to fight back. It is a shame that our leaders want to make budget cuts at the expense of one of the most needy and most helpless segments of our society.

Submitter : Ms. Marianne Jones
Organization : Pittsylvania Co. Schools
Category : Academic

Date: 11/06/2007

Issue Areas/Comments

GENERAL

GENERAL

As a special education teacher, I would like to say I oppose the elimination of reimbursement under Medicaid for school administration expenditures and cost related to transportation.

Submitter : Ms. Sandy Pugh

Date: 11/06/2007

Organization : Special Education District of Lake County

Category : Individual

Issue Areas/Comments

GENERAL

GENERAL

See Attachment

CMS-2287-P-873-Attach-1.DOC

Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-2287-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, gifts and talents, or both. As a member of CEC, I am writing in response to the September 7, 2007 *Federal Register* announcement requesting public comment on the Notice for Proposed Rule Making for the elimination of school administration expenditures and transportation for Medicaid-eligible children who receive services under Part B and Part C of the Individuals with Disabilities Education Act.

Introduction

I am deeply concerned about the devastating impact that the proposed Centers for Medicare and Medicaid Services (CMS) regulations for the elimination of reimbursements for transportation and administrative claiming under Medicaid will have on the welfare of children with disabilities. The elimination of these reimbursements would inevitably shift the financial responsibility for these claims to individual school districts and early childhood providers across the nation. The Administration estimates that the elimination of these reimbursements will provide a savings of \$635 million in the first year and \$3.6 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 to schools and early childhood providers.

Major Issues and Concerns

I have major issues with the proposed rule to eliminate the Medicaid reimbursement for transportation and administrative claiming. I believe it is flawed and should be withdrawn. I recognize that the proposed rule, in some cases, seeks to address legitimate policy issues. However, according to the background for the proposed regulations, "school-based administrative activities do not meet the statutory test under section 1903(a)(7) of being 'necessary....for the proper and efficient administration of the State plan.'" I strongly disagree with this statement. The provision of transportation services and administrative claiming under Medicaid are indeed necessary for carrying out state Medicaid plans. Many medically provided services under Medicaid are provided at the school and early childhood settings where Medicaid-eligible children attend, whether or not those services are provided by employees of the state or the local Medicaid agency. This is particularly relevant because the background to the proposed regulations also states that, "CMS recognizes that schools are valid settings for the delivery of Medicaid services", yet the proposed rules would still not recognize the need for transportation to

and from school for Medicaid-eligible children who take advantage of these services at school and early childhood settings.

In addition, the proposed regulations state that they were drafted, “Due to inconsistent application of Medicaid requirements by schools to the types of administrative activities conducted in the school setting...” However, the studies that conclude that the misfeasance conducted by some schools in claiming Medicaid reimbursements only took into account an insignificant number of schools. CMS should rightly impose sanctions on those schools and early childhood providers that improperly or illegally misrepresent claims for Medicaid reimbursement; punishing every school and early childhood provider nationwide is not the proper course of action to take in this instance.

I believe that Congress and the Administration should work together to achieve consensus on appropriate policies and procedures to ensure that Medicaid beneficiaries receive the highest quality services, consistent with Title XIX of the Social Security Act, and to ensure that states operate their Medicaid programs to achieve the best outcomes and in the most publicly accountable manner. I 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 illnesses, developmental disabilities, and child welfare), services providers, and representatives of affected Medicaid populations. I am not aware of any meaningful effort by the Secretary of HHS or CMS to work with affected stakeholders to address current policy concerns. Indeed, I am 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 Medicaid.

Legal Basis for Providing Transportation and Administrative Claiming

The proposed CMS regulations to eliminate Medicaid transportation and administrative claiming contradict current law. There is firm legal standing for the allowable use of Medicaid claiming for transportation and administration.

First, Section 1903(c) of the Title XIX of the Social Security Act states that “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 C of such Act.” Clearly the proposed regulations would be in direct conflict with this provision of law and would not further the purposes of Title XIX of the Social Security Act.

Second, school-based claiming was protected in the courts in the 1987 *Bowen* case, when the appellate court ruled that school-based Medicaid claims were reimbursable, and the Supreme Court elected to let that decision stand by denying cert.

Third, the proposed rules would not comply with Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services. Under current law, states must provide EPSDT services to all children who are eligible for the Medicaid program. This is one of the mandates that states must meet in order to operate a Medicaid program. Through EPSDT, Medicaid-eligible children must be seen periodically by health care professionals. In 1989 the law was amended to mandate that states provide any necessary Medicaid service that a child requires regardless of whether the state specifically covers the service as part of its regular Medicaid program. A state cannot restrict the services that it provides under the EPSDT mandate; it must make all types of services available, including the services children with disabilities require.

Fourth, under the Medicare Catastrophic Coverage Act of 1988, states are permitted to obtain limited funds for Individualized Education Program-related services and for early intervention/family support services as defined in the individualized family service plan (IFSP). The proposed regulations would deny legally allowable claims to provide services under IEPs and IFSPs.

Finally, the proposed rules would go beyond the regulatory scope and power of the Executive Branch and is inconsistent with Medicaid law. To the extent that policy changes are needed, I believe that the legislative process is the appropriate arena for addressing these issues.

Federal Cost Shifting and Reduced Levels of Service

The proposed rules for the elimination of the Medicaid transportation and administrative claiming will be a huge financial hit to already cash-strapped schools and early childhood providers. The federal government has not even provided half of the promised funds for the IDEA, and denying schools and early childhood providers in this country an additional \$635 million will only make a bad situation worse. This in turn will shift the financial burden to state and local governments to pay a greater share for required services under IEPs and IFSPs, and the frequency and/or intensity of those services may be reduced.

