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# Spreckels Union School District

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Harold Kahn, Ed.D., Superintendent


October 29, 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: Proposed Rulemaking (CMS-2287-P)**

To Whom It May Concern:

On behalf of the Spreckels Union School District, I am writing to express our strong opposition to proposed rule CMS-2287-P relating to federal Medicaid reimbursements to local education agencies.

As you are aware, proposed rulemaking CMS-2287-P would eliminate reimbursement under the Medicaid program for the costs of certain local outreach and transportation services provided through school agencies. The proposal is based on a Secretarial finding that specified outreach activities are not necessary and that special education transportation services do not meet the definition of an optional transportation benefit. Based on these determinations, under the proposed rule, federal Medicaid payments would no longer be available for administrative activities performed by school employees or contractors, or anyone under the control of a public or private educational institution, nor would these federal reimbursements be provided for specified special education transportation services for school-aged children.

These cuts would reduce total Medicaid reimbursements to California schools by over $100 million.

These services provided by schools are essential to ensuring that our most fragile and at-risk students can be educationally successful. As an example, under the proposal one of the items that would be cut completely are reimbursements to schools for outreach efforts that include identifying Medicaid-eligible students and helping them access Medicaid services. School health programs are the initial contact with health services for many children. It is difficult to understand how the federal government can argue against providing coverage of costs for services for our most fragile population.

And federal statutes require schools to provide services to special education students, whether or not sufficient funding is provided. Thus, this contradictory action by the federal government would

force us to make cuts in other essential educational programs to ensure that federally required services can continue, despite the lack of funding.

We strongly urge this administration to reject this proposal, recognizing that it is counterproductive to federal IDEA and NCLB goals to serve all students, and will undermine our best efforts to ensure that all students have equal access to services basic to their educational success.

Sincerely,

Harold Kahn

Harold Kahn
Superintendent
Spreckels Union School District

DHCS

State of California—Health and Human Services Agency
Department of Health Care Services

SANDRA SHEWRY
*Director*

ARNOLD SCHWARZENEGGER
*Governor*

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November 6, 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

Dear Sir or Madam:

The Department of Health Care Services (DHCS), on behalf of the State of California, appreciates this opportunity to comment on the proposed regulation changes. Please find attached California's comments in response to the Notice of Proposed Rule Making (NPRM) (CMS-2287-P) published at 72 Fed. Reg 173 (September 7, 2007). The NPRM proposes amendments to 42 C.F.R. Parts 431, 433, and 440.

Overall, we find CMS's proposal to eliminate all Medicaid adminstritive funding for all schools due to funding problems with a few schools to be a misguided approach to solving these problems. Rather than arbitrarily eliminating all funding, CMS should focus its efforts on working with states to ensure proper claiming.

Schools perform critical administrative activities, including outreach and enrollment of children into Medicaid. CMS has placed great focus on enrolling eligible but unenrolled children into Medicaid and S-CHIP and CMS's action here to cut funding for schools to enroll children contradicts CMS's position that states should enroll eligible children.

Because children attend school, schools are a logical place for states to focus enrollment activities to meet our mutual goal of enrolling all eligible children. To accomplish this, schools must be funded for these activities. To take the position, as CMS does, that states should send eligibility workers to every school open house or parent event does not reflect the reality of the volume or number and variety of events that occur nor the logistics that would be involved in replacing the use of school employees to do outreach with state or county eligibility workers.

Director's Office
1501 Capitol Ave., MS 0000, P.O. Box 997413, Sacramento, CA 99859-7413
(916) 440-7400, (916) 440-7404 fax
Internet Address: www.dhcs.ca.gov

Beyond the impossible logistics involved, states would have to hire thousands of eligibility workers to do this work, at far greater cost than the cost of funding schools to do outreach and assist in completing applications. It is far more logical to have schools include enrollment into Medicaid as a feature of their school events and reimburse schools for these activities. To accomplish CMS's goal of enrolling eligible children into Medicaid, it is vital that schools receive funding to do this work.

California has operated its school-based programs in close collaboration with CMS following very strict CMS guidelines. The State and CMS have worked together to resolve any problems that have come up and ensure proper claiming. In 2003, CMS issued its School-Based Administrative Claiming Guide, which states and schools were to follow in claiming. There has been no CMS review or evaluation of state compliance with this Guide, and there is no evidence that states are abusing it. Without evidence on how well CMS's current guidance is working, there is no basis to eliminate this funding.

Our more detailed comments are enclosed and cover a number of issues raised by the proposal. In addition to this letter, we have enclosed five specific areas of comment for your consideration. The areas of comment include:

- The negative impact the resulting loss of federal financial participation (FFP) would have on the health of Medicaid-eligible children who receive or are referred to necessary health care services, including transportation, by their public school personnel.

- The fiscal impact the proposed rule would have on school districts to provide necessary school-based health care.

- The reversal of recent federal guidance on school participation in Medicaid claiming and contradictions of federal definitions of "governmental units" and "local governments" that may participate in Medicaid claiming.

- The increase in administrative costs of states and schools by requiring additional interagency coordination between school districts.

- The basis for these proposed regulations on audit findings that are as much as ten years old and that do not represent current claiming practices.

If you have any questions, or if we can provide further information, please contact me at (916) 440-7400.

