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October 12, 2007

Centers for Medicare & Medicaid Services
Department of Health and Human Services
7500 Security Boulevard
Baltimore, MD 21244

RE: File Code CMS-2261-P
Notice of Proposed Rule
Medicaid Coverage: Coverage for Rehabilitative Services

Dear Sir or Madam:

Ohio Legal Rights Service is (OLRS) is an independent state agency and the federally and state designated Protection and Advocacy (P&A) system and Client Assistance Program for people with disabilities in the State of Ohio. The mission of OLRS is to protect and advocate, in partnership with people with disabilities, for their human, civil and legal rights. OLRS submits these comments in response to the Notice of Proposed Rule entitled "Medicaid Program: Coverage for Rehabilitation Services," published in the Federal Register on August 13, 2007.

OLRS opposes the regulations as proposed. Ohioans, and especially Ohio children, have already been significantly impacted by CMS' efforts to limit the scope of services under rehabilitation services. Rehabilitation Services under Medicaid are a critical support for persons with physical and mental disabilities. As recently as 2004 over 70% of individuals receiving these services were receiving them for mental health needs. [1] The proposed regulations are especially harmful to children because they conflict with their entitlement to services under the EPSDT provisions of the Medicaid Act. The full scope of restricting this service is not known since many Ohio children have not even received the EPSDT screenings that may have identified the needs for these services[2]. Ohio children have yet to recover the services to which they are entitled under EPSDT after the takedown of the Medicaid program that provided rehabilitative services to individuals with mental retardation and developmental disabilities for well over a decade.

The proposed definitions seek to establish in rule a narrower scope of services to be covered under the rehabilitation option. This is made clear in the Regulatory Impact Analysis at B which projects a savings of over 2 billion dollars between 2008 and 2012 on rehabilitative services alone with the

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[1] Crowley, Kaiser Commission on Medicaid and the Uninsured, *Medicaid's Rehabilitation Services Option: Overview and Current Policy Issues*, 7.
[2] Ohio's last reported EPSDT participation ratio was 47%. See http://www.cms.hhs.gov/MedicaidEarlyPeriodicScrn/downloads/epsdtfy2004.pdf

implementation of these rules. The proposed regulations, when combined with the commentary in the preamble, leave the distinct and incorrect impression that certain services cannot be covered under Medicaid at all. The regulations are inconsistent with the statutory purpose of Medicaid coverage of rehabilitation services, which is "to enable each State, as far as practicable . . . to furnish (1) medical assistance . . . and (2) rehabilitation and other services to help . . . families and individuals *attain* or retain capability for independence or self-care . . ." 42 U.S.C. § 1396 (emphasis added).

Section § 441.45 should be eliminated in its entirety

The majority of these regulations are added to a section of the Code of Federal Regulations that, for several services, provides limitations to service. These limitations are not supported by statute [See 42 U.S.C. § 441.10]. The only basis for the limitations in these proposed regulations is the Secretary's general authority to issue regulations. There is no other basis in the Act for the restrictions proposed in new section § 441.45 rules. Congress has not restricted FFP for these services, and has specifically not adopted some of the language proposed in these regulations (for example "intrinsic element").

In contrast to these regulations, there have been a variety of ways that Congress, HHS and CMS have provided flexibility to states to serve the individuals in need of services. Some examples include the Money Follows the Person grants, the alternatives available under the DRA, New Freedom Initiatives, and others. Yet for this service, so critical for individuals with disabilities, CMS has promulgated rules that will restrict services and limit a state's flexibility to provide needed services for persons with disabilities.

Conflict with EPSDT

Medicaid's Early and Periodic Screening, Diagnostic and Treatment Service (EPSDT) requirements provide that all Medicaid beneficiaries under age 21 must receive all necessary services listed in 42 U.S.C. § 1396d(a) to correct or ameliorate physical or mental illnesses and conditions, regardless of whether those services are covered under a State's plan. 42 U.S.C. §§ 1396a(a)(43), 1396d(r)(5). OLRS is representing a proposed class of children who have not received the treatment to which they are entitled under EPSDT.