Conclusion

The proposed CMS rules to eliminate the transportation and administrative claiming for schools and early childhood providers under Medicaid are both misguided and contrary to existing legal precedent. For the reasons stated here, I urge the Secretary of Health and Human Services to withdraw the proposed rule.

Thank you for allowing the public to provide comments on the Notice for Proposed Rule Making for the elimination of school administration expenditures and transportation for school-age children under the Medicaid program, and thank you for considering my comments and recommendations.

Submitter : Ms. Kelly Immordino

Date: 11/06/2007

Organization : Ms. Kelly Immordino

Category : Individual

Issue Areas/Comments

GENERAL

GENERAL

See Attachment

CMS-2287-P-874-Attach-1.DOC

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Comment in Response to File No. CMS-2287-P; RIN 0938-AP13**

“Medicaid Program; Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School.”42 CFR Parts 431, 433, 440.

Comment Submitted By: Ms. Kelly M. Immordino
Villanova University School of Law
299 North Spring Mill Road
Villanova, PA 19085
Kimmordino@law.villanova.edu

Comments Submitted To: Secretary Mike Leavitt
Center for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS-2287-P
Mail Stop S3-14-22
7500 Security Boulevard
Baltimore, MD 21244

Comments Submitted Electronically On: November 6, 2007

Date: November 6, 2007

I. Introduction

I would like to take the opportunity to thank the Department of Health and Human Services for giving me the opportunity to comment on this topic. Furthermore, I appreciate the Department's initiative to correct a problem afflicting the Medicaid program. Through this comment, I hope to draw the agency's attention to the potential consequences which could occur as a result of promulgating this rule. Additionally, I seek to offer suggestions designed to bridge the gap between the agency's proposed rule and the parties affected by the rule's implementation.

My reason for writing this comment stems from both my passion for developing disabled children as well as my profound belief that educating disabled children requires a cooperative effort. I write out of concern that this proposed rule will hinder the development of this country's disabled children receiving care under Medicaid as well as hurt the school districts and providers dedicated to facilitating the growth of these children. I have had the privilege and honor of working with disabled children and school districts through various contexts and have experienced first hand the unity required to nurture and educate these children. Currently, I am a second year law student at Villanova University School of Law. It is my desire to use my degree

to further my aspirations of child advocacy and education law. Prior to the commencement of my legal education, I completed my bachelor degree at Loyola College in Maryland with a degree in political science. During my undergraduate career, I volunteered with several organizations in Baltimore dedicated to the development of disabled children in the inner city school system. I submit this comment solely of my own accord, and this comment does not reflect the thoughts or opinions of Villanova Law School or Loyola College in Maryland.

I will be commenting on CMS-2287-P, the Department's proposed rule eliminating federal Medicaid funding for "school administrative expenditures and costs related to transportation of school age children between home and school."¹ While I believe this rule acknowledges a current problem with the use of Medicaid funding, my comment will discuss the serious consequences a total elimination of federal Medicaid funds will have on the Individuals with Disabilities Education Act, the public school system and the Medicaid program. Additionally, my comment will highlight various suggestions aimed at curing the current problems with the distribution of Medicaid funds in this area without depriving educational institutions the funds needed to successfully accomplish the IDEA's goals.

II. Background of Rule and Individual with Disabilities Education Act

CMS-2287-P proposes a total elimination of federal Medicaid funds for reimbursement of administrative activities and transportation costs for disabled children with Individualized Educational Plan (hereinafter referred to as "IEP") and Individualized Family Services Plan (hereinafter referred to as "IFSP").² According to the Secretary, these expenses are no longer "necessary for the proper and effective administration of the plan."³ While the rule calls for tremendous cutbacks to various school expenses, the rule does not eliminate administrative costs which are related to "direct medical costs."⁴ Moreover, transportation to and from direct medical providers and transportation for non-school age children is not eliminated.⁵ These eliminations of reimbursement funds will, by initial estimates, reduce Medicaid expenses by \$635 million in 2009 and over \$3.6 billion over the first five years of the plans effectiveness.⁶

The Individuals with Disabilities Education Act (hereinafter referred to as "The Act" or "IDEA") was signed into law in 1975.⁷ The act was created to guarantee children with disabilities receive adequate education. Currently, the act aids over 6.5 million children between the ages of three and twenty-one.⁸ Each of these children is guaranteed the right to a free and appropriate education under the act.⁹

¹ Prop. R. 42 CFR Parts 431, 433, 440, "Medicaid Program; Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School."CMS-2287-P, RIN 0938-AP13.

² Prop. R. 42 CFR Parts 431, 422, 440, *supra*.

³ Prop. R. 42 CFR Parts 431, 422, 440, *supra*

⁴ Prop. R. 42 CFR Parts 431, 422, 440, *supra*

⁵ Prop. R. 42 CFR Parts 431, 422, 440, *supra*

⁶ Prop. R. 42 CFR Parts 431, 422, 440, *supra*

⁷ Department of Education, *Building the Legacy: IDEA 2004*, www.idea.gov (accessed October 21, 2007).

⁸ Department of Education, *Building the Legacy: IDEA 2004*, *supra*.

⁹ Report to Congress

The understanding of the IEP and the IFSP are central to the understanding of CMS-2287-P. The IEP is a plan which unites parents, educators, related services personnel and others to create an effective plan for the child's development.¹⁰ Children most often qualifying for an IEP are students with developmental disabilities including but not limited to: autism, speech and hearing problems, mental retardation. Similarly, the IFSP is a plan which begins at birth and guides a child's development. The IFSP, however, focuses more on familial integration with the child's needs in combination with early intervention.¹¹ Additionally, the IFSP does include the same assessments and developmental benchmarks as the IEP.¹²

To assure the appropriate education of disabled children, the IDEA provides funds to public school districts to aid in the cost of educating these special needs students. According to the National Education Association, the cost of educating a special education student is approximately \$16,921 per year, compared to the \$7,552 it costs to educate a non-special education student.¹³ Because of the growing expense of educating a student with disabilities, Medicaid was authorized by Congress to reimburse medically necessary services for children under the IDEA.¹⁴ These funds also included the transportation and administrative costs associated with providing the medical treatment necessary for these students, the very funds at issue in this rule.

