



Ohio Legal Rights Service

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November 5, 2007

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

Re: File code CMS-2287-P
Proposed Rule: Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School

Dear Sir or Madam:

Ohio Legal Rights Service (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 published in the Federal Register on September 7, 2007 and entitled "Medicaid Program; Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School."

Under current federal law, local school districts are able to receive reimbursement through Medicaid for medical services provided to eligible children with disabilities who may need diagnostic, preventative, and rehabilitative services as well as speech, physical, and occupational therapies. Additionally, under current regulations, local school districts can be reimbursed through Medicaid for transportation and administrative claims related to the provision of these medical services. Under the proposed rule, however, reimbursement would no longer be available through Medicaid for specialized transportation from home to school and back for school-age children with an Individualized Education Program (IEP) or an Individualized Family Services Plan (IFSP). The proposed rule would also eliminate reimbursement through Medicaid for school-based administrative activities. An estimated \$3.6 billion over five years in federal funding, including an estimated \$615 million in fiscal year 2007, would no longer be available for these services provided to children with disabilities, thereby shifting financial responsibility for these special education costs to states, local school districts, and local communities.

OLRS must carefully scrutinize any proposed governmental action which may adversely impact children with disabilities in Ohio. Clearly, the likely consequences of the proposed rule if adopted must be considered in conjunction with a number of other developments and changes in funding and services in Ohio which children with disabilities have recently endured. For instance, many such children in Ohio have not received necessary services under the Early Periodic Screening, Diagnosis, and Treatment (EPSDT) program under Medicaid, prompting class action litigation by OLRS in the fall of 2005 because of the monumental failure of the state's EPSDT system. Such litigation follows the recent termination of the Community Alternative Funding System, a payment system which covered specific habilitation

services for those who were eligible for Medicaid and included therapy services for children in special education classes in public schools in Ohio. Furthermore, many children who are mentally retarded or have developmental disabilities and who receive Medicaid services through Individual Options waivers have seen a reduction in funding for services through adoption of the Ohio Development Disabilities Profile.

Analysis of the proposed rule must not be limited to its impact on current programs for children with disabilities, but rather must also extend to programs which may be determined beneficial in the future. Indeed, the proposed rule threatens implementation of the Ohio Medicaid Schools Program, a proposal which would afford local education authorities the ability to receive federal funding through Medicaid for specific direct services, certain administrative activities, and specialized transportation provided to eligible students.

Because the proposed rule would have substantial consequences for children with disabilities and would needlessly hinder the ability of the state of Ohio to provide essential services to them in a manner which it deems most effective, OLRs must uphold its duty to protect children with disabilities within the state and oppose adoption of the proposed rule. The reasons for this opposition will be discussed in further detail below.

Specialized transportation

The proposed rule would have a detrimental impact on the ability of local school districts to provide health care services to eligible children with disabilities, many of whom receive such services while at school or who have special health care needs for which management of and access to treatment in schools remains vital. Indeed, schools are often the primary provider of health care services for low-income children with disabilities for whom Medicaid is the only insurance available. For these reasons, schools throughout the country have utilized federal funding through Medicaid to transport children in accessible buses to schools for their medical appointments, outfit buses with specialized equipment needed by children with disabilities, and provide bus aides when deemed necessary. The proposed rule, however, would prohibit Medicaid funding for these accommodations.

As discussed further below, the proposed rule would also prevent implementation of the Ohio Medicaid Schools Program (OMSP), a proposal which includes federal funding through Medicaid for specialized transportation for children with disabilities, among other things.

School-based administrative activities

Furthermore, reimbursement through Medicaid would no longer be available for school-based administrative activities. Although not included within the purview of direct medical service expenditures, these activities include a wide array of essential services performed by schools for the benefit of children with disabilities, such as providing appropriate outreach activities which help eligible students enroll in Medicaid, identifying students who may be eligible for Medicaid services or who need medical screenings and evaluations, helping children and their families through the Medicaid application process or referring them to other needed services in their local community, and providing coordination and monitoring of medical care and assistance to arrange for the provision of health care services. These administrative activities are crucial to ensure children with disabilities receive the care and treatment they deserve.

