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STATE OF NEW HAMPSHIRE
DEPARTMENT OF HEALTH AND HUMAN SERVICES
DIVISION OF MEDICAID SERVICES

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January 6, 2020

Dr. Carl Ladd
Barrett Christina, Esq
Bridey Bellemare
Ms. Jane Bergeron-Beaulieu
NH School Administrators Association
46 Donovan Street, Suite 3
Concord, NH 03301

Dear Dr. Ladd, Attorney Christina, Executive Director Bergeron-Beaulieu and Executive Director Bellemare:

I am writing in response to your letter dated November 27, 2019, regarding the Department of Health and Human Service's draft proposed Medicaid to Schools regulation. As you referenced the New Hampshire Association of Special Education Administrators' November 20, 2019 letter, please find the Department's response to that letter attached. That response addresses a number of concerns raised in your November 27, 2019 letter. The remaining issues are discussed below.

As noted in that letter, I would like to emphasize that the Department's goal is to ensure we have a strong, sustainable, and compliant Medicaid to Schools program. As you are aware, given clarifying guidance issued by CMS in July 2019, the Department filed an emergency rule to ensure that the state's Medicaid program complies with federal regulations, which treat schools as a setting, rather than as a separate program under Medicaid. On December 17, 2019, following a series of stakeholder meetings, the Department filed the proposed rule with the Office of Legislative services thereby initiating the formal regular rulemaking process. That proposed rule included changes made since receiving your letter, as well as feedback from other stakeholders. We remain committed to working with you and all stakeholders as we continue through this process.

Medical Necessity

With regard to your concern about "medical condition or injury," the qualifying language to "medically necessary" has been removed. Proposed rule He-W 589.04(b)(2).

Life Skills

Social activities and the teaching of life skills are necessarily medical in nature. The three major skills areas are activities of daily living (including instrumental activities of daily living), social skills, and occupational or vocational skills. If there is a medical component to a service related to these three major skills, the medical (as opposed to educational) service may be reimbursable under Medicaid. Medicaid may provide reimbursement for services included in a child's IEP or IFSP as long as:

(1) the services are listed in Section 1905(a) of the Social Security Act and are medically necessary; (2) all federal and state regulations are followed, including those specifying provider qualifications; and (3) the services are included in the state plan or available under EPSDT.

MACPAC Issue Brief, April 2018, *Medicaid in Schools*, at p. 2. (available at <https://www.macpac.gov/wp-content/uploads/2018/04/Medicaid-in-Schools.pdf>).

Guidance Counselors

Guidance counselors, absent separate licensure, are not medical providers. “In order for schools and practitioners to participate in the Medicaid program and receive Medicaid reimbursement, they must meet the applicable Medicaid provider qualifications.” CMS 7/1/19 Guidance at p. 17. CMS has emphasized that, “practitioners who furnish services in school settings must meet applicable qualifications established by the state and those qualifications must minimally be the same as those providers who furnish services in other settings in the community.” CMS 7/1/19 Guidance at p. 17.

To the extent a guidance counselor has qualifications that are the same or equivalent to the requirements for mental health providers licensed under RSA 330-A, there may be an efficient pathway to licensure. The Department has been working with the New Hampshire Office of Professional Licensure and Certification as well as with the licensing boards to identify opportunities to increase licensure for professionals providing services in the school setting.

Concern that Examples Listed in the Rules Unintentionally Limit Reimbursable Activities

As you are aware, we briefly discussed this concern at both stakeholder engagement meetings as well as at the MCAC subcommittee meeting. We have addressed this concern by including broad language that states, “[a]ny other remedial services that are included in the student’s care plan as medically necessary for the maximum reduction of a student’s physical or mental disabilities excluding education and social activities such as classroom instruction and academic tutoring.” Proposed He-W 589.04(af). Additionally, the Department expanded on the activities described in the rule as well as adjusted the language from “to include” to “such as.” These examples are intended to serve as a guide to schools and not to restrict schools access to reimbursement.

Treatment Plan

The concern about requiring occupational therapists, physical therapists, and other providers to use a therapy plan as a documentation requirement was discussed at the stakeholder meeting held on November 21, 2019 and at the MCAC subcommittee meeting. The goal of the provision is to ensure providers maintain sufficient documentation to be compliant with Medicaid related laws and regulations, not to add additional hurdles to compliance. As CMS noted in its guidance, “the provider . . . must document the provision of the service by creating and maintaining clinical and billing records that would be required of any other provider” CMS 7/1/19 Guidance at p. 15.

Licensed Practical Nurse

The Department has reinserted Licensed Practical Nurses as an individual who may perform nursing services under the direction of a physician, APRN, registered nurse, or physician assistant. Proposed He-W 589.03(j)(3)

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Rehabilitative Assistants and Areas of Knowledge

Following discussions at the stakeholder meeting held on November 21, 2019 and at the MCAC subcommittee meeting, the Department adjusted the language in the proposed rule to condition certain areas of knowledge on whether the topics are “applicable for the tasks delegated to the rehabilitative assistant” or if otherwise required by law. Proposed He-W 589.04(af)(4).

Documentation under FERPA and HIPAA

As you note, in most instances, the relevant records are educational records and thus are governed under the Family Educational Rights and Privacy Act (FERPA). Thus the provision regarding HIPAA has been adjusted to note it relates to records only “as applicable.” Proposed He-W 589.06(k).

Thank you for your collective efforts and thoughtful commentary on the proposed rule. The Department will continue to solicit comment and feedback on the proposed rule, as well as to engage stakeholders for other approaches to strengthen the State’s Medicaid to Schools program. It is our belief that this continued collaboration will result in a better system, and will result in one of the strongest Medicaid to Schools programs in the country.

Sincerely,



Henry Lipman
Medicaid Director