III. Summary of Comment

I support the agency's investigations and solutions to the current issues underlying the distribution of federal Medicaid funds to schools administering services pursuant to IEP and IFSP plans. I would like to take this opportunity to explore the current need for the reimbursement of these costs as well as suggest alternatives to the complete elimination of the reimbursement of these services.

The growth the number of disabled children in the public school sector and the number of children with IEP's in the public school system, illustrate the great need for transportation and administrative costs. Forcing administrative activities to be removed from the school district and to Medicaid-trained agencies would encourage a great disconnect between the school district and the child's IEP team. The nature of the IEP promotes integration for the betterment of the child. This could create detrimental effects for children currently enrolled in the IEP program. A sweeping plan to eliminate the reimbursement of certain costs could impact the development of many disabled children as well as greatly disable the premise of the IDEA, the public school systems and the Medicaid program.

¹⁰ Cortiella, Candace, "IDEA 2004 Close Up: The Individualized Education Program (IEP)" <http://www.schwablearning.org/articles.aspx?r=978> (accessed October 27, 2007).

¹¹ Bruder, Mary Beth, "The Individual Family Services Plan." <http://endoflifecare.tripod.com/juvenilehuntingtonsdisease/id304.html> (accessed October 24, 2007).

¹² Bruder, *supra*

¹³ "Special Education and the Individuals with Disabilities Education Act." <http://www.nea.org/specialed/index.html> (accessed October 24, 2007).

¹⁴ Annett, Mary, *Billing Medicaid for School-Based Services*, <http://www.asha.org/about/publications/leader-online/archives/2002/q2/020416c.htm> (accessed October 24, 2007).

The proposed rule acknowledges the great disharmony between Medicaid and school districts. There are problems with billing accountability as well as the existence of certain ineffective administrative personnel. Rather than completely eliminate the reimbursement funds, I urge the agency to consider training programs similar in nature to the Medicare training program or the Department of Education's training programs relating to the IDEA. I further suggest that reimbursement of federal Medicaid funds become dependent on the participation in such training programs.

In the event that this agency deems these costs ineffective, I urge the agency to consider not a total elimination, but rather a partial one. By establishing more specific criteria for reimbursement funds, Medicaid may be able to create a greater synchronization between the agency and the schools. Additionally, reducing reimbursement, rather than completely eliminating reimbursement may effectively aid in both helping those schools with some burden as well as satisfy the Secretary's concern with maintaining funding for only those activities which are "necessary for the proper and effective administration of the plan."

III. Detailed Discussion of Comment

The Troubling Consequences of a Complete Removal of Medicaid Reimbursement Funds

Eliminating Federal Medicaid reimbursement expenses for school based administrative and transportation expenditures for disabled children could cause problematic effects to each party involved in this proposed rule. Not only will this rule obviously affect school districts, but the rule could have profound impacts on the IDEA and the Medicaid program.

1) Impacts to the Individuals with Disabilities Act

The Department of Education and the Individuals with Disabilities Education Act ("IDEA") created the Individualized Education Program ("IEP") and the Individualized Family Services Plan ("IFSP") with the intent to facilitate a child's development by implementing specific plans and teams to maximize a child's growth. These plans aid the overall goal of the act to guarantee that public schools provide free and appropriate education to disabled children.¹⁵ The IEP and the IFSP do not only include familial and educational goals, they are designed to include services for child's physical and mental development. This combination of educational and rehabilitative goals is designed to promote the greatest development possible in children with disabilities.

To meet this overall cohesion of education and rehabilitation, the IEP and the IFSP consist of integrated teams which unite the child's family with their educational and rehabilitative facilitators to assure that the child's needs are being met in every aspect of development. The IEP and IFSP teams include parents, teachers, special education experts, psychotherapists. These plans also integrate direct medical service providers, such as speech and language pathologists, aids and experts in special needs, into the developmental team. This unification of various

¹⁵ CRS Rep. 2006, Herz, Elicia "The Link Between Medicaid and the Individuals with Disabilities Education Act (IDEA): Recent History and Current Issues, (hereinafter "The Link") <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1008&context=crs> (accessed October 22, 2007).

specialists and parents is essential to meeting the needs of the disabled child and assuring that the child receives a “free and appropriate education.”

Direct medical services are also essential to the free and appropriate education of a disabled child. For a child to receive the most valuable educational environment, the child must continue to receive direct medical services. Because of this need, Medicaid united with the IDEA to assure that children qualifying for Medicaid were provided funds necessary for the direct medical services needed. The IDEA designated specific disabilities for which direct medical services are necessary, and it is for these services that Medicaid can currently reimburse the school district. Medicaid has become involved in the IDEA by providing partial funding for medical services provided in school.¹⁶

Currently, Medicaid will provide reimbursement for: “Audiology; developmental assessments; medical equipment; diagnostic medical services; medical supplies; nursing services; occupational therapy; physical therapy; psychological services; school health aide services; social work; speech/language pathology.”¹⁷ These provided services aid a variety of disabled children and many of these services are provided within the walls of a school. Additionally, these services are essential to enabling a child to participate in educational activities and programs.¹⁸ However, for a school district to receive reimbursement for these activities, services must meet four conditions: “(1) the child receiving the service must be enrolled in Medicaid; (2) the service must be covered in the state Medicaid plan or authorized in federal Medicaid statute; (3) the service must be listed in the child’s IEP and (4) the [school district] must be authorized by the state as a qualified Medicaid provider.”¹⁹

While this proposed rule is not eliminating the reimbursement of these direct medical services provided in schools, it is eliminating the administrative and transportation costs necessary to assure these direct medical services are provided for and are properly facilitated. Paramount to the IDEA, is the “idea” of working together to create a working developmental plan for the child. However, necessary to implementing the free and appropriate educational goals of the act are the finances which support and develop these programs and services. There is no objection that fulfilling the requirements of the IDEA is a costly expenditure. However, these expenses are necessary to encourage the development of a disabled child.