In Ohio, children have already been restricted from receiving services under EPSDT that were considered habilitative in nature. This has been done in spite of the fact that therapy services such as physical therapy, occupational therapy, and speech therapy can be provided outside of the "rehabilitation" benefit. For example, physical therapy and related services are specifically listed in 42 U.S.C. § 1396d(a)(11) and medical care, or any other type of remedial care recognized under state law, furnished by licensed practitioners within the scope of their practice is covered in 42 U.S.C. §1396d(a)(6). Ohio's Medicaid agency has informed OLRS that the basis for this restriction is that CMS has applied this restriction beyond the rehabilitation services category of service to other covered state plan services both in Ohio and through audits of programs in other states.. These proposed regulations fail to clarify that the restrictions on habilitation, and restorative services, cannot be applied to deny needed services to children.

There are numerous ways in which the proposed regulations conflict or potentially conflict with the EPSDT requirements. OLRS suggests an overall restatement of the EPSDT requirement in these regulations. At a minimum we suggest the following changes:

- Insert a new paragraph in § 441.45(a) clearly stating that states must ensure that children receive

all federally-covered Medicaid rehabilitation services when necessary to correct or ameliorate a physical or mental illness or condition.

- Ø Amend § 441.45(a)(5) to state that even when a state plan does not include certain rehabilitative services, these services must nonetheless be made available to children when necessary to correct or ameliorate a physical or mental illness or condition.
- Ø Amend § 441.45(b)(4), to refer to the EPSDT requirement and instruct states to comply with it.

Proposed § 440.130(d)(1)(v)-(vii), (2) - Maintenance v. Restorative services

The proposed regulations create as much confusion as they seek to dispel. When confusion exists denials of services that should be covered are likely to occur. An example of the confusion created is the discussion of services that maintain, rather than restore, function. Throughout the preamble and proposed regulations, CMS emphasizes that rehabilitation services must reduce disability and restore function in order to be reimbursable under Medicaid. S*ee, e.g.,* 72 Fed. Reg. at 45211 (Proposed 42 C.F.R. §§ 440.130(d)(1)(i)(A)). The discussion of a written rehabilitation plan in the preamble emphasizes the "ultimate goal" of reduction of medical care. *Id.* at 45203. Moreover, the preamble states that "[i]t is important to note that this benefit is not a custodial care benefit but should result in a change in status." *Id.* At the same time, the proposed regulations acknowledge that maintaining a functional level may be necessary to achieve a rehabilitation goal. *Id.* at 45211 (Proposed 42 C.F.R. § 440.130(d)(1)(vi)). But, the discussion of the written plan in the preamble states that "[i]f it is determined that there has been no measurable reduction of disability and restoration of functional level, any new plan would need to pursue a different rehabilitation strategy . . ." *Id.* at 45204 (Preamble, II.C).

This emphasis on change in status and on achievement of specific goals is likely to result in states denying coverage for medically necessary rehabilitation services, because such services may not lead to immediate results. Recovery is not necessarily a linear process. It may appear that progress toward a goal is not being made when, in fact, a plateau or relapse may be part of the natural progression of recovery. This is true with physical or mental illnesses and with substance abuse. The Medicaid statute emphasizes the importance of rehabilitation services to *attain* independence and health. 42 U.S.C. §1396. The overall emphasis of the rules and commentary, however, creates a strong possibility that states will actually apply a more narrow definition than is appropriate.

Moreover, services aimed at maintaining function could fit under a category of service other then rehabilitation For example, assistance with dressing or eating could be covered as a personal care service, as could supervision to prevent injury. This should be recognized both in the preamble and in the regulations. This is particularly true under EPSDT. Because any of the categories of Medicaid services that are necessary to "correct or ameliorate" must be covered to address an individual child's physical or mental condition, there is a greater likelihood that the actual service needed will be covered.