The proposed rule, in fact, does not dispute the importance of these administrative activities. Rather, it prohibits reimbursement through Medicaid for these activities that are performed “under the administrative control of a public or private educational institution and that are conducted by school

employees or contractors, or anyone under the control of a public or private educational agency.” School-based administrative activities are not “necessary for the proper and efficient administration of the State [Medicaid] plan” unless performed by employees of the state or local Medicaid agency. The distinction is meaningful because state or local Medicaid agencies would doubtfully send their own employees into schools, thereby sacrificing the most logical, effective, and convenient settings to identify and enroll eligible children in Medicaid.¹ Even if employees of state or local Medicaid agencies were given this task, it would be far less efficient and effective than the current approach to outreach and enrollment activities, which is valuable specifically because staff and employees of schools are familiar to and trusted by families.²

Therefore, the practical effect of the proposed rule would be to eradicate the successful efforts made by schools to identify and enroll low-income children with disabilities into Medicaid.³ Because fewer children who are eligible for services would be identified, it would impair the ability of states and local school districts to provide needed medical services to all who are eligible for such services. Even those who are identified may not receive services in a timely manner.

For reasons which have not been satisfactorily explained, the proposed rule would directly contradict guidance for school-based medical care outreach published in 2000 by the Department of Health and Human Services, the Department of Agriculture, and the Department of Education, which indicated that schools represent “the single best link” for identifying and enrolling eligible low-income children for medical care.⁴ This federal guidance sought to encourage agreements between state Medicaid agencies and schools so that the latter could receive financial assistance for administrative activities to identify and enroll eligible children.⁵ As further discussed below, the proposed rule would prevent implementation of the Ohio Medicaid Schools Program (OMSP), a proposal which would include federal funding through Medicaid for school-based administrative activities, among other things.

Early Periodic Screening, Diagnosis and Treatment program under Medicaid

The proposed rule would also impact Medicaid’s Early Periodic Screening, Diagnosis, and Treatment (EPSDT) program, under which states are mandated to perform a multitude of activities to ensure that children, once they are enrolled in Medicaid, actually obtain health care services and receive “regular check-ups, including vision, dental, and hearing exams, as well as necessary immunizations and laboratory tests and follow-up testing and treatment.”⁶ States are required to notify families about the availability of these services and to help them receive access to health care services for their children. The proposed rule would prohibit reimbursement through Medicaid for states who contract with school systems so that school nurses can inform families about EPSDT and assist families in arranging care, as

¹ See *Congressional Action is Needed to Prevent the Administration from Eviscerating Efforts to Enroll Uninsured Low-income Children in Health Coverage Through the Schools*, by Judith Solomon and Donna Cohen Ross, Center on Budget and Policy Priorities, September 17, 2007. Most children who are uninsured but eligible for Medicaid attend school, which are therefore the most ideal places in which to identify and enroll such children in health care coverage.

² *Id.*

³ Upon elimination of federal reimbursement for school-based administrative activities, schools may decide to reduce the number of nurses and social workers. See *NSBA’s Letter to U.S. Senate*, August 7, 2007.

⁴ *Congressional Action is Needed to Prevent the Administration from Eviscerating Efforts to Enroll Uninsured Low-income Children in Health Coverage Through the Schools*, by Judith Solomon and Donna Cohen Ross, Center on Budget and Policy Priorities, September 17, 2007.

⁵ *Id.*

⁶ *Id.* Also, “if a child’s screening identifies health problems, the law also requires the EPSDT program to provide necessary health care, diagnostic services and treatment that will correct or improve the health problems, even if the services are not routinely covered by Ohio’s Medicaid plan.” See <http://olrs.ohio.gov/ASP/EPSDT.asp>

some states currently do. It would also prohibit federal reimbursement when school staff assists in “coordinating the care of children enrolled in special education who have special health care needs.”⁷

This is especially serious for children with disabilities in the state of Ohio, many of whom have not even received screenings under EPSDT which could identify those who actually need the services.⁸ OLRs serves as counsel for plaintiffs and the proposed plaintiff class in *G.D. v. Jones Kelley*, class action litigation which was filed in October 2005 on behalf of a class of children eligible for Medicaid who are being denied the benefits of Ohio’s EPSDT system. The lawsuit alleges that this system does not permit Medicaid eligible children to apply for and receive treatment services from EPSDT. Indeed, the state of Ohio has failed miserably in its duty to inform families of children who are on Medicaid about this important program. States throughout the country fail to meet the 80% screening ratio expected by the federal government, but Ohio’s latest reported ratio is an embarrassing 47%.

