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January 6, 2020

Ms. Jane Bergeron-Beaulieu  
NH Association of Special Education Administrators  
25 Triangle Park Drive, #103  
Concord, NH 03301

Dear Executive Director Bergeron-Beaulieu:

I am writing in response to your letter, dated November 20, 2019, regarding the Department of Health and Human Service's draft proposed Medicaid to Schools regulation. At the outset, 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.

**Background: The 1988 Federal Legislation Allowing for Medicaid Reimbursement for Medical Services Provided under IDEA**

In reviewing your stated concerns, it is helpful to understand the context in which schools first became authorized to seek Medicaid federal financial participation for Individualized Education Program (IEP) services provided by schools under the Individuals with Disabilities Education Act (IDEA). In 1988, Congress amended section 1903(c) of the Social Security Act by adding 42 U.S.C.A. §1396b(c), "Treatment of educationally-related services," to allow Medicaid coverage of health related services provided to children under IDEA. Through that amendment, Congress removed the prohibition that excluded Medicaid reimbursement for a medical service where the service was initiated through an IEP. 42 U.S.C.A. §1396b(c) does not change the state or federal requirements of the Medicaid program, nor does the provision exempt services included in an IEP from all other requirements under federal and state law. CMS has addressed the amendment and school participation in the Medicaid program in guidance:

The Medicaid statute was amended by Congress in order to facilitate payment for the health-related services under the IDEA. . . . IDEA statutory and regulatory provisions on health-related services do not create exceptions to Medicaid requirements and procedures, or expand the scope of Medicaid responsibility or coverage. Therefore, schools or their health practitioners who seek to bill the Medicaid program for reimbursement for health services must meet Federal and state Medicaid provider qualifications . . .

CMS, *Medicaid and School Health: A Technical Assistance Guide* (Aug. 1997) at p. 48 (emphasis added) (available at [https://www.medicaid.gov/medicaid/finance/downloads/school\\_based\\_user\\_guide.pdf](https://www.medicaid.gov/medicaid/finance/downloads/school_based_user_guide.pdf)).

The Medicaid and CHIP Payment and Access Commission (MACPAC), an entity that advises Congress on Medicaid and CHIP policy issues, similarly explained that Medicaid services provided in the school setting must comply with state and federal law:

State Medicaid may cover 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>). The federal Office of Inspector General reiterated these requirements in multiple audit reports. *See, e.g.*, OIG report A-06-14-00002, (Aug. 2017).

Given this consistent messaging from our federal partners, the Department has moved forward in its rulemaking in an effort to assist school districts that seek federal financial participation through the Medicaid program to ensure compliance with all applicable state and federal Medicaid regulations. As the United States General Accounting Office has recognized, “coordinating the differing requirements of Medicaid and IDEA can be challenging.” GAO Report, *Medicaid and Special Education: Coordination of Services for Children with Disabilities is Evolving.* (Dec. 1999) at p. 13. The Department remains committed to assisting schools in navigating those challenges and remains open to dialogue on how to ensure the State has one of the strongest programs in the country.

### **RSA 186-C:25 Does Not Shift the Responsibility to Provide or Pay For Special Education Services to DHHS**

In 1990, the New Hampshire legislature enacted RSA 186-C:25 to allow schools to voluntarily participate in Medicaid reimbursement to schools “for medically-related services provided to handicapped children by local school districts and school administrative units.” 1990 Chapter law 272, purpose statement. RSA 186-C:25 did not change the responsibilities of local education agencies under the IDEA, other than to allow it to seek reimbursement for costs “which are reimbursable under federal law but which were previously fully funded by such districts or administrative units.” RSA 186-C:25, I.

As MACPAC noted in its April 2018 issue brief, “[u]nder IDEA, local education agencies are required to provide necessary services identified in an IEP whether or not Medicaid funding is available.” MACPAC Issue Brief, April 2018, *Medicaid in Schools*, at p. 2. Although the financial responsibility under IDEA remains with the local school districts and/or school administrative units, the Department is committed to providing a regulatory framework that will allow schools to maximize their participation in the program.

## **The Department's Response to NHASEA's Comments on the Proposed Rule**

The Department has revised portions of the draft rule, since publishing a draft on November 4, 2019. As such, many of the comments raised in the numbered paragraphs have been addressed, in part due to your continued engagement.

### **Consultation under Medicaid**

In numbered paragraph 1, you suggest that consultation should be reimbursable under the state's Medicaid plan. CMS has informed the Department that "provider to provider consultation" cannot be a stand-alone coverable Medicaid service. The presence of the beneficiary is required for a covered service. The resources that go into an encounter (such as a consultation) can be accounted for in the rate for that service. Further, under the proposed rule, providers may still bill for the direct service where the student is present for at least 51% of the unit of service.

We understand that this issue continues to be of concern. The Department is researching how districts may be able to seek reimbursement for consultation and other indirect services through administrative claiming. We look forward to working with you as we explore appropriate means by which districts may seek reimbursement for indirect and administrative services related to the medical services provided to its Medicaid enrolled students.

