



# N.H. Association of Special Education Administrators

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Henry Lipman  
New Hampshire State Medicaid Director  
New Hampshire Department of Health and Human Services  
129 Pleasant Street  
Concord, NH 03301

Dear Henry,

We appreciate the opportunity to respond to proposed language in the Medicaid to Schools regulations, as published on or about November 4, 2019.

As a backdrop to our comments, we understand the following concerning federal law that governs school-based Medicaid programs:

First, federal law mandates, pursuant to the Social Security Act, that "...[n]othing in this subchapter shall be construed as prohibiting or restricting, or authorizing the Secretary [of the U.S. Department of Health and Human Services, and by extension, the Centers for Medicare and Medicaid Services (CMS)] 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 [IEP] established pursuant to part B of the Individuals with Disabilities Education Act [IDEA] or furnished to an infant or toddler with a disability because such services are included in the child's individualized family service plan [IFSP] adopted pursuant to part C of such Act." 42 U.S.C.A. § 1396b(c). We understand this federal statute to mean that any federal or state regulations or guidance issued by CMS may not restrict Medicaid payment for services because such services are ordered in a child's IEP or IFSP. We also understand this statute to mean that the Social Security Act recognizes a child's IEP as a care plan that can order covered services. Specifically, IDEA regulations mandate that a child's IEP must include a "...statement of the...related services...to be provided to the child, or on behalf of the child..." 34 C.F.R. §300.320(a)(4), as attached. As such, when numerous regulations or CMS guidance practically restrict or prohibit Medicaid payments for such services or do not recognize the sufficiency of an IEP as a care plan and such regulations or guidance are unnecessarily burdensome on schools and not grounded in federal statutory or regulatory requirements, such regulations or guidance violate the Social Security Act.

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Second, federal law mandates, pursuant to the IDEA, that “[i]f any public agency other than an educational agency is otherwise obligated under Federal or State law...to provide or pay for any services that are also considered special education or related [covered] services...such public agency shall fulfill that obligation or responsibility...” 20 U.S.C.A. §1412(a)(12)(B)(i). As we know, the New Hampshire Department of Health and Human Services (DHHS) is a public agency, and the NH legislature has elected to require that DHHS provide Medicaid reimbursement for related services pursuant to RSA 186-C:25. Furthermore, the IDEA stipulates that “...the financial responsibility of each public agency... including the State Medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency...” 20 U.S.C.A. §1412(a)(12)(A)(i). As such, when CMS mandates that DHHS shift the responsibility for payment of covered services to schools, through unnecessarily burdensome regulations or guidance, the IDEA is violated.

As noted below, much of the language of the proposed regulation violates the Social Security Act and the IDEA.

1. Medicaid reimbursement for most consultations have been eliminated. The provision of consultation by practitioners within each covered service context is oftentimes crucial to the efficacy of the covered service. Practitioners render crucial expert opinions regarding the diagnosis or treatment of a child, in the context of related services, in IEP meetings and in interactions with parents and other school personnel in order that the student may receive appropriate benefit from the delivery of the covered service. At least one federal district court has recognized consultation as a related service pursuant to the IDEA.<sup>1</sup> Additionally, the proposed rule eliminates reimbursement for the time a practitioner must spend documenting the rendering of an expert opinion in the context of consultation, assessment and evaluation of a student’s need. Absent a federal statutory or regulatory prohibition,<sup>2</sup> the elimination of Medicaid reimbursement for consultation and documentation thereof violates the Social Security Act and the IDEA.
2. For occupational therapy, physical therapy and speech-language/hearing services, the proposed rule mandates the development of a therapy plan when services are to be delivered by an assistant. As such, the proposed rule does not recognize the IEP as the care plan in this context. Writing an additional care plan will result in increased costs to districts. Absent a federal statutory or regulatory mandate of the development of a separate care plan in addition to the IEP, the proposed rule violates the Social Security Act and the IDEA.
3. For Substance Abuse Disorder (SUD) and Vision Services, the proposed rule has incorporated by reference the requirements of other state Medicaid regulations that were not promulgated to govern Medicaid reimbursements for such services in the context of a child’s IEP. As a result, school districts cannot practically comply with the requirements of these incorporated regulations, thus denying school districts Medicaid payment for such services. Absent a federal statutory or regulatory mandate of the incorporation of such standards in the school district context, the proposed rule violates the Social Security Act and the IDEA. The incorporation by

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<sup>1</sup> James M. ex rel. Sherry M. v. Hawai’i, 803 F.Supp. 2d 1150, 1156 (D. Haw. 2011)