Sincerely,

Stan Rosenstein
Chief Deputy Director
Health Care Programs

Enclosure

cc: See Next Page

cc: Mr. Dave Lucas
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**Proposed Regulations: Elimination of Reimbursement under Medicaid for School Administration Expenditures and Costs Related to Transportation of Students between Home and School (CMS-2287-P)**

The State of California has actively participated with CMS in developing its School Medi-Cal Administrative Activities (SMAA) program in compliance with federal requirements. Administrative activities performed in school settings must be associated with or in support of the provision of Medicaid services. These include:

1. Services specified in an Individualized Education Plan (IEP) and Individual Family Service Plans (IFSP).

2. Specific primary and preventive services provided in those schools by providers who may also bill non-Medicaid children.

Other administrative activities not associated with a covered Medicaid service may be covered, including Medicaid outreach and referral; facilitating Medicaid application; and providing Medicaid-related training, translation, and general administration. Many schools provide their students with a wide range of health care and related services, the costs of which may or may not be reimbursable under the Medicaid program.

These programs are reviewed regularly by staff from three levels of government: the school, the local (regional) educational consortium, and the State. The negative findings described in this rulemaking do not apply to the State of California.

**Comments from the State of California**

1. **The State of California strongly objects to these proposed regulations based upon the negative impact the resulting loss of federal financial participation (FFP) would have on the health of Medicaid-eligible children who receive or are referred to necessary health care services, including transportation, by their public school personnel.**

The proposed rule from the federal Centers for Medicare and Medicaid Services (CMS) asserts that SMAA does not constitute "the proper and efficient administration of the state plan" when performed by school personnel. The rulemaking asserts that SMAA and home-to-school transportation (as an administrative activity and as medical assistance) is meant only to fulfill an educational purpose, not a medical purpose. The rulemaking states that only employees of a state or local Medicaid agency are capable of performing SMAA and home-to-school medical transportation in compliance with the Medicaid statute.

This assertion conflicts with the facts of the historical collaborations between state and federal educational and medical staff that resulted in the inclusion of school districts in the provision of necessary health care services to Medicaid-eligible persons. If schools lose federal reimbursement of costs of their administrative

activities, they may not be able to fund the staff positions that perform Medicaid administrative activities. These administrative activities are not part of the administrative activities associated with service rates, yet without them children and their families will experience greater difficultly in learning about and accessing Medicaid services. School districts are allowed to participate in the Medicaid program by the Social Security Act (SSA), Office of Management and Budgets Circular A-87 (OMB A-87), State Medicaid Directors letters, the federal 2003 Medicaid School-Based Administrative Claiming Guide (2003 School-Based Guide), and other policy documents, as detailed in this paper. The appropriate right of schools to participate in Medicaid is consistent with the need for schools to perform SMAA. SMAA facilitates students' access to necessary medical services.

Federal law and guidance describes SMAA and home-to-school medical transportation as necessary means of helping low-income persons to access necessary health care services. This rulemaking would arbitrarily and capriciously reverse these legal and historical precedents. Furthermore, redefining administrative activities as only those that are included as an inherent part of service rates may prevent the performance of Medicaid administrative activities to the extent currently provided by school personnel.

Health care providers and educators began to develop methods of providing necessary health care services through schools partially in response to requirements of the Education for All Handicapped Children Act of 1975 (EHA), renamed the Individuals with Disabilities Education Act (IDEA—last amended in 2004).[1] As increasing numbers of children suffer from chronic ailments,[2] the need for school-based health care becomes even more important—not only to the school system but to preservation of a healthy workforce.

Because children are typically in school five days per week to receive an education, teachers and other school staff have daily contact with children, providing the opportunity for school staff to appropriately direct children to health care services when needed. This regular contact allows school personnel to be more effective and efficient than state and local Medicaid agency staff in helping children access necessary health care. SMAA helps millions of children access available health care, assists many families in applying for Medicaid, and provides access to transportation and translation services that enable families to receive necessary health care services.

[1] Title 20 of the United States Code, Section 1400 et seq.
[2] Centers for Disease Control and Prevention, http://www.cdc.gov/HealthyYouth/asthma/index.htm; and the California School Health Centers Association, http://www.schoolhealthcenters.org/

Transportation. Medical transportation is a Medicaid service available to children who qualify for services under IDEA and who are Medicaid beneficiaries. Title 42 of the United States Code (U.S.C.) Section 1396b(c) allows Medicaid to be primary to the U.S. Department of Education for payment of the health-related services, including transportation, provided under IDEA.[3] Such needs are identified, and specific treatments are prescribed, on children's individualized educational plans (IEP) or individualized family service plans (IFSP).

CMS asserts that schools are required to provide home-to-school transportation for their students and that reimbursement for the costs of such transportation duplicates the statutory obligation of the educational program. There is no State or federal requirement for schools to provide home-to-school transportation for all students. California schools are obligated to provide transportation to students only when transportation is specified in a student's IEP or IFSP, as required by IDEA.

CMS will continue to allow claims for children to receive school-based services, including home-to-school transportation, when required by an IFSP. This exception reveals that CMS acknowledges the potential for schools to provide Medicaid services and perform Medicaid activities not solely to serve "an educational purpose." Without federal funding of home-to-school medical transportation and SMAA, schools will find it increasingly difficult to help low-income families access Medicaid services. An end to Medicaid funding of SMAA and home-to-school medical transportation will at minimum create a gap in necessary services and activities while schools attempt to replace that funding through other funding sources.