Since 1988, Congress has recognized the burden placed on school districts in financing the education and development of special education students.²⁰ This burden on school districts was a driving force behind Congress’ application of Medicaid funding to disabled children under the IDEA.²¹ After the passage of the amendment to the Social Security Act authorizing Medicaid funds to children with IEPs and IFSPs, the Center for Medicaid and Medicare Services (hereinafter referred to as “CMS”) interpreted this statute to mean that Medicaid funds were not

¹⁶ Herz, Elicia “The Link,”

¹⁷ Illinois Department of Healthcare and Family Services, *School Based Health Services* http://www.hfs.illinois.gov/annualreport/reimbursing_education.html (accessible October 22, 2007).

¹⁸ CRS Rep. 2003, Apling, Richard N. and Herz, Elicia J., “Individuals with Disabilities Education Act (IDEA) and Medicaid.” <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-7575:1> (October 26, 2007).

¹⁹ Herz, Elicia “The Link,” (supra)

²⁰ Apling and Herz, “Individuals with Disabilities Education Act (IDEA) and Medicaid.”, supra.

²¹ Apling and Herz, “Individuals with Disabilities Education Act (IDEA) and Medicaid.”, supra.

required, but allowed.²² Additionally, the CMS interpretation provides that Medicaid will only be the first payer when states have elected to pay for services pursuant to a child's IEP.

As of fiscal year 2005, Medicaid expenses for school based services amounted to \$2.9 billion. Of this total, \$2.1 billion was spent on in school Medicaid benefits and only \$834 million was spent on school-based administrative activities.²³ Yet, these costs were called to attention in President Bush's 2007 Budget proposal. President Bush declared that these administrative and transportation costs were prone to abuse.²⁴ In response, the GAO and the Secretary of this agency conducted a study to further investigate these allegations.²⁵ Although the study only included eighteen states, this study affirmed the President's conclusions.²⁶

It must be recognized that Medicaid only provides in-school services for a small number of children.²⁷ Medicaid is only responsible for the services delivered to those children already enrolled in Medicaid. It is estimated that Medicaid only provides services for one quarter of all IDEA enrolled children.²⁸ The remainder of these children receives payment for these services by other means such as state and local educational funds.²⁹ Removing Medicaid's reimbursement funds will profoundly impact the IDEA and the minority of students claiming Medicaid funds for their direct medical services. Direct Medical services are an integral part to a child's development, so much so that these services are an important part of the child's IEP or IFSP. Removing the reimbursement of administration costs has the potential to break the cohesion the IEP strives for. Without the reimbursement of funding, administrative costs may go by the wayside or worse, be unable to proceed because of financial hardships.

2) Potential Impacts to the Public School Districts

The removal of federal Medicaid funds could cause significant problems in the public school system. Quite obviously, the removal of funds will profoundly impact school districts as the removal of funding could directly affect their ability to provide services to their children. Currently, with Medicaid's help, school districts are able to allocate funds which may have been given to disabled students and the administration of their education to other areas of education and child development. These school districts have come to rely and appreciate the help Medicaid has given them, and Medicaid's help offsets other expenses necessary for educative services.

Additionally, removing the costs for transportation of children with IEPs and IFSPs could result in problematic consequences. It cannot be denied that when examined, current transportation costs for disabled children, are a costly expenditure. According to the Special Education Expenditure Project's report, "*What Are We Spending On Transportation Services for Students*

²² Herz, Elicia "The Link," (supra)

²³ Herz, Elicia "The Link," (supra)

²⁴ Herz, Elicia "The Link," (supra)

²⁵ Herz, Elicia "The Link," (supra)

²⁶ Herz, Elicia "The Link," (supra)

²⁷ Apling and Herz, "Individuals with Disabilities Education Act (IDEA) and Medicaid.", supra.

²⁸ Apling and Herz, "Individuals with Disabilities Education Act (IDEA) and Medicaid.", supra.

²⁹ Apling and Herz, "Individuals with Disabilities Education Act (IDEA) and Medicaid.", supra.

with Disabilities?” the cost of transporting a single, disabled child is approximately \$4418.³⁰ Multiply that cost by the 1.97 million kids needing transportation and the expense becomes obvious.³¹ Therefore, the federal Medicaid reimbursement for transportation costs for children with IEP’s and IFSP’s provides certain assistance to a heavy financial burden.

Unfortunately, at this time, the Secretary no longer feels that providing reimbursement for transportation expenses is “necessary for the proper and efficient administration of the plan.”³² In support of this determination, the Secretary points to the IDEA as the provider of a “free and public education.”³³ The secretary believes that because of this guarantee, Medicaid has no obligation to provide transportation costs to and from schools even if the student is receiving medical care at the school’s facilities. However, while this obligation to provide transportation is triggered when a school district provides transportation to the general student public, if the school district does not provide transportation to the general public a problem may arise. Disabled students falling in the latter category are analyzed on a case by case basis during the creation and implementation of their IEP.³⁴ If transportation is deemed necessary then the student will be provided transportation, if it is not deemed necessary then they may be denied. However, the question still lingers: *if a child is receiving some or all of their medical services at a school, why will their transportation to school not be available for coverage, but their transportation to a “direct medical service provider” will?*

The public school systems have seen a rise in the number of special education students. Without these federal funds to administer a student’s direct medical service, school districts may find themselves unable to facilitate the IEP or IFSP of their students. Therefore, absent federal funds a school district may have to assume these costs, thus possibly affecting other aspects of education and the administration of the direct medical services offered by the school.