<sup>2</sup> Please note that DHHS has issued guidance and acknowledged that elimination or restriction of Medicaid reimbursement for consultation is not supported by federal regulation. See, <https://www.dhhs.nh.gov/ombp/medicaid/mts/documents/mts-provider-guid-fy2020-02.pdf> p. 3, answer to question 6.

reference is also contrary to the public interest in that it has "...incorporated rules by reference which are overbroad or too general, when the delegation [of the authorizing statutes of the Medicaid to School program] calls for the agency [DHHS] to adopt rules specifically suited to state needs." JLCAR Rule 403.01(e). The authorizing statutes, RSA 186-C:25, V and RSA 167:3-k, IV(a) respectively, require DHHS to engage in rulemaking to "...further... define...services eligible for medical reimbursement..." and "...further define services..." and "[i]n defining such services...to the extent practicable, seek to maximize the availability of federal financial assistance to local school districts and school administrative units." Incorporation by reference in the context of the proposed rule has only served to restrict Medicaid payment rather than expand access to Medicaid payment because of the burdensome compliance requirements of the incorporated rules.

4. Pursuant to the IDEA, legal authority to order covered services is conferred on the IEP team via the development of the IEP: "The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes...a statement of the special education and **related [covered] services** and supplementary aids and services, based on peer-reviewed research to the extent practicable, **to be provided to the child**, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child...to advance appropriately toward attaining the annual goals... to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and...to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph.... 20 U.S.C.A. §1414(d)(1)(A)(i)(IV). When licensed practitioners participate in IEP team deliberations or provide information that informs an IEP team decision within the school setting and relative to the delivery of covered services pursuant to the order of such in an IEP, the requirements of 42 C.F.R. §440.110<sup>3</sup> and 42 C.F.R. §440.130(d)<sup>4</sup> are met regardless of whether a licensed practitioner may independently "prescribe" services in the community, because the ultimate "order" of the services stem from the authoritative decision of the IEP

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<sup>3</sup> "(a) Physical therapy—

(1) Physical therapy means services prescribed by a physician or other licensed practitioner of the healing arts within the scope of his or her practice under State law and provided to a beneficiary by or under the direction of a qualified physical therapist. It includes any necessary supplies and equipment...

(b) Occupational therapy—

(1) Occupational therapy means services prescribed by a physician or other licensed practitioner of the healing arts within the scope of his or her practice under State law and provided to a beneficiary by or under the direction of a qualified occupational therapist. It includes any necessary supplies and equipment...

(c) Services for individuals with speech, hearing, and language disorders—

(1) Services for individuals with speech, hearing, and language disorders means diagnostic, screening, preventive, or corrective services provided by or under the direction of a speech pathologist or audiologist, for which a patient is referred by a physician or other licensed practitioner of the healing arts within the scope of his or her practice under State law. It includes any necessary supplies and equipment..."

<sup>4</sup> "'Rehabilitative services,' except as otherwise provided under this subpart, includes any medical or remedial services recommended by a physician or other licensed practitioner of the healing arts, within the scope of his practice under State law, for maximum reduction of physical or mental disability and restoration of a beneficiary to his best possible functional level."

team. If the proposed rule practically operates to prohibit Medicaid payment for services because a licensed practitioner cannot independently “prescribe” services in the community, even though such practitioner can provide a recommendation of services to an IEP team, such prohibition violates the Social Security Act and the IDEA.

5. For Rehabilitative Assistance:

- a. The proposed rule seeks to require prior authorization by DHHS. As stated in paragraph 4, above, legal authority to order covered services is conferred on the IEP team via the development of the IEP. To require prior authorization from DHHS for rehabilitative assistance unlawfully allows DHHS to potentially override the legal decision of an IEP team to order rehabilitative assistance and is therefore a violation of the Social Security Act and the IDEA. Additionally, the prior authorization requirement is duplicative of the IEP team decision process and creates an overly burdensome administrative requirement that will shift costs of providing services to schools because schools will be required to dedicate more administrative resources to the pursuit of prior authorization. Furthermore, CMS has acknowledged in its guidance that the ordering of a covered service in an IEP may be “deemed” as prior authorization.<sup>5</sup>
- b. The proposed rule may indicate that a licensed practitioner may need to train and supervise rehabilitative assistants (paraprofessionals). Such a mandate is contrary to guidance issued by the NH Department of Education (DOE) and DOE regulations. Both DOE guidance and regulations mandate the supervision of paraprofessionals by a special education teacher.<sup>6</sup> Historically, the Medicaid to Schools program mandated that a licensed practitioner provide a “consultation” to a paraprofessional delivering rehabilitative assistance to a child. This consultative relationship ensured that the services delivered by the paraprofessional fit within the covered service definition of rehabilitative assistance and allowed for the rendering of an expert opinion by the licensed practitioner to the paraprofessional regarding the efficacy of the rehabilitative assistance intervention. Requiring a licensed practitioner to supervise a paraprofessional will not only violate DOE guidance and regulations, but will also burden licensed practitioners with a personnel supervision responsibility for which the licensed practitioners do not have capacity in their schedule, all while remaining responsible to provide covered services to children on a previously burgeoning caseload. As such, Medicaid reimbursements will be reduced in violation of the Social Security Act and the IDEA. Alternatively, licensed practitioners could provide consultation to special education teachers relative to interventions by paraprofessionals, thus enhancing the supervision of paraprofessionals by special education teachers regarding the delivery of rehabilitative assistance.
- c. Restrictions of the activities included in the definition of rehabilitative assistance in comparison to the historical allowance of such activities will reduce or restrict payment for such activities in violation of the Social Security Act and the IDEA because such