Medical transportation is based on 42 U.S.C. §1396b(c), 42 U.S.C. §1396d(a)(28), 42 CFR §431.53, and 42 CFR §440.170(a). Transportation as a service is also defined in California's federally approved "State Plan for Assurance of Transportation" (trans. 83-10, eff. 7-1-83) and in the 2003 School-Based Guide. Nonetheless, CMS intends to modify its policy concerning this statutory Medicaid service. Although the proposed rulemaking confirms the availability of medical transportation when it is from a school to a medical provider, the rule ignores the needs of many students with disabilities who require medical (specialized) transportation between home and school to facilitate frequent contact with school-based Medicaid service providers, including auditory specialists, occupational therapists, speech therapists, psychologists, and licensed medical staff. Many students suffer from chronic health conditions that are most cost-effectively treated in the course of the school day.

Eliminating FFP for transportation places an undue burden on schools already hard-pressed even to provide for basic educational materials. The great strides in school-based health care made over the last 30 years in low-income communities would easily be reversed by such abrupt and ill-considered rulemaking.

[3] 42 U.S.C. §1396b(c).

2. **CMS inaccurately minimizes the fiscal impact the proposed rulemaking would have on school districts to provide necessary school-based health care. In regard to these costs, CMS states:**

> The estimated annual Federal savings under this proposed rule ... is only about one eighth of one percent of total annual spending on elementary and secondary schools....We use a threshold of 3 to 5 percent of annual revenues or costs in determining whether a proposed ... rule has a 'significant' economic impact on small entities."

It is misleading and inaccurate for CMS to compare the cost of school-based health care to the entire budgets for K–12 education. Rather than "one eighth of one percent of total annual spending," the proposed rule would impose a 50-percent economic impact on these school-based programs—far beyond the "3 to 5 percent" allowable limits established by the Regulatory Flexibility Act of 1993, cited in the proposed rulemaking. The loss of this 50 percent of FFP would have a substantial and negative impact on the ability of California to care for its neediest children in the timely and cost-effective manner that is allowed through the SMAA program.

During state fiscal year 2006-07, California schools spent over $223 million performing SMAA and received $111 million in FFP. Schools would not likely be able to replace such funding if it were taken away. Additionally replacing school-based staff with Medicaid agency staff imposes additional administrative costs on schools related to coordinating such activities. The proposed rule is neither effective nor efficient in assisting needy children and their families in accessing necessary health care. The elimination of the SMAA program would decrease the administrative efficiency of Medicaid providers that might treat these children by adding substantial administrative burdens to their services.

With approximately 760,000 uninsured children less than 18 years of age in California, loss of this federal support can only serve to increase the many barriers these persons encounter in their efforts to grow and learn. When parents lack language skills, transportation, or information about available health care, school personnel are often children's only source of contact with professional caring adults who can direct them to necessary and cost-effective health care services. Unless schools can help students reach necessary medical services through the proper and efficient performance of administrative activities, it is likely that many will suffer increasing health problems that can result in chronic conditions that will cost public agencies far more than it would have cost to direct them to treatment when they were in school. Without such funding, schools will not have staff available to provide such guidance and children will not receive the treatment they need.

3. **The State of California strongly objects to these proposed regulations because they arbitrarily and capriciously reverse recent federal guidance on school participation in Medicaid claiming and contradict federal definitions of "units of government" and "local governments" that may participate in Medicaid claiming.**

   a. State Medicaid Director Letter, dated May 21, 1999, affirmed that "Medicaid is the payer of *first* resort for medical services provided ... pursuant to IDEA." The letter describes certain limitations on such claims, particularly that services may be claimed "that a child would not otherwise receive in the course of attending school." Transportation to and from home is available for students only on days "when the child receives a medical service ... that is listed in the IEP [individualized educational plan] as a required service." The Department of Health and Human Services' (DHHS's) support of these services implicitly requires equal support for administrative activities related to these services.

   b. CMS's Medicaid School-Based Administrative Claiming Guide, dated May 2003. While schools are legally liable to provide IDEA-related health services at no cost to eligible students, Medicaid reimbursement is available for these services because section 42 U.S.C. §1396b(c) requires Medicaid to be primary to the U.S. Department of Education for payment of the health-related services provided under IDEA. Medicaid covers services included in an IEP under the following conditions:

      i. The services are medically necessary and included in a Medicaid-covered category (speech therapy, physical therapy, etc.);

      ii. All other federal and state Medicaid regulations are followed, including those for provider qualifications, comparability of services and the amount, duration and scope provisions;

      iii. The services are included in the state's plan or available under the federal Early and Periodic Screening, Diagnosis, and Treatment program (EPSDT); and

      iv. The medical service must be provided to a Medicaid eligible student.

   c. Office of Management and Budgets Circular A-87 (OMB A-87). CMS asserts that SMAA and home-to-school transportation should be eliminated because federal statutes do not specify that schools are equivalent to units of government. CMS "believes" that the absence of such statutory language would allow the Secretary of DHHS to exercise the right to arbitrarily regulate the Medicaid program, without regard to legal and historical precedent, by determining that SMAA and transportation are not claimable when performed by school personnel. However, schools are clearly considered in federal guidance on cost accounting to be units of government. OMB A-87 includes "school districts" as "local governments" eligible to participate in federal awards:

(B) 13. "Governmental unit" means the entire State, local, or federally-recognized Indian tribal government, including any component thereof. Components of governmental units may function independently of the governmental unit in accordance with the term of the award.