### **Therapy Plan**

In paragraph 2, you raise concerns about the documentation requirements for occupational therapists, physical therapists and other providers. The provision ensures providers maintain sufficient documentation to be compliant with Medicaid related laws and regulations. As CMS noted in its guidance related to Medicaid in Schools, "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.

### **SUD/Vision Services**

In paragraph 3, you suggest that the Department should not incorporate by reference other state Medicaid regulations. A school is required to comply with all applicable state and federal Medicaid regulations if it chooses to participate in Medicaid to Schools. Incorporating other state Medicaid regulations into He-W 589 is a way to inform schools of relevant rules. To the extent there are questions regarding the applicability of a particular rule please let us know and the Department may be able to address those questions through Department issued guidance.

### **An IEP is not an Order for purposes of Medicaid reimbursement**

In paragraph 4, you suggest that an IEP should constitute an order for medical services under the state's Medicaid program. As is described above, IDEA and Medicaid are two separate federal programs. While these programs may overlap, each program has its own laws, regulations, and procedures. To the extent a school chooses to seek reimbursement for a medical service provided as part of an IEP, Medicaid may provide reimbursement for the cost of the services described in the IEP so long as the services are provided in compliance with all state and federal Medicaid regulations.

The Department understands that you also have concerns regarding prior authorization, including those raised in paragraph 5a. We are continuing to assess the prior authorization requirement and the administrative burdens it entails. We look forward to continuing to work with you and other stakeholders on this issue.

### Rehabilitative Assistance

As to paragraph 5b – review of services performed by paraprofessionals as rehabilitative assistance services – He-W 589.04(aj) requires that a licensed clinician designated by the care plan team must review the service log of activities performed by the paraprofessional with the paraprofessional every 30 days. The prior version of the rule required a weekly review of activities, which the Department recognized as being administratively burdensome.

As to paragraph 5c – services provided under rehabilitative assistance – following stakeholder feedback, the Department has reinserted language in He-W 589.04(b)(5), which states that all covered services shall be “designed to meet the health needs of a student by facilitating the reduction of a physical or mental impairment and providing rehabilitation.” He-W 589.04(af) provides examples of what would constitute covered services. When read together, He-W 589.04(af) and He-W 589.04(b)(5) should assist schools in determining which services constitute educational services that cannot be billed as medical services to Medicaid.

The Department understands that this is an important and complicated area for schools. The Department’s site visits have been helpful in guiding the Department’s rulemaking and we appreciate the opportunity to observe the important work being done in schools.

### Documentation

Schools that choose to seek reimbursement under Medicaid for medical services provided in schools must comply with Medicaid documentation requirements. As such, providers “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. Direct service providers working in schools must “maintain appropriately comprehensive clinical records to support the reported expenditures.” *See also id.* at 16.

The Department does not require documentation beyond that which is required to be compliant with Medicaid. The Department will continue to elicit and review feedback on the proposed rule and will make adjustments where appropriate. The Department will also continue to publish guidance to address particular questions and concerns.

### Qualified Professionals

In paragraph 7, you raise issues related to provider qualifications. Again, Medicaid in schools is not a separate “program” but rather is a setting under Medicaid. CMS specifically addressed provider requirement in its July 1, 2019 guidance:

In order for schools and practitioners to participate in the Medicaid program and receive Medicaid reimbursement, they must meet the applicable Medicaid provider qualifications and the requirements in 42 C.F.R. § 431.107, including having a provider agreement and a Medicaid provider identification number. Practitioners in schools are also subject to the screening and national provider identification (NPI) requirements in section 1866(j)(2) of the Act and 42C.F.R. § 455.400 – 455.470. Rendering providers must meet the screening requirements and claims must include the NPI of the physician or other professional who ordered or referred such items or services. Finally, 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 (emphasis added).

CMS has explained that “[i]t is not sufficient for a state to use Department of Education provider qualifications for reimbursement of Medicaid-covered school health services.” CMS, *Medicaid and School Health: A Technical Assistance Guide*, (Aug 1997) at p. 15.

The Department has described practitioners as needing “comparable” qualifications. The Department did not intend to cause confusion with other uses of the term “comparability” such as those described in your letter. The Department’s reference to comparability of qualifications for providers has been in the context of the CMS requirement 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. The GAO has recognized that “required qualifications for Medicaid providers may be higher than the standards of local school districts, thus limiting the reimbursement that can be obtained under Medicaid.” GAO Report, *Medicaid and Special Education: Coordination of Services for Children with Disabilities is Evolving.*” (Dec. 1999) at p. 13.

#### Billing for Services in a Group Setting

Schools are able to seek Medicaid reimbursement for occupational therapy, physical therapy, and speech-language hearing services in the group context. He-W 589.04(r)(3), He-W 589.04(v)(3), He-W 589.04(an)(3), He-W 568.08(a)(10), He-W 568.10(e)(2), and He-W 589(e)(2) all address the billing and documenting of group therapy.

In conclusion, 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. Thank you for the time you have devoted to this endeavor, and I look forward to continued collaboration.

Sincerely,



Henry Lipman  
Medicaid Director