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<sup>5</sup> Medicaid and School Health: A Technical Assistance Guide, August 1997  
<https://www.dhhs.nh.gov/ombp/medicaid/mts/documents/schoolbaseduserguide.pdf> , p. 15.

<sup>6</sup> Ed 1113.12(b);  
[https://www.education.nh.gov/instruction/special\\_ed/memos/documents/fy18\\_memo\\_2\\_paraprofessional\\_personnel.pdf](https://www.education.nh.gov/instruction/special_ed/memos/documents/fy18_memo_2_paraprofessional_personnel.pdf)

previously allowed activities were “for maximum reduction of physical or mental disability and restoration of a...[student] to his [or her] best possible functional level.” 42 C.F.R. §440.130(d). The proposed rule may also eliminate rehabilitative assistance as a covered service. We consider the proposed rule to be ambiguous in this regard,<sup>7</sup> but DHHS could remove this ambiguity in the draft rule by making it clear that rehabilitative assistance fits squarely within the definition of a covered service by removing rehabilitative assistance as a non-covered service pursuant to He-W 589.04(av)(1).

6. The proposed rule has added many documentation requirements that were not previously required:
  - a. Specialized Transportation- Under the proposed rule<sup>8</sup>, it seems that the language would require that transportation trip logs require the tracking of mileage of each individual student on a vehicle, rather than considering the round-trip mileage of the trip. As DHHS has acknowledged in the past, “[w]e realize that students may be picked up and dropped off at various locations along a route to and from school, but to calculate a cost per mile based on each student would be operationally prohibitive....”<sup>9</sup> Due to the operationally prohibitive nature of tracking each child’s individual mileage, Medicaid payments will be restricted or cease in violation of the Social Security Act and the IDEA.
  - b. Covered services, generally- The proposed rule has added additional burdensome and ambiguous documentation requirements. For instance, the proposed rule requires that in addition to identifying the type of covered service provided,<sup>10</sup> the practitioner must also provide a “description” of each service provided. To us this is duplication of effort and introduces a subjective standard that school districts will struggle to meet. In contrast, Office of Inspector General review of the program requirements in its January 2012 audit of the Manchester, NH School District never revealed criticism of the underlying documentation requirements of the Medicaid to Schools Program although certainly the audit revealed a lack of compliance with those documentation requirements by the Manchester School District.<sup>11</sup> Regarding the description requirement, when will a description of the service be “sufficient” in order to meet audit standards? “Insufficient” descriptions, as determined by a Medicaid auditor in any future audits, will restrict payment for covered services in violation of the Social Security Act and IDEA. Other additional documentation requirements will exceed the time capacity of practitioners to document during busy schedules of delivery of services to students and thereby restrict payments for covered services in violation of the Social Security Act and IDEA. Neither 42 C.F.R. 431.17<sup>12</sup> nor He-W 520.03<sup>13</sup> contain such burdensome requirements that apply to Medicaid providers in general.

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<sup>7</sup> Compare He-W 589.04(av)(1) with He-W 589.04(ae).

<sup>8</sup> He-W 589.04(ax)(1)

<sup>9</sup> DHHS Memorandum to NH Schools, January 9, 1997.