(H) (B) 16. "Local government" means a county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments (whether or not incorporated as a non-profit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

As units of government, school districts are referred to by all Medicaid statutes as are other units of government.

d. Unless CMS intends to request revisions to the OMB definitions, the rulemaking will contradict them. CMS has revised the Code of Federal Regulations (CFR) at 42 CFR §§433.50 and 433.51 to define the term "unit of government" in a way that might exclude schools from Medicaid participation. However, enforcement of these provisions was placed on moratorium by Congress until October 1, 2008. In addition, several states are currently challenging these regulations in federal court. CMS's arbitrary and capricious efforts to eliminate SMAA and home-to-school medical transportation reverse 30 years of federal law and guidance. California strongly opposes this effort.

**4. The proposed rule would increase administrative costs of states and schools by requiring additional interagency coordination between school districts.**

CMS affirms that FFP "will not be available for school based administrative and certain transportation costs unless conducted by employees of the State of local Medicaid agency." This provision may severely impair the well-established practice of school personnel to perform Medicaid administrative activities toward children and their families. The elimination of federal reimbursement of the costs of these activities would result in the loss of school personnel positions; the educational staff that would remain possess neither the time nor training to perform these administrative activities.

If only state or local Medicaid agencies are eligible for reimbursement of the costs of administrative activities performed at a school site, the staff of these agencies will need to work on the school campus. This would require additional school expenditures to cover facilities costs, fingerprinting, and background checks, thereby decreasing the efficiency of the proposed rule. The physical distance of these staff from their host Medicaid agency administrations would increase the complexity of supervising the staff and decrease the effectiveness of their efforts.

This arbitrary and capricious rulemaking would reduce the ability of states to conduct Medicaid administrative activities, which would reduce students' access to necessary services and the ability of schools to support the health of their students.

Funding should not be denied for an otherwise valid Medicaid expenditure just because it is associated with schools. This rulemaking is neither effective nor efficient, and it imposes a substantial administrative and financial burden on state and local governments.

5. **CMS has based these regulations on audit findings that are as much as ten years old and do not represent current claiming practices. The proposed rule refers to negative audit findings from a few states without indicating the prevalence CMS has found of such practices among all states. They do not describe the efforts CMS and the few offending states have taken since those audits to remediate noncompliance. And they do not describe the lessons compliant states have learned and put into practice from having learned of those few audits. Furthermore, CMS has not conducted compliance audits on school based administrative activities that have been conducted using the 2003 School-Based Guide.**

   Referring to negative audit findings for a few states from the 1990s, CMS explains its intention with the proposed rule to abolish SMAA for all states. Notably, both reports of the Governmental Accounting Office (GAO) cite:

   > HCFA guidance has been insufficient and its reviews of districts' claims activities uneven. As a result, what is submitted by states is approved by some HCFA regional offices ... and is denied by others .... These weak controls permit an environment for opportunism in which inappropriate claims could generate excessive Medicaid payments.

   The April 2000 GAO report indicates that states continued to be subjected to inconsistent guidance from CMS's ten regional centers. Referring to how these audits were resolved, the report states:

   > We are making recommendations to the Administrator of HCFA that are aimed at improving the development and consistent application of clear policies and appropriate oversight for school-based Medicaid services. Additionally, we are referring evidence of certain improprieties and other matters to the cognizant U.S. Attorney's Offices for appropriate action.

   By issuing guidance without actually following up on its audit findings, CMS will continue to provide states with inconsistent guidance. Regions that participate in audits will get current guidance, while other regions will continue to base their activities on older guidance. It is premature for CMS to reverse such recent guidance as the 2003 School-Based Guide and to propose such restrictive rulemaking when CMS has not yet fulfilled its own responsibility to conduct appropriate, consistent, and complete oversight and to provide reliable localized guidance.

   Furthermore, the audit findings do not indicate how audited states responded to the negative findings. The few negative audit findings referred to in the proposed

rulemaking do not establish an appropriate basis to eliminate a nationwide program like SMAA. Without additional information, CMS might not realize the positive effect these audits might have had in bringing these and other states into compliance with federal law. State and local governments may depend on such audits to receive individualized guidance from federal authorities. CMS should not diminish its responsibility to conduct and follow up on its audits throughout the nation by the elimination of an entire program.

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# Altmar Parish Williamstown Central Schools

**639 County Route 22, P.O. Box 97, Parish, NY 13131**

APW Board of Education
***Linda Williamson, Legislative Liaison***
William Scriber, Pres., Michael Hale, Sr., VP, Thomas Benedetto, Michael Hale, Sr., Bonnie Frederick, Francis Maunder, Elmer Plantz
Phone: (315) 625-5251 Fax: (315) 625-7952

DATE: October 31, 2007 **RE: CMS-2287-P**

TO: Secretary Michael Leavitt,
Center for Medicare & Medicaid Services,
Dept. of Health and Human Services

FROM: Linda Williamson, Legislative Liaison
APW Central School District,
639 County Rte 22, Parish, NY 13131

Regarding the proposed change in regulations and resulting reduction of funds for reimbursement to schools for administrative and transportation related expense for disabled students, and on behalf of APW CSD students and families we would like to make the following objections:

1. Regarding your assertion that this is a measure to eliminate waste and fraud, we believe that the solution to this problem is not to eliminate funding for services that are critical to students with disabilities, but rather to provide effective oversight as a means to curtail improper or illegal practices. Punishing all for the sins of a few is unfair.