Your agency has a long-standing policy of recognizing that maintenance therapy may be covered. *See, e.g.,* Letter from Andrew A. Frederickson, Chief, Medicaid Operations (Region VIII) to Garth L. Splinter, CEO, Oklahoma Health Care Authority (April 9, 1999); HCFA, *Medicaid State Bulletin,* 231 (Sept. 10, 1992); Letter from HCFA to Regional Administrator, Region VIII (Oct. 2, 1991). Thus, the overly restrictive definition and interpretation in this area conflicts with longstanding agency policy.

OLRS recommends the following changes:

- Ø Delete the definition of restorative services. It creates unnecessary confusion.
- Ø Add the following language to proposed regulation § 440.130(d)(1)(vi): "Failure to make

measurable progress toward a particular goal within a certain time period does not necessarily indicate that a service is not necessary to help achieve a rehabilitation goal."

In the alternative:

- Ø Add the recommended language to proposed 440.130(d)(1)(vi) listed above; **AND**
- Ø Add a new subsection (c) to § 441.45, with the following language: "If a service cannot be covered as a rehabilitative service, states shall determine whether the service can be covered under another category of Medicaid services." Also, add discussion to Section II.C. of the preamble that maintenance services could qualify for coverage under another category of services and give examples of other categories.
- Ø Delete the language at 72 Fed. Reg. at 45204, Section II.C of the preamble stating that "[i]f it is determined that there has been no measurable reduction of disability and restoration of functional level, any new plan would need to pursue a different rehabilitation strategy . . ."

Proposed § 440.130(d)(1)(vi) – Restorative Services

Three days after CMS issued these proposed regulations, it also issued a letter describing peer guidance and explaining how it could be covered under the rehabilitation option. *Dear State Medicaid Director,* Peer Support Services – SMDL #07-011 (August 15, 2007). As CMS acknowledges in the letter, this is an important service for individuals with mental illness and substance abuse services. Given its importance to CMS, States, providers and patients, the specifics of this guidance should be referenced in the regulations.

OLRS recommends that if the definition of "restorative services" is not eliminated as recommended, Section 440.130(d)(1)(vi), which describes those services should be amended and language added stating that peer guidance is a covered rehabilitation service.

Proposed § 440.130(d)4) Impairments to be addressed

OLRS strongly requests that§ 440.130(d)4) be struck from the regulations. For the first time the regulations include "impairments to be addressed" and identify individuals with physical impairments, mental health impairments, and/or substance-related disorder treatment needs. This section will be used to deny needed services to otherwise eligible recipients and is beyond the authority of the agency. As noted above, the statutory definition of "Rehabilitation services" encompasses <u>any</u> services that "help such families and individuals attain or retain capability for independence or self-care", 42 U.S.C. 1396(b) (emphasis added). There is no authority for the limitations proposed in this subsection. Individuals with cognitive impairments [including mental retardation, stroke, and brain injury] could be denied services under this section of the proposed regulations. There is no rational basis for limiting rehabilitation services to address only the individual's physical or mental health impairments or substance disorder needs and thus this subsection could violate the Equal Protection clause of the U.S. Constitution, as well as the comparability requirements of Medicaid.

The proposed rules do not provide guidance for coverage of services for individuals with dual diagnoses of mental retardation/related conditions and mental illness. While the proposed regulations acknowledge that physical impairments and mental health and/or substance related disorders can be appropriately treated with rehabilitation services [*See* 72 Fed. Reg. at 45212 (Proposed § 441.45(b)(2)], there is no explanation of how states may cover services for those with dual diagnoses and how they may justify doing so when claiming FFP. This is likely to lead to denial of medically necessary covered

services for a population that already faces significant barriers to care.