Recent elimination of the Community Alternative Funding System in Ohio

This recent litigation initiated by OLRs is significant because many of the children who are eligible for but are not receiving necessary medical services under Ohio’s EPSDT system had previously received such services under the Community Alternative Funding System (CAFS) program, which Ohio recently discontinued on June 30, 2005. CAFS was the payment system in Ohio which covered specific habilitation services for individuals who were eligible for Medicaid, including physical, occupational, and speech therapy as well as other services for children in special education classes in Ohio public schools. After compliance issues arose and proposals were announced to eliminate CAFS, litigation ensued, eventually resulting in a settlement agreement whereby hundreds of school districts that had utilized funding from CAFS for services to children for about \$67 million in reimbursements in fiscal year 2005 would receive about \$20 million beginning in fiscal year 2006.⁹ This represents a significant loss of funding for services provided to children with disabilities in the state of Ohio, and the proposed rule eliminating reimbursement under Medicaid for school-based administrative and transportation claims only magnifies these losses, which have caused immeasurable hardship for children in Ohio eligible for Medicaid.

Ohio Medicaid Schools Program

As mentioned previously, the proposed rule effectively precludes implementation of the Ohio Medicaid Schools Program (OMSP).¹⁰ This proposal would include federal funding through Medicaid for specific direct services, certain administrative activities, and specialized transportation. The program, developed by the Ohio Department of Education (ODE) and the Ohio Department of Job and Family Services (ODJFS), affords local education authorities (LEAs) the ability to receive federal funding for Medicaid services provided by licensed practitioners to eligible students.

A determination of whether or not a claim for service is allowable under the proposed program would be governed by several objective criteria.¹¹ The child must be eligible to receive Medicaid services, and

⁷ See *Congressional Action is Needed to Prevent the Administration from Eviscerating Efforts to Enroll Uninsured Low-income Children in Health Coverage Through the Schools*, by Judith Solomon and Donna Cohen Ross, Center on Budget and Policy Priorities, September 17, 2007.

⁸ See <http://www.cms.hhs.gov/MedicaidEarlyPeriodicScrn/downloads/epsdtfy2004.pdf>

⁹ See http://www.oecd.org/oecd/h_docs/FORUM/06_0102_cafs.cfm

¹⁰ See *Memorandum from the Center for School Finance dated May 15, 2007*. Approval for the program was considered likely, according to the Center for School Finance.

¹¹ Inappropriate billing by schools was cited as one of the primary justifications for the proposed rule. In 2003, CMS issued new guidance that provides a comprehensive framework by which states may submit claims for federal reimbursement for administrative activities performed by school employees, such as outreach and enrollment assistance. The guidance explains how schools should account for the time of its employees and provides precise definitions of administrative activities which would be

such services must be among those included in Ohio's approved Medicaid plan and specified in the child's Individualized Education Program (IEP).¹² The services must also be delivered by the appropriately licensed professional specified in Ohio's approved Medicaid plan."¹³ It is extremely doubtful, however, that this program could be implemented in any form without assurances that school districts could receive reimbursement through Medicaid for the administrative costs involved. It would simply be too expensive to administer the program.

Therefore, the recent termination of the CAFS program and the expected inability to implement OMSP places added pressure on special education funding in the state of Ohio and leaves children with disabilities in the state of Ohio in a dismal situation.