2. We take particular offense to the statement, "In the end, we ultimately rejected these alternatives because the intervening years have proven that such activities cannot be adequately regulated or overseen." We believe that oversight is a critical function that should not be tossed aside, and request that you reconsider that decision.

3. For many years now our public schools have seen a significant increase in the number of students who are in need of special services. Cutting this funding will directly impact our ability to identify students in need of services earlier rather than later. As you know early identification is an extremely cost effective measure. Students with special needs who are not identified early end up costing the system more in the long run.

4. As a rural school district with a geographic area that covers approximately 180 square miles, any reduction of funding for transportation services would create a hardship that would be felt by all of our students. We would still have to provide services to our students with disabilities and if funds are cut, it is very likely that in turn we would have to shuffle services. In other words we would probably have to cut other services, maintaining only what is absolutely mandated. That would be a step backward.

5. Finally, our school district is located in Upstate New York, an area which has been economically depressed for quite some time now. Almost half of our students qualify for free or reduced price lunch. Many of our population are either unemployed or underemployed. Although, there are plans by NYS to remedy this, nothing changes quickly and there is little likelihood that the local economy will change any time soon. Cuts to funding result in added expense to our taxpayers who are already shouldering the financial burden for federally mandated services in a system that is shamefully under funded.

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November 5, 2007

Centers 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

**Re:** ***Comments on Proposed Rule CMS-2287-P***


·NSBA·

*Excellence and Equity in Public Education through School Board Leadership*

**Office of Advocacy**

- Norman D. Wooten
  President
- Anne L. Bryant
  Executive Director
- Michael A. Resnick
  Associate
  Executive Director


On behalf of the nation's 95,000 local school board members, the National School Boards Association asks that the Centers for Medicare and Medicaid Services (CMS) rescind its proposed rule [CMS-2287-P] to eliminate reimbursement under Medicaid for school administration expenditures and certain transportation costs published in the *Federal Register* on September 7, 2007.[1]

NSBA strongly opposes this proposal, which would deny schools reimbursement for legitimate and necessary administration services undertaken by school employees or contractors and curtail the range of transportation costs that are considered eligible for federal financial participation (FFP), on the grounds that it: 1) contradicts the terms of the statute to allow states flexibility in administering their state Medicaid plan; 2) exceeds Secretarial authority; and 3) discriminates against schools. These points are explained in more detail below.

In addition, cutting funding for Medicaid outreach and services in a school setting is neither sound fiscal or social policy. In proposing this rule, CMS will impose a significant financial burden on local school districts, estimated to cost more than $3.6 billion over the first five years. Conversely, the proposed federal savings of this rule represents less than 0.2% of 2006 federal Medicaid expenditures—a minimal impact on the federal budget.

More importantly, this rule would create a lost opportunity to reach our most vulnerable children. Every school day, close to fifty million students attend more than 97,000 public schools, uniquely situating schools to efficiently reach the majority of disadvantaged youth and their families.[2] If finalized, this rule will impede us from serving these populations.

Statutory Authority

Under the federal-state Medicaid program, collaboration with other public agencies is a consistent statutory theme. Collaboration is perhaps most obvious in the case of children, because of the unique requirements of the early and periodic screening, diagnostic and treatment (EPSDT) benefit, which requires states to perform EPSDT outreach and informing, as well as help Medicaid-eligible children and their families access services.[3]

[1] 72 Fed. Reg. 51397-51403 (September 7, 2007).
[2] NCES, 2005-2006, 2007-2008.
[3] 42 U.S.C. §1396a(a)(43).

Schools are and have been a strategic partner in this process. They are ideal places to identify Medicaid-eligible children and connect them to needed services in schools and their communities, since children must attend school and they have access to professional specialists on site. As CMS itself indicated, in its Medicaid *School-Based Administrative Claiming Guide,* "the school setting provides a unique opportunity to enroll eligible children in the Medicaid program, and to assist children who are already enrolled in Medicaid to access the benefits available to them."[4]

Because schools are such an effective location for outreach, many state Medicaid programs have entered into interagency agreements with local school systems. These agreements cover a range of activities including outreach, helping families through the Medicaid application process, and providing assistance to arrange necessary health care services for children.

School involvement in the Medicaid program is not only common among states; it is also expressly contemplated in statute. The statute's eligibility determination provisions expressly designate elementary and secondary schools as "qualified entities" for purposes of making presumptive and permanent eligibility determinations in order to afford eligible children and adults the ability to promptly apply for medical assistance and be enrolled. [5] In addition, CMS' own *State Medicaid Manual* encourages state Medicaid agencies to coordinate EPSDT administrative activities with schools.