3) Potential Impacts to the Medicaid Program

Finally, the removal of these costs could place unnecessary burden on federal and state Medicaid employees. These employees are responsible for a variety of projects both on federal and state levels. On the federal level, Medicaid employees specializing in health care are responsible for determining the policy and trends existing in Medicaid.³⁵ On the regional level, these same health care specialists are responsible for insuring that state Medicaid policies are in compliance with Federal policies.³⁶ On the state level, Medicaid employees are responsible for intake, billing procedures, and assuring that local Medicaid recipients are receiving allotted funds.

³⁰ Chambers, Jay and Parrish, Thomas, *What are We Spending On Transportation Services for Students with Disabilities, 1999-2000?*” <http://www.csef-air.org/publications/seep/national/Transportation.PDF> (accessed on October 23, 2007).

³¹ Chambers and Parrish, *What are We Spending On Transportation Services for Students with Disabilities, 1999-2000?*”, supra.

³² Prop. R. 42 CFR Parts 431, 422, 440, supra

³³ Prop. R. 42 CFR Parts 431, 422, 440, supra

³⁴ Bluth, Linda, *What are a School Systems Obligations to Provide Transportation Services to Students with Disabilities.* http://stnonline.com/stn/specialneeds/bluth_osep.htm (accessible October 21, 2007).

³⁵ Centers for Medicare and Medicaid Services, *Careers at CMS*, http://www.cms.hhs.gov/CareersatCMS/04_Positions.asp#TopOfPage (accessed October 21, 2007).

³⁶ Centers for Medicare and Medicaid Services, *Careers at CMS*, supra.

The Secretary has offered to hand over school administrative responsibilities to state Medicaid agencies. For many state Medicaid employees, these responsibilities are great and time consuming. Further burdening these employees with administrative work for children's direct medical services pursuant to the IDEA could result in problematic consequences. These employees may not be familiar with the specific medical needs of each child with an IEP or an IFSP. Moreover, these Medicaid employees may not be familiar with the specific direct medical services providers located in the school. By placing these responsibilities on the state and regional Medicaid employees, HHS could be encumbering its state and regional offices with additional work and greater accountability which may not be feasible given the employees other responsibilities.

These potential consequences lie at the heart of my concerns with the agency's proposed rule. There is no denial that serious changes must be made, however, in the absence of answers to such ambiguous questions, this agency has only muddied the waters in this area of legislation. I urge this agency to consider my suggestions and implement a more compromising rule rather than risk future uncertainty at the expense of our nation's most vulnerable children.

Suggestions to Agency to Improve Proposed Rule CMS 2287-B

1) Overview of suggestions

Despite my concerns with the broad consequences of the proposed rule, I recognize and understand the importance of regulating in this area. There is no doubt that the Medicaid program is plagued with problems and competing interests. However, in an attempt to rectify these competing interests and my personal concerns with the promulgation of this rule as it is, the remainder of my discussion will confer my suggestions to the agency. In short, I suggest the following changes to the agency:

- An implementation of a training program designed to train school administrators in proper billing and administrative procedures.
- Make federal Medicaid reimbursements based on participation in the training program.
- In the alternative, consider a reduction of administrative and transportation costs rather than a total elimination.
- Set national standards for administrative billing procedures to make oversight by current Medicaid employees more manageable and conduct further studies to create better and more effective practices in school districts.

It is my hope that the agency considers these suggestions as a means to close the gap between the Medicaid program and the IDEA and its obvious accessories.

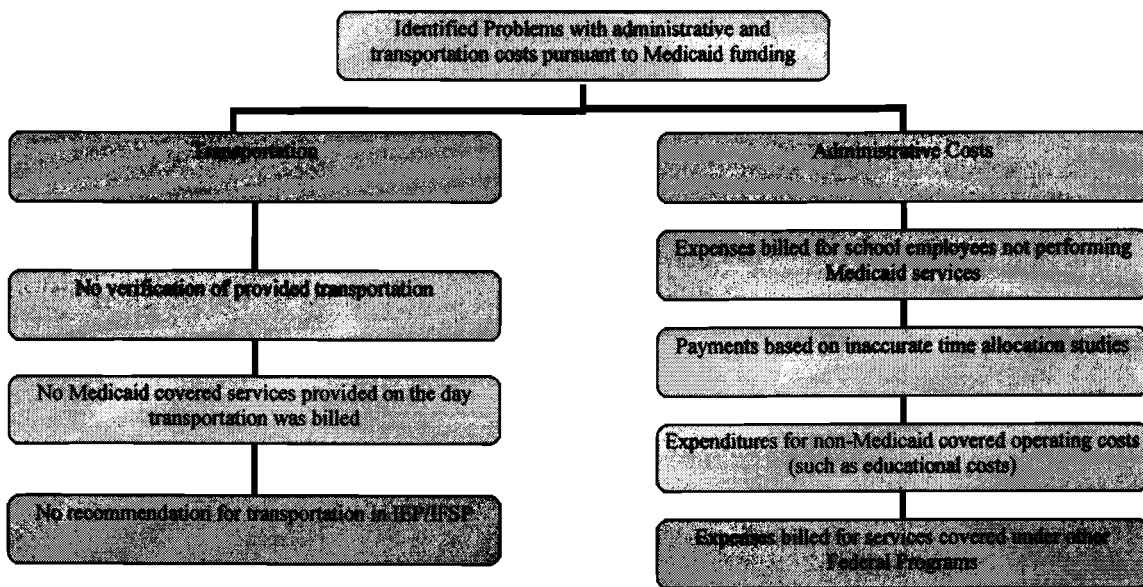
2) Identification and Background of Current Problems

Should the agency continue with this proposed regulation and the elimination of federal Medicaid reimbursement funds for administrative and transportation costs for children with IEPs and IFSPs, the agency is risking broad detrimental effects. However, by considering

compromises to the proposed rule, the agency could still effectively reduce the problems currently plaguing the administration of these costs as well as continue to aid in fulfilling IDEA’s broader objectives.