Proposed § 440.130(d)(5): Settings for service provision

The preamble indicates that states "have the authority to determine in which settings a particular service may be provided." 72 Fed. Reg. at 45205 (Preamble, II.E). This provision conflicts with the statutory definition of 42 U.S.C. § 1396d(a)(13) and the fundamental right under Medicaid to the free choice of provider. The statutory definition defines the service as "rehabilitation services, including any medical or remedial services (provided in a facility, a home, or other setting) recommended by a physician or other licensed practitioner of the healing arts." The point of the definition is that the services constitute rehabilitation services if they meet the definition, regardless of the setting in which they are provided. Medicaid recipients are also entitled to free choice of provider, and states should not be given the latitude to require services to be provided only in an office or facility setting.

OLRS recommends the following:

- Ø Clarify that rehabilitation services are covered in a facility, a home, or other setting.
- Ø Add *as examples* of other settings those listed in the preamble (schools, community mental health centers, and substance abuse treatment centers) to § 440.130(d).

Proposed § 441.45(b)(1) – Non-covered Services

The proposed rule announces that services will not be provided if they are an "intrinsic element" of a program other than Medicaid. 72 Fed. Reg. at 45212 (Proposed § 441.45(b)(1)). The term "intrinsic element" is not defined. During consideration of the Deficit Reduction Act of 2005 (Pub. L. 109-171), Congress considered but rejected an "intrinsic element" test for rehabilitation services. See Jeff Crowley, Kaiser Commission on Medicaid and the Uninsured, Medicaid's Rehabilitation Services Option: Overview and Current Policy Issues, 1 (August 2007). This is indicative that the "intrinsic element" test conflicts with Congressional intent with regard to coverage of rehabilitation services.

The "intrinsic element" requirement under the proposed regulations is based on a faulty premise. These service exclusions will predominantly, if not exclusively, apply to services for children under age 21, given the nature of the programs implicated. These children will all be eligible for EPSDT. Services under EPSDT should be covered if they are necessary to correct or ameliorate a physical or mental condition, even if it could be covered under another program. The proposed regulation touches on this in § 441.45(b)(1)(i) and (ii), but not with sufficient clarity. This will cause confusion for state Medicaid officials and providers and will cause erroneous denials of coverage for services.

This requirement appears to conflict with statutory and regulatory provisions regarding Medicaid coverage of related services under the Individuals with Disabilities Education Act (IDEA) and third party payment. In Section I.A. of the preamble, it is noted that Medicaid has been used to fund services that are included under the IDEA. 72 Fed. Reg. at 45202. Such coverage is permissible and appropriate as the Medicaid statute specifically provides that the Secretary cannot prohibit or restrict coverage of Medicaid services simply because the services are included in an individualized education plan for IDEA services. 42 U.S.C. § 1396b(c). Also, the Medicaid statute requires that State and local agencies administering the state Medicaid plan "will take all reasonable measures to ascertain the legal liability of third parties . . ." 42 U.S.C. § 1396a(a)(25)(A). Even if a third party is liable, when EPSDT services are at issue, the Medicaid agency is supposed to pay a claim for services, then pursue reimbursement from

the liable third party. 42 U.S.C. § 1396a(a)(25)(E); 42 C.F.R. § 433.139(b)(3)(i) (2007). Thus, when a service is the responsibility of a third party, the other program is still a third party payer.

OLRS recommends that § 441.45(b) should be omitted, because it conflicts with the EPSDT requirements and other parts of the Medicaid statute.

In the alternative:

- Ø Omit the intrinsic element test.
- Ø Amend Section 441.45(b)(1)(iv)to clarify that Medicaid coverage should not be denied merely because a service is provided in an individualized education plan.
- Ø The responsibilities for states regarding third party payers, and the third party payers' own responsibilities, should be recognized and clarified in § 441.45(b)(1), and reference made to 42 C.F.R. § 433.139 (2007).