Furthermore, with respect to students with disabilities, Congress clearly intended to preclude the Secretary of Health and Human Services (HHS) from denying payment for Medicaid-covered services provided pursuant to a child's Individualized Education Program (IEP). Under the *Medicare Catastrophic Coverage Act of 1988* (P.L. 100-360), school districts are allowed to receive payment from Medicaid as the primary payer for Medicaid services provided to Medicaid-eligible students under the Individuals with Disabilities Education Act (IDEA). Such services may include diagnostic, preventive, and rehabilitative services; speech, physical and occupational therapies; and transportation for such services. This proposed rule would expressly contradict the intent of this statute by reversing current policy that allows federal matching funds for transportation provided to children with special health care needs who receive health care services while they are at school.

Secretarial Powers

In its proposed rule, CMS relies on its authority under §1903(a)(7) of the Act[6] to limit federal payments for administrative services to payments "found necessary by the Secretary for the proper and efficient administration of the state plan."[7] In making this assertion, the Secretary of HHS finds that these activities performed specifically *by school employees* are not "necessary...for the proper and efficient administration of the State [Medicaid] plan."

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[4] CMS
[5] 42 U.S.C. §1396r-1a(b)(3)(A).
[6] 42 U..S.C. §1396b(a)(7).
[7] 72 Fed. Reg. 51397.

NSBA believes that Secretarial authority in this regard cannot be construed to limit the power of states to administer their plans, or to act in the best interest of beneficiaries, or to involve other agencies in plan administration—which is exactly what this rule would do. Such action constitutes an overstep of Secretarial powers and a willful disregard for Congressional intent. As noted above, Congress itself has involved schools in the administration of plans, therefore, as a matter of law the Secretary cannot find that school administration is improper or inefficient.

In addition, this rationale makes little sense. State Medicaid programs enter into interagency agreements with local school systems precisely *because* they are effective and efficient locations through which to reach families and provide services. School-based outreach and enrollment activities are successful because they use school staff that are trusted by families and are already in the schools and in contact with children and families.[8] It is inconceivable to think that state agencies would be able to effectively manage a program of this size without relying on local agency personnel to help administer and communicate information about the program.

Secondly, the Secretary's power to deny federal financial participation is tied to the duty of making findings. In this case, CMS points to several audits and the failure of its 2003 Administrative Claiming Guide to halt errors related to school administration claiming. However, the reports of abusive billing that CMS cites took place well *before* states were required to implement the 2003 guidance. Furthermore, the fact that audits are happening is not a valid basis for halting federal administrative payments. Were audits the basis for such a disallowance, there would be no payment under federal law for any medical assistance costs or state administrative service undertaken by either the state agency or any other agency.

In the world of accounting, audits are a commonplace way of improving the fiscal management of a program, not dismantling it. Negative audit findings should not reverse worthwhile public policies, but rather should inform the process of improving their fiscal integrity. In issuing this rule, CMS would rather eliminate an entire program than accept responsibility for improving its accountability.

Discriminates Against Schools

NSBA believes that the proposed rule overtly discriminates against schools since it attempts to disqualify local school districts from receiving Medicaid reimbursement for performing the same activities that other local agencies do in administering the state Medicaid plan. Despite statutory authority, case law, and precedent that establish an irrefutable basis for schools to receive Medicaid reimbursement, CMS seems set on prohibiting schools from receiving federal Medicaid dollars.

[8] Center for Budget and Policy Priorities, *Administration Moves to Eviscerate Efforts to Enroll Un-Insured Low-Income Children in Health Coverage through Schools*, Washington: September 2007.

NSBA questions whether CMS is proposing that Medicaid agency staff should be stationed in schools to carry out administrative functions essential to securing health care services to Medicaid eligible children who need them. If this is the case, it should be noted that many state Medicaid agencies do not employ outreach and enrollment workers, service coordination personnel, or other personnel essential to the enrollment of children and carrying out EPSDT health care access obligations. As the statute illustrates, state agencies are expected to rely on other public agency staff to carry out their obligations. For those states that might have the resources available to commit their own employees into the schools, *this* certainly would be an inefficient approach.

In addition, the fact that other federal and local sources of funding exist to help provide health services to students with disabilities does not absolve the federal Medicaid program of its responsibility to provide payment for Medicaid services to Medicaid-eligible students. This issue was clearly decided by Congress with passage of the *Medicare Catastrophic Coverage Act of 1988*, which allows Medicaid to be the primary payer for Medicaid services for Medicaid-eligible students with disabilities. Schools should not be penalized financially, just because other departments of the federal government also have a responsibility to provide for these children. To propose so, is especially troublesome given that the federal government is woefully behind in its commitment to fund special education. In fact, current funding for IDEA is less than half of what Congress promised three decades ago to states and local school districts to implement this federal mandate.

Impact on Services

The loss of federal reimbursement for administrative and transportation services provided by school districts would have a devastating impact on schools' ability to provide needed services to Medicaid-eligible children. If finalized, this rule will risk poor children not being identified for and receiving needed medical services, and poor disabled students not receiving services in a timely manner.

The loss of these funds would force districts to scale back their special education and special services personnel (such as school nurses and social workers), increasing the specialist-per-pupil ratio. As a result, school personnel would not be available to link children with community medical and health clinics in their area through case referrals. In addition, services identified in a child's Individual Education Plan (IEP)—such as occupation and speech therapies, behavioral modification, counseling, dental and mental cares, and clinic or hospital-based services—could be affected.