<sup>10</sup> He-W 589.06(c)(6)

<sup>11</sup> <https://oig.hhs.gov/oas/reports/region1/11000014.pdf>

<sup>12</sup> “...Content of records. A State plan must provide that the Medicaid agency will maintain or supervise the maintenance of the records necessary for the proper and efficient operation of the plan. The records must include...[p]rovision of medical assistance....” 42 C.F.R. §431.17

7. In both the emergency Medicaid to Schools rule and the proposed rule, DHHS has often cited CMS guidance that is argued to be rooted in the “comparability” requirement relative to the justification of the removal of DOE credentialed providers of speech, mental health and psychological services as qualified individuals. Our understanding of “comparability,” as the term is understood in the context of the Social Security Act,<sup>14</sup> means that, “[t]he [state] plan must provide that the services available to any categorically needy beneficiary under the plan are not less in amount, duration, and scope than those services available to a medically needy beneficiary; and...[t]he plan must provide that the services available to any individual in the following groups are equal in amount, duration, and scope for all beneficiaries within the group... (1) The categorically needy...[or](2) A covered medically needy group.”<sup>15</sup> Our understanding is that the mandate of the statute and regulations fundamentally ensures that the amount, duration and scope of services, when comparing different categories of Medicaid eligible recipients, must be comparable. To us, the term “comparability” governs equality of services<sup>16</sup> amongst recipients, but the categories of such do not seem to be at issue in regard to the Medicaid to Schools Program and students therein who are Medicaid eligible. Even if comparability applies regarding categories of Medicaid eligible recipients in the context of the Medicaid to Schools program, the Social Security Act has recognized as reimbursable covered services delivered pursuant to an IEP, and therefore, such services are unique in their scope regardless of purported comparability concerns. Additionally, we can find no support in the federal “comparability” regulation, or in the Social Security Act, for the proposition that “comparability” requires that practitioners who deliver services in the school setting must possess the same credentials of providers of services in the community. In our view, if DOE certification requirements mandate competencies necessary to deliver covered services in the context of the school setting, and those competencies are similar to competencies required of community based providers, we can detect no rational reason to promulgate an emergency rule or a proposed permanent rule that excludes the very practitioners who deliver the majority of mental health and psychological services in the school setting. We understand that the CMS guidance of July 1, 2019 requires 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.”<sup>17</sup> To us, “qualifications” means that competencies must be similar when comparing school based practitioners and community based practitioners, but does not mean that the credentialing of the practitioners has to be the same or that a DOE issued credential cannot be recognized as requiring the necessary competencies. To the extent, however, CMS adheres to the position that its guidance requires that the credentials must to be exactly the

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<sup>13</sup> “Providers shall maintain clinical records to support claims submitted for reimbursement for a period of at least 6 years from the date of service or until the resolution of any legal action(s) commenced in the 6 year period, whichever is longer.” He-W 520.03.

<sup>14</sup> 42 U.S.C.A. §1396a(a)(10)(B) and (C)

<sup>15</sup> 42 C.F.R. §440.240

<sup>16</sup> “...42 U.S.C. § 1396a(a)(10)(B), sets forth a requirement that the ‘categorically needy’ receive at least the same level of protection as the ‘medically needy,’ and that ‘categorically needy’ individuals receive equal treatment vis-à-vis each other.” King by King v. Sullivan, 776 F. Supp. 645, 653 (D. R.I. 1991).

<sup>17</sup> SAMHSA and CMS Joint Informational Bulletin, July 1, 2019

<https://www.dhhs.nh.gov/ombp/medicaid/mts/documents/samshacms712019.pdf> , p. 17

same, the CMS guidance is not supported by the Social Security Act mandate of “comparability,” or the federal regulation implementing comparability requirements. As such, any guidance issued by CMS or regulatory changes in the NH Medicaid to Schools program based on a misunderstanding of “comparability” requirements violates the Social Security Act and the IDEA.

8. The proposed rule seems to eliminate the opportunity for schools to seek Medicaid reimbursement for occupational therapy, physical therapy and speech-language hearing services in the group context. As the proposed rule states, “[s]chools shall submit claims for physical, occupational, and speech-language therapy services in accordance with the following...[o]nly units of direct treatment performed by a physical therapist, occupational therapist, SLP, a physical therapy assistant, occupational therapy assistant, or speech-language assistant shall be billed, meaning the time the therapist or physical therapy assistant, occupational therapy assistant, or speech-language assistant spends providing direct treatment **to one recipient...**” (emphasis added, He-W 589.06(d)(1)) The delivery of services in a group setting is often a setting determined by the IEP team to be the most appropriate setting to meet least restrictive environment requirements pursuant to the IDEA. Disallowing Medicaid reimbursement in this setting violates the Social Security Act and the IDEA.

In summary, as set forth above, where changes to the Medicaid to Schools program prohibit or restrict Medicaid payment for services delivered to a student pursuant to the student’s IEP, or cause the financial liability of an LEA to precede that of DHHS where payment for covered services is the responsibility of DHHS under state law pursuant to RSA 186-C:25, the proposed rule violates the Social Security Act and the IDEA.

Sincerely,



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