In justifying the elimination of administrative and transportation costs, the agency cites current problems and errors in the billing of these Medicaid funds. The Secretary suggests that because of the billing problems that have arisen from Medicaid’s reimbursement funds, a resolution of this issue is to transfer these administrative responsibilities to local Medicaid employees. This additional pressure on Medicaid employees could produce more detrimental effects on Medicaid as a whole. Medicaid employees will be spread thinner, will have to work to determine the developmental necessities for a child and be spread thinner over many different projects.

Through several studies, the GAO and the HHS were able to identify the abuses pursuant to transportation and administrative costs. The identification of these abuses propelled the Secretary to create this proposed rule eliminating all expenses related to administrative and transportation costs in school settings. However, this total elimination is not the answer. In diagnosing these problem areas, illustrated by the chart below, Medicaid should be able to establish better goals and systems designed to provide funding for qualifying disabled children receiving direct medical services in their school system.



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There is no denial that these problem areas may have cost Medicaid funding unnecessary expenditures. However, this is not to say that these services are no longer needed to provide direct medical services to disabled children in schools. The administrative measures needed to facilitate these medical services are great. As previously mentioned, IEP’s and IFSP’s require a team effort and communication between team members to cultivate a child’s development. By

³⁷ Herz, Elicia “The Link,” (supra)

removing federal Medicaid funding, Medicaid is risking ineffective service to children who need these services which are provided in school.

It has been well noted that this agency expresses grave concerns regarding the abuse of billing for Medicaid expenses. These concerns are not without merit. However, billing problems will not necessarily be solved by transferring these responsibilities to Medicaid employees. Fraud is an enormous problem within the Medicaid system.³⁸ These fraudulent behaviors cost Medicaid significant amounts of money and have preempted Medicaid to provide guidance for prevention.³⁹ In fact, the GAO has made two investigations within the last ten years, determining that improper billing practices have resulted in receipt of “improper payments.”⁴⁰ However, in these investigations, the GAO has recognized that these errors are the result of both poor billing practices and “uneven oversight” by the CMS.⁴¹ Additionally, the GAO discovered problems relating to school district’s receipt of these Medicaid funds. Several states had previously only received 50 – 85% of their total federal funds.⁴² Furthermore, the GAO notes one extreme case where a school district was receiving only \$7.50 per every \$100 claimed.⁴³ Therefore, problems existed both in the billing and receipt of these Federal Medicaid dollars proving the existence of an inherent disconnect in the relationships between school districts, the IDEA and Medicaid.

3) Suggestion #1: *Implement a training program to train school administrators in proper billing and administrative procedures.*

It must be recognized that while Medicaid professionals have experience in billing and administrative procedures pursuant to Medicaid coverage, school districts can often find these tasks “daunting” or overwhelming.⁴⁴ To assure that even the conditions for Medicaid coverage alone are met can seem difficult and confusing to a school administrator. While Medicaid provided two guides for assisting school professionals in these administrative tasks (*Medicaid and School Health: A Technical Assistance Guide* (August, 1997) and *Medicaid School-Based Administrative Claiming Guide* (May, 2003)) these guides have been virtually ineffective in “[bridging] the gap for the education community because of the wide variability in state Medicaid programs.”⁴⁵

As a result of these problems on both ends of administrative tasks, Medicaid has become frustrated with the billing and administrative errors which have occurred. However, rather than removing funding entirely for these administrative and transportation costs, I suggest to this agency to explore training programs similar to the training programs enacted for Medicare providers. By taking the time to effectively train school administrators to properly bill and complete administrative activities effectively, the agency would be facilitating a cohesion between school districts and the Medicaid agency.

³⁸ Center for Medicare and Medicaid Services, *Fraud and Abuse for Professionals*, <http://www.cms.hhs.gov/FraudAbuseforProfs/> (accessed October 22, 2007).

³⁹ Center for Medicare and Medicaid Services, *Fraud and Abuse for Professionals*, supra.

⁴⁰ Herz, Elicia “The Link,” (supra)

⁴¹ Herz, Elicia “The Link,” (supra)

⁴² Herz, Elicia “The Link,” (supra)

⁴³ Herz, Elicia “The Link,” (supra)

⁴⁴ Herz, Elicia “The Link,” (supra)

⁴⁵ Herz, Elicia “The Link,” (supra)

CMS has established a training program with the Medicare agency.⁴⁶ This training program, ongoing for ten years, provides “consistent, accurate and reliable information about the Medicare program.”⁴⁷ These training sessions, which occur both face to face and via the internet are useful tools for explaining and making consistent representations about the Medicare program. Additionally, these training sessions provide help with outreach, and education and enable people to educate others about their Medicare program.⁴⁸ Similarly, the Department of Education has established training programs dealing with federal TRIO and educational service programs.⁴⁹ By placing the same amount of effort into a Medicaid training program, this Agency can eliminate the current problems and continue to provide services to those who need them. While implementing a training program is an undertaking, using the resources available to school districts, such as the Internet, can enable Medicaid to communicate information accurately and reliably without compromising students’ services. Rather than placing a greater pressure on current Medicaid employees to prepare administrative tasks pursuant to children with IEPs and IFSPs, the Medicaid agency can use these training sessions to ensure greater oversight from the current administrative tasks.