Medicaid's transportation reimbursement has enabled school districts to continue to enhance their special buses with ramps, lifts, seat belts and personal aids for students with more severe disabilities. Some schools have used Medicaid transportation funds to hire more bus drivers to run additional routes to transport students for medical services. Without these funds, these enhancements and personal care services would have to be eliminated or scaled back.

Additionally, the loss of this funding will have permeating effects on other programs within schools. With Congress failing to fully fund IDEA, Medicaid reimbursement helps districts plug some of these funding holes. In light of this, these cuts will likely impact students in regular education programs since districts are mandated to offer many special education services. This could mean a variety of things—from larger class sizes, to cuts in electives and after school activities, to reductions in teachers and support positions. Otherwise, governments may be forced to replace lost Medicaid dollars by raising state and/or local taxes.

Financial Impact

Despite these very real and substantial costs, CMS indicates that this rule will not have a "significant economic impact" on local school districts. This finding is based on the assertion that the estimated cost ($635 million in 2009) of the rule is only "about one eighth of one percent of the total annual spending on elementary and secondary schools" and therefore does not meet the 3 to 5 percent threshold of annual revenues or costs in determining whether a rule has a "significant" economic impact.[9]

This rationale is flawed for a couple of reasons. As CMS clearly knows, not all school districts currently claim or receive FFP for administrative and transportation services. Federal funding is spread unevenly between states, among districts, and between elementary and secondary schools. Therefore, to compare the cost of the proposed rule to overall nationwide spending for elementary and secondary education minimizes its financial impact. Additionally, a large percentage of school districts' budgets are largely fixed due to contractual obligations and operational costs. Therefore, discretionary funds such as Medicaid reimbursement dollars have a much more significant impact on the availability of resources than if all aspects of a district's budget were flexible.

A more realistic financial analysis would: 1) examine the financial impact of the proposed cuts only on districts that actually claim for reimbursements; 2) take into consideration the unique aspects (such as fixed costs) of school districts budgets; and 3) include the likely loss of state Medicaid funding that would result from schools no longer being able to sustain these programs.

Conclusion

Unfortunately, this rule demonstrates that the Administration has chosen to rely on bureaucratic arguments in order to retreat from supporting the health needs of our most vulnerable children. Local school board members urge CMS to rescind this proposal and to reaffirm its commitment to low-income and disabled children by continuing to invest in school-based administrative and transportation services. In order to ensure that low-income children are enrolled in Medicaid and are able to access the health care services that they need, schools must be a valued partner in the process. Local school board members want to work together to provide for our nation's children—it is in the best interest of all of us to ensure that they are healthy and able to learn.

[9] 72 Fed. Reg. 51397-51403 (September 7, 2007).

Thank you for this opportunity to comment on CMS-2287-P. Please direct any questions or comments to Chrisanne Gayl, Director Federal Programs at (703) 838-6763 or **cgayl@nsba.org**.

Sincerely,

Michael A. Resnick

Michael A. Resnick
Associate Executive Director

MAR: cg/kc
N:Adv/Medicaid/110207CMSComments

[redacted] 152

**Submitter :** **Sharon Petrakis** **Date: 10/08/2007**

**Organization :** **Chester County Intermediate Unit and Devereux**

**Category :** **Social Worker**

**Issue Areas/Comments**

**GENERAL**

GENERAL

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.

Sincerely,
Sharon Petrakis, LSW

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# FRANKLIN CITY PUBLIC SCHOOLS

207 West Second Avenue
Franklin, Virginia 23851-1713
(757) 569-8111 • Fax (757) 569-8078

November 9, 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

Dear Sir or Madam:

This letter provides the opportunity for Franklin City Public Schools to express concerns about Rule 2287-P. This rule proposes cuts to Medicaid reimbursements for school-based services. The Centers for Medicare and Medicaid Services (CMS) proposes to eliminate reimbursement, under Medicaid, for school administration expenditures and costs related to the transportation of school-age children between home and school. Franklin City Public Schools is adamantly opposed to this proposal.

Elimination of funding for services because of inappropriate, or even abusive, claiming practices by some providers is not the solution. CMS' continued collaboration with the Medicaid agency puts them in a better position to establish regulations to ensure proper claiming and support the key role schools play, in identifying Medicaid-eligible children, promoting access to Medicaid services, and arranging or delivering needed care. CMS has provided us with the necessary guidance to ensure appropriate claiming for school-based Medicaid administrative activities.

Federal financial participation in the costs of outreach, informing, and care coordination is available to all public entities performing such activities on behalf of the Medicaid program. Cutting funding for these activities in the school setting is not sound fiscal or social policy. Our division has participated in Administrative Claiming since 2003. We received $169,926 in fiscal 2006-2007 for administrative activities. We would continue to provide these services, but would have to shift funds from other areas of our already overburdened budget to cover the costs or raise taxes if this proposal becomes a reality.

The Medicare Catastrophic Coverage Act of 1988 expressly allows Medicaid to reimburse school districts for state plan covered services, including transportation that we provide pursuant to the Individualized Education Programs of Medicaid-eligible children with disabilities. A rule to prohibit us from claiming administrative and transportation expenses would contradict existing law.

We are highly invested in helping children achieve their fullest potential. We urge the Centers for Medicare and Medicaid Services to continue investing federal matching funds in efficient and effective school-based Medicaid administrative activities and state plan-covered transportation services.