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

The proposed regulations make it explicit that habilitation services are not coverable as rehabilitation services, because they are designed to help individuals acquire new functional abilities rather than to restore function. 42 C.F.R. § 441.45(b)(2), *see also* 72 Fed. Reg. at 45205 (Preamble,II.F.2). The discussion and regulation regarding habilitation is especially disconcerting to OLRS, especially given the experience in Ohio. This restriction severely impacts children and their rights to rehabilitation services under EPSDT because they are in the process of learning and attaining new skills. This argument has also been used to narrow not only rehabilitation services but also services in other state plan categories. For example, physical therapy, occupational therapy and speech therapy are specifically covered under 42 C.F.R. § 440.110. Again, the Medicaid statute emphasizes the importance of rehabilitation services to *attain* independence and health. 42 U.S.C. §1396.

The regulations and discussion appear to suggest that individuals with mental retardation or similar conditions would never have a need for rehabilitation services. This is overly broad and will lead to automatic exclusion of services for this population when they may be appropriate. Persons with mental retardation may lose functional abilities that are very appropriate for "rehabilitation". Second, neither the regulations nor preamble acknowledge the different nature of some "related conditions," which include epilepsy, autism, and cerebral palsy. 42 C.F.R. § 435.1010 (2007). These diagnoses can cause loss of function that needs to be restored, thus, those individuals would need and could benefit from rehabilitation services, even under CMS' narrower restrictions.

Finally, we commend CMS for clarifying that states may cover habilitation services under other service authorities, but suggest that interested persons be informed of this in the regulations.

OLRS recommends:

- Ø Add language to § 441.45(b)(2) stating that a diagnosis of mental retardation or related conditions does not automatically exclude a person from coverage of mental health or other rehabilitation services.
- Ø Add the following language to § 441.45(b)(2): "Habilitation services may also be provided under other Medicaid services categories, including but not limited to therapy services, defined at 42 C.F.R. § 440.110 (including physical, occupational, and speech/language or audiology therapy) and medical or other remedial care provided by licensed practitioners, defined at 42

C.F.R. § 440.60."

- Clarify that services for individuals with a dual diagnosis of mental retardation/related condition and mental illness may be covered, and provide further explanation of how that coverage can be achieved.
- Clarify children are eligible to receive rehabilitation services that correct or ameliorate defects and physical and mental illnesses and conditions.

Proposed § 441.45(b)(4)

Among the excluded services listed are "services . . . provided to inmates living *in the secure custody* of law enforcement and residing in a public institution." It is not clear whether this is intended to be a narrower category of individuals than those for whom FFP is not available because they are living in a public institution, as defined by 42 C.F.R. § 435.1010 (2007). If so, this would be undesirable. If not, it would be unnecessary and confusing.

OLRS recommends: omit the phrase "in the secure custody of law enforcement."

Conclusion:

Rehabilitation services under Medicaid are a critical support for individuals with disabilities. They are an important component of services that Medicaid eligible children may need to "correct or ameliorate" a physical or mental illness or condition. These regulations will have a negative impact on persons with disabilities, because the regulations significantly restrict the service and the state's flexibility to meet the needs of its citizens with disabilities.

The proposed regulations inhibit accomplishment of statutory purpose of Medicaid coverage of rehabilitation services - "to enable each State, as far as practicable . . . to furnish (1) medical assistance . . . and (2) rehabilitation and other services to help . . . families and individuals *attain* or retain capability for independence or self-care . . ." 42 U.S.C. § 1396 (emphasis added). OLRS urges CMS to withdraw the proposed regulations and work with affected stakeholder to address current policy concerns. Like other disability advocacy organizations we are concerned by CMS' enforcement actions and audits by the HHS Office of the Inspector General (OIG) that have appeared more focused on limiting federal expenditures than improving the appropriateness or effective administration of services under the rehabilitative services option.

We appreciate your thoughtful consideration of these comments.

Sincerely,

/s/

Julianne Johnson
Disability Rights Advocate

/s/

Barbara S. Corner
Attorney at Law