4) Suggestion #2: Provide federal Medicaid reimbursements available to school districts based on the participation and completion of training programs.

Should Medicaid invest the commitment to providing training, Medicaid could make reimbursements dependant on a school districts participation in these training programs. Therefore, rather than providing 50% reimbursement automatically, schools which demonstrate a willingness to participate in training programs will receive reimbursements in accordance with their participations. By increasing knowledge about the Medicaid program and the procedures necessary for effective administration of the program, Medicaid can ensure that less billing and administrative errors will occur. Additionally, by making reimbursement funds dependant on training participation, the Agency can ensure greater participation and accountability in this problematic area.

5) Suggestion #3: Rather than completely eliminate reimbursements, consider a percentage reduction of administrative and transportation costs.

In the alternative, should Medicaid not desire to create a training program to facilitate the cohesion of these administrative activities, it is respectfully encouraged that this agency reduces the percentage of reimbursement rather than totally eliminate the federal funds. By reducing, rather than eliminating the reimbursement funds, the federal Medicaid program will still minimize its expenses related to these costs over the next five years. Reducing these costs will hopefully encourage the school districts to comply appropriately with the Medicaid standards to assure that they are receiving funds for these necessary expenses, rather than take advantage of the Medicaid program. Simultaneously, by providing a percentage of reimbursement costs, Medicaid is aiding school districts in administering these direct medical services appropriately and effectively. While this may not be the most ideal situation for the federal Medicaid program

⁴⁶ Centers for Medicare and Medicaid Services, *National Medicare Training Program*, <http://www.cms.hhs.gov/NationalMedicareTrainingProgram/> (accessed October 25, 2007).

⁴⁷ Centers for Medicare and Medicaid Services, *National Medicare Training Program*, supra.

⁴⁸ Centers for Medicare and Medicaid Services, *National Medicare Training Program*, supra.

⁴⁹ U.S. Department of Education, www.ed.gov (accessed October 25, 2007).

at this time, I believe that this solution is more favorable than risking the aforementioned broad implications of promulgating the rule as it stands.

6) Suggestion #4: Identify and establish national standards for administrative billing procedures and conduct further studies to create better and more effective practices in school districts.

This Agency has worked hard to establish a relationship with the IDEA and the public school districts. Before creating disharmony, it is urged that this agency consider national standards for these procedures. Creating national standards may make it easier to see where problems occur as well as make Agency oversight easier and more effective. By stating proper procedures and working together with the states to determine these procedures, this Agency could continue to assist the disabled children at issue in this rule as well as maintain their control over the areas currently prone to abuse.

Additionally, I urge this agency to undertake greater studies related to diagnosing these problematic areas. While the GAO and CMS has pursued some studies, I believe a greater and more intrusive number of studies is needed to gain an accurate picture of the current disconnect in the school districts. Before a total elimination occurs, I recommend the agency pursue more accurate and in-depth studies of these troubles.

VI. Summary of Recommendations

While the agency has made significant progress in addressing the current problems plaguing the Medicaid agency in this area, it is my suggestion that the agency explore alternatives prior to the promulgation of the rule as is. It is my belief that before a total elimination results, the agency should consider several less severe alternatives.

Therefore, as previously mentioned, I suggest to the agency the following:

- Implement a training program designed to unify the national standards for administration and transportation billing and oversight.
- Consider assessing reimbursement funds based on the school district's participation in these training activities.
- Consider a smaller reimbursement percentage designed to assure that the most essential and necessary costs are covered.
- Set national standards and conduct further studies designed to indicate better practices for administration and transportation expenditures and implementation costs.

I respectfully ask that the agency consider these suggestions as a means to bridge the gap between Medicaid and the IDEA and create a harmonious relationship between the two programs. By considering these alternatives, it is my wish to assure that the needs of this agency

are met without disrupting the development of the nation's disabled children receiving direct medical services from the Medicaid program.

VII. Conclusion

In conclusion, I applaud the agency for undertaking the investigation into the current problems relating to school districts and Medicaid reimbursement funds. While I do understand the agency's need to protect these funds from fraud and abuse, I urge the agency to consider the broad implications a total elimination may have on the IDEA, the medical services and Medicaid agencies. While a complete elimination may be a sure way to eradicate billing abuses and fraudulent behavior, I implore the agency to consider alternatives which would not detrimentally effect, ultimately, the development of disabled children. I commend this agency for its efforts in providing healthcare to our nation's disabled children and being a significant member a team dedicated to the development of these children. However, I encourage the agency to explore alternative options so to preserve the unity of this team and assure that our nation's disabled children continue to receive the most useful developmental tools for creating a brighter future.

I would like to thank the agency in advance for consideration of these comments. I hope that these comments and suggestions have been helpful and I would be more than happy to further discuss the above comments in greater detail should you so desire. Thank you for your concern in this matter.

Respectfully submitted,

/s/Kelly M. Immordino

Kelly M. Immordino

Submitter : Mr. Jim Walker

Date: 11/06/2007

Organization : Page Unified School District

Category : Other Association

Issue Areas/Comments

GENERAL

GENERAL

Our District strongly opposes CMS-2287-P. We are an important provider of health services to our students. 65% of our students live in poverty with most coming from the Navajo Reservation. 18% of our students have special needs. The loss of funding would severely impair our ability to provide services to all of our students.

Our district provides important outreach services to all of our children, providing information on Medicaid eligibility and services. We also provide essential and cost effective coordination for our children with severe disabilities. This cut would greatly impact our ability to provide these services to many of our families in need.

Submitter : Becky Brothers
Organization : Blount County Board of Education
Category : Academic

Date: 11/06/2007

Issue Areas/Comments

GENERAL

GENERAL

First we must fund IDEA at the 40% that was intended.
This Medicaid reimbursement is the only way we have to recoup finances to provide mandated services to any child under IDEA.
Please do not cut our funding sources.