Very truly yours,

William M. Pruett
Division Superintendent

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# Henry County Schools

*Ahead of the learning curve.*

Sharon D. Dodson, Ed.D.
**Superintendent**

November 6, 2007

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2287-P
Mail Stop S3-14-22
7500 Security Blvd.
Baltimore, MD 21241

Dear Sir or Madam:

It has come to my attention that Rule 2287-P proposes cuts to Medicaid reimbursements for school-based services. It is my understanding that the Centers for Medicare and Medicaid Services (CMS) proposes to eliminate reimbursement, under Medicaid, for school administration expenditures and costs related to the transportation of school-age children between home and school. On behalf of Henry County Schools, I must express my adamant opposition to this proposal.

Henry County Public Schools has been participating in Medicaid reimbursements since 1991. In fact, Henry County Public Schools receives one of the highest Medicaid reimbursements among public school systems in Virginia. Our interim Medicaid payment for therapy services from FY 2006-07 exceeded $136,000. In our experience CMS has provided school divisions in Virginia with the necessary guidance to ensure appropriate claiming for school based Medicaid administrative activities.

In our school division the financial effects of this change in Administrative Claiming alone would exceed $100,000 annually. Should Administrative Claiming be eliminated we would have to shift funds from other areas in our budget to cover the cost or raise taxes if this proposal should become a reality. Our community in particular would be substantially impacted. We have lost over 10,000 jobs locally in the last five years directly related to the domestic decline in the textile and furniture industry. The proportion of students living in poverty has skyrocketed. For the school system to assume the cost of outreach, informing, and care coordination is impossible. However, our community is in desperate need of these services. Furthermore, the Medicare Catastrophic Coverage Act of 1988 expressly allows Medicaid to reimburse our school division for state planned covered services, including transportation that we provide in accordance with the Individualized Education Programs of Medicaid-eligible students with disabilities. A rule to prohibit us from clairning administrative and transportation expenses would apparently be in conflict with existing law.

3300 Kings Mountain Road
| P.O. Box 8958 | Collinsville, VA 24078-8958 | (276) 634-4711 Fax (276) 638-8990 |

Our school division struggles daily with dwindling local resources and increasing demand. Over the past four years we have had to consolidate and close five community schools as a result of the loss of manufacturing jobs. These are extraordinarily challenging times for our school division. However, in spite of this, Henry County Schools' students met the academic challenges of the federal No Child Left Behind Legislation and is in fact a school division making Adequate Yearly Progress (AYP). Loss of these funds, otherwise available to other public entities performing the same activities on behalf of the Medicaid program, would unfairly exacerbate a dire situation.

Yours truly,

Sharon D. Dodson
Superintendent

SDD/mdo

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**Submitter :** Mrs. Tamara Uselman **Date:** 11/16/2007

**Organization :** Perham - Dent Public Schools

**Category :** Academic

**Issue Areas/Comments**

**GENERAL**

GENERAL

see attachment

CMS-4129-P-2-Attach-1.DOC

November 1, 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: File code CMS-2287-P

Dear Centers for Medicare and Medicaid Services:

On behalf of the Perham – Dent School District, I am writing to express opposition to the proposed rule that the Center for Medicare and Medicaid Services (CMS) announced on September 7, 2007. This proposed rule would eliminate Medicaid reimbursement for administrative and transportation costs for services provided to students with disabilities as required by the Individuals with Disabilities Act (IDEA). We urge you to withdraw implementation of the proposed rule since we believe promulgation will be harmful to the most vulnerable of our school district's children - those with disabilities who are also members of low-income families.

We are concerned that this rule will reduce the availability of, and access to, needed health care for these students. Medicaid reimbursement for administrative services is critically important to ensure that schools are able to provide appropriate outreach activities that link children to medical services, identify those students who may need medical screening, and provide referral services in the community.

The Medicare Catastrophic Coverage Act of 1988 allows school districts to receive Medicaid payments for health services delivered to Medicaid eligible children. Children with disabilities are often in need of additional services, including transportation for diagnostic, preventive and rehabilitative services and therapies, as well as the administrative costs of providing school-based services, such as outreach for enrollment purposes, coordination and/or monitoring of medical care. A rule to prohibit schools for claiming these expenses would contradict existing law and seriously impede the ability of states and school districts to provide these services, which are mandated
under IDEA.

The federal government is only funding approximately 20 percent of the national average per pupil expenditure for each child in special education instead of the 40 percent that Congress promised to pay when IDEA was first enacted. Major reductions in Medicaid reimbursements will severely restrict the ability of states and local school districts to provide much-needed health care services to disabled children.

We urge you to reconsider implementing this proposed administrative change and to work with states and school districts to ensure that all children receive the health services that they deserve. Without access to appropriate health care, children with disabilities will experience additional challenges in their efforts to make progress consistent with the No Child Left Behind goals and objectives.

Thank you for your time and consideration.

Sincerely,

Tamara Uselman, Superintendent

**Windham Northeast Supervisory Union, Student Support Services**
**25 Cherry Street, Bellows Falls, VT 05101**
**Office: (802) 463-1612; Fax: (802) 463-4652; E-mail: kacdiss@sover.net**

November 6, 2007

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.

Respectfully,

Kathleen A. Callahan, Ed. D.
Director of Student Support Services