Ohio Developmental Disabilities Profile

The state of Ohio has recently changed the way in which it determines the level of funding for individuals who receive Individual Options (IO) waivers, a Medicaid service provided to eligible individuals with mental retardation or developmental disabilities which permits such persons to live in community settings rather than in an Intermediate Care Facility (ICF/MR). The Ohio Development Disabilities Profile (ODDP) was developed because of concerns that the level of funding available for individuals receiving IO waiver services was dependent upon the county in which the individual resided. This system is used for every new recipient of IO waiver services and is being phased in for those who were already enrolled and is intended to ensure that individuals with similar needs receive similar funding, regardless of the county in which they live.¹⁴ For the first time, statewide rates have been established for the IO waiver.

Although the ODDP may provide a funding range where the level of services will not be affected, and even may increase the amount of funding available, there are unfortunately some individuals who receive IO waivers for whom the level of funding will decrease under this system. Although not directly relevant to the issues implicated by the proposed rule, this does demonstrate the erratic and uncertain environment in Ohio which children with disabilities have endured recently.

Individuals with Disabilities Education Act

The proposed rule would prohibit reimbursement for school-based administrative and transportation costs under Medicaid, but many of the services affected are required under the Individuals with Disabilities Education Act (IDEA). However, there is no comparable increase in funding for the IDEA that would enable states and school districts to compensate for the reduction in funding under Medicaid.¹⁵ Federal

able to receive federal reimbursement through Medicaid. The proposed rule would nevertheless prohibit federal reimbursement for outreach and enrollment assistance performed by school employees. In fact, in justifying the need for the proposed rule, CMS cites reports of abuses in billing that occurred before states were obliged to implement the 2003 guidance. See *Congressional Action is Needed to Prevent the Administration from Eviscerating Efforts to Enroll Uninsured Low-income Children in Health Coverage Through the Schools*, by Judith Solomon and Donna Cohen Ross, Center on Budget and Policy Priorities, September 17, 2007.

¹² See *Memorandum from the Center for School Finance dated May 15, 2007*. "This program will include evaluations and treatment services under speech therapy, occupational therapy, physical therapy, audiology services, psychological services, counseling, social work and nursing services. The program will also include targeted case management services – a specifically defined type of service coordination. Also included will be specialized transportation." *Id.*

¹³ *Id.* "This will include licensed speech therapists, licensed audiologists, licensed occupational therapists, certified occupational therapist assistants, licensed physical therapists, certified physical therapist assistants, licensed school psychologists, licensed counselors and licensed social workers, licensed registered nurses, and licensed practical nurses." *Id.*

¹⁴ In February 2007, the Ohio Department of Mental Retardation and Developmental Disabilities recommended that county boards throughout the state put a "pause" on the waiver transition process for the Individuals Option (IO) waiver to allow the department "to review issues identified with the process, and to develop and propose changes to the federal government for the waiver reimbursement system." See <http://olrs.ohio.gov/ASP/oddp.asp>

¹⁵ See *Education Coalition Letter in Support of Medicaid Provision in S-CHIP*, September 21, 2007.

funding for students with disabilities is becoming more critical as school districts face more financial burdens.¹⁶ For example, upon reauthorization by Congress in 2004, the IDEA mandated school districts to provide additional services for eligible students, although federal funding for the IDEA decreased in 2006 and “looks to be funded at a below inflation level this year.”¹⁷ At a time when the cost of educating students with disabilities continues to advance, the proposed rule would rescind an important source of funding for local school districts, further complicating the problem.

Conclusion

In sum, OLRS opposes the proposed rule because it is most injurious to children with disabilities who come from low-income families, perhaps the most vulnerable of school children. It undermines the ability of the state of Ohio to provide health care services to all children with disabilities within its boundaries in the most effective manner it may deem necessary, such as working together with local school districts to enroll low-income children with disabilities in Medicaid and ensuring they receive the services they need. For the reasons stated herein, and because potential legislation has been introduced which adequately addresses the concerns which prompted the proposed rule, OLRS believes that this proposed rule is unwarranted.

Respectfully,

/s/

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¹⁶ This proposed rule comes at a time “when the federal government is funding barely 18 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.” See *Joint Association Letter to Secretary Michael O. Leavitt*, August 23, 2007.

¹⁷ See *Joint Association Letter to the House of Representatives regarding H.R. 5834*, September 26, 2006.