Submitter : Mrs. Jill Robinson
Organization : Norfolk Public Schools
Category : Speech-Language Therapist
Issue Areas/Comments

Date: 11/06/2007

GENERAL

GENERAL

see attachment

CMS-2287-P-877-Attach-1.DOC

Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-2287-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, gifts and talents, or both. As a member of CEC, I am writing in response to the September 7, 2007 *Federal Register* announcement requesting public comment on the Notice for Proposed Rule Making for the elimination of school administration expenditures and transportation for Medicaid-eligible children who receive services under Part B and Part C of the Individuals with Disabilities Education Act.

Introduction

I am deeply concerned about the devastating impact that the proposed Centers for Medicare and Medicaid Services (CMS) regulations for the elimination of reimbursements for transportation and administrative claiming under Medicaid will have on the welfare of children with disabilities. The elimination of these reimbursements would inevitably shift the financial responsibility for these claims to individual school districts and early childhood providers across the nation. The Administration estimates that the elimination of these reimbursements will provide a savings of \$635 million in the first year and \$3.6 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 to schools and early childhood providers.

Major Issues and Concerns

I have major issues with the proposed rule to eliminate the Medicaid reimbursement for transportation and administrative claiming. I believe it is flawed and should be withdrawn. I recognize that the proposed rule, in some cases, seeks to address legitimate policy issues. However, according to the background for the proposed regulations, "school-based administrative activities do not meet the statutory test under section 1903(a)(7) of being 'necessary....for the proper and efficient administration of the State plan.'" I strongly disagree with this statement. The provision of transportation services and administrative claiming under Medicaid are indeed necessary for carrying out state Medicaid plans. Many medically provided services under Medicaid are provided at the school and early childhood settings where Medicaid-eligible children attend, whether or not those services are provided by employees of the state or the local Medicaid agency. This is particularly relevant because the background to the proposed regulations also states that, "CMS recognizes that schools are valid settings for the delivery of Medicaid services", yet the proposed rules would still not recognize the need for transportation to

and from school for Medicaid-eligible children who take advantage of these services at school and early childhood settings.

In addition, the proposed regulations state that they were drafted, “Due to inconsistent application of Medicaid requirements by schools to the types of administrative activities conducted in the school setting...” However, the studies that conclude that the misfeasance conducted by some schools in claiming Medicaid reimbursements only took into account an insignificant number of schools. CMS should rightly impose sanctions on those schools and early childhood providers that improperly or illegally misrepresent claims for Medicaid reimbursement; punishing every school and early childhood provider nationwide is not the proper course of action to take in this instance.

I believe that Congress and the Administration should work together to achieve consensus on appropriate policies and procedures to ensure that Medicaid beneficiaries receive the highest quality services, consistent with Title XIX of the Social Security Act, and to ensure that states operate their Medicaid programs to achieve the best outcomes and in the most publicly accountable manner. I 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 illnesses, developmental disabilities, and child welfare), services providers, and representatives of affected Medicaid populations. I am not aware of any meaningful effort by the Secretary of HHS or CMS to work with affected stakeholders to address current policy concerns. Indeed, I am 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 Medicaid.

Legal Basis for Providing Transportation and Administrative Claiming

The proposed CMS regulations to eliminate Medicaid transportation and administrative claiming contradict current law. There is firm legal standing for the allowable use of Medicaid claiming for transportation and administration.

First, Section 1903(c) of the Title XIX of the Social Security Act states that “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 C of such Act.” Clearly the proposed regulations would be in direct conflict with this provision of law and would not further the purposes of Title XIX of the Social Security Act.

Second, school-based claiming was protected in the courts in the 1987 *Bowen* case, when the appellate court ruled that school-based Medicaid claims were reimbursable, and the Supreme Court elected to let that decision stand by denying cert.

Third, the proposed rules would not comply with Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services. Under current law, states must provide EPSDT services to all children who are eligible for the Medicaid program. This is one of the mandates that states must meet in order to operate a Medicaid program. Through EPSDT, Medicaid-eligible children must be seen periodically by health care professionals. In 1989 the law was amended to mandate that states provide any necessary Medicaid service that a child requires regardless of whether the state specifically covers the service as part of its regular Medicaid program. A state cannot restrict the services that it provides under the EPSDT mandate; it must make all types of services available, including the services children with disabilities require.

Fourth, under the Medicare Catastrophic Coverage Act of 1988, states are permitted to obtain limited funds for Individualized Education Program-related services and for early intervention/family support services as defined in the individualized family service plan (IFSP). The proposed regulations would deny legally allowable claims to provide services under IEPs and IFSPs.

Finally, the proposed rules would go beyond the regulatory scope and power of the Executive Branch and is inconsistent with Medicaid law. To the extent that policy changes are needed, I believe that the legislative process is the appropriate arena for addressing these issues.

Federal Cost Shifting and Reduced Levels of Service

The proposed rules for the elimination of the Medicaid transportation and administrative claiming will be a huge financial hit to already cash-strapped schools and early childhood providers. The federal government has not even provided half of the promised funds for the IDEA, and denying schools and early childhood providers in this country an additional \$635 million will only make a bad situation worse. This in turn will shift the financial burden to state and local governments to pay a greater share for required services under IEPs and IFSPs, and the frequency and/or intensity of those services may be reduced.

Conclusion

The proposed CMS rules to eliminate the transportation and administrative claiming for schools and early childhood providers under Medicaid are both misguided and contrary to existing legal precedent. For the reasons stated here, I urge the Secretary of Health and Human Services to withdraw the proposed rule.

Thank you for allowing the public to provide comments on the Notice for Proposed Rule Making for the elimination of school administration expenditures and transportation for school-age children under the Medicaid program, and thank you for considering my comments and recommendations.