

# NEW HAMPSHIRE SCHOOL ADMINISTRATORS ASSOCIATION

CHAMPIONS FOR CHILDREN



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

RECEIVED

DEC 4 2019

November 27, 2019

DIRECTOR'S OFFICE  
OMEP

Dear Henry,

As organizations, the New Hampshire School Administrators Association, the New Hampshire School Boards Association and the New Hampshire Principal's Association support and agree with the comments provided by the New Hampshire Association of Special Education Administrators (NHASEA) in a letter sent to you on or about November 20, 2019. As you are aware, NHASEA's letter was in response to draft initial proposed Medicaid to Schools regulations, published on or about November 4, 2019.

All of our organizations, including NHASEA, now appreciate the opportunity to jointly respond to the most recent draft of the proposed Medicaid to schools regulations (the regulations) published on or about November 19, 2019.

We restate the comments provided by NHASEA in its letter of November 19, 2019, as most if not all of those comments apply to the regulations published on or about November 19, 2019. We are concerned with additional violations of the Social Security Act and the Individuals with Disabilities Act (the IDEA), as well as state law, as set forth below.

First, the regulations now modify the term "medically necessary" by also mandating that the service be necessary "...due to a medical condition or injury and not solely needed for education." He-W 589.04(b)(2). "Medical condition or injury" is not defined and raises our concern that solely identifying a child with a disability pursuant to the IDEA or the Rehabilitation Act of 1973 (Section 504) and subsequently ordering covered services pursuant to an IEP or 504 plan will not be sufficient to justify the services as Medicaid reimbursable. Beyond just an identification of a disability pursuant to the IDEA or Section 504, a medical condition or injury may need to be diagnosed, apparently outside of the IEP or Section 504 team disability determination. Both an IEP and a Section 504 plan have a fundamental educational purpose, and related / covered services advance that educational purpose in the context of the IDEA and Section 504. Under this proposed language, all services delivered could be labeled as "solely needed for education," and thereby subject to payback in a Medicaid audit. Failure to recognize the IEP as an ordering document, in and of itself, and adding the additional

requirement of a “medical condition” or “injury” in order for covered services to be reimbursable by Medicaid violates the Social Security Act<sup>1</sup> and the IDEA.<sup>2</sup>

Second, the regulations now prohibit Medicaid reimbursement for “social activities”<sup>3</sup> and the teaching of “life skills.”<sup>4</sup> In the context of supporting children with disabilities, social activities are often present opportunities where behavioral management interventions can be applied, as well as modeled by typically developing peers. Additionally, elimination of the teaching of life skills is inconsistent with the allowance of reimbursement for personal care<sup>5</sup>, behavioral management<sup>6</sup> and assistance with communication<sup>7</sup> as life skills often are taught in the context of such interventions. Elimination of such interventions as reimbursable by Medicaid violates the Social Security Act and the IDEA.

Third, reimbursement for school guidance counselor services is prohibited.<sup>8</sup> In many instances, school counselors provide covered mental health services to children with disabilities. Elimination of such interventions as reimbursable by Medicaid violates the Social Security Act and the IDEA.

Fourth, we object to the defining of some of the activities of rehabilitative assistance with greater particularity. We are concerned that the definitions will be more restrictive than the current “plain meaning” of the activities. For example, in the proposed descriptions of certain activities of rehabilitative assistance, as set forth in He-W 589.04(ae)(1)-(4), use of the words “to include” may lead to the interpretation that “...when specific words in a statute [regulation] follow general ones, the general words are construed to embrace only objects similar in nature

---

<sup>1</sup> Federal law makes it clear that even though an IEP may have an educational purpose, pursuant to the Social Security Act, “[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 established pursuant to part B of the Individuals with Disabilities Education Act or furnished to an infant or toddler with a disability because such services are included in the child’s individualized family service plan 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 or the New Hampshire Department of Health and Human Services (DHHS) 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 individualized education program (IEP) as a care plan that can order covered services.

<sup>2</sup> 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, DHHS is a public agency, and the New Hampshire legislature has elected to require DHHS to 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 DHHS shifts the responsibility for payment of covered services to the schools, through unnecessarily burdensome regulations or guidance, DHHS violates the IDEA.

<sup>3</sup> He-W 589.05(i); He-W 589.04(ae)(5)

<sup>4</sup> He-W 589.05(o)

<sup>5</sup> He-W 589.04(ae)(8)

<sup>6</sup> He-W 589.04(ae)(3); He-W 589.04(ac)(1)

<sup>7</sup> He-W 589.04(ae)(2)

<sup>8</sup> He-W 589.05(s)

to those enumerated by the specific words.”<sup>9</sup> Thus, for example, communication assistance may only be covered when it involves the use of an AAC device or other device that ameliorates communication limitations, rather than assistance with communication in a broader sense. An unnecessary narrowing of covered services activities for purposes of restricting Medicaid payment, absent federal statutory or regulatory mandate, thereby violates the Social Security Act and the IDEA.

Fifth, the regulations introduce the concept of a treatment plan that a health care clinician must develop in order that rehabilitative assistance may be reimbursed by Medicaid. The rule is ambiguous as to whether this is a care plan (IEP) or a separate treatment plan that must be developed specifically for rehabilitative assistance. He-W 589.04(ai). The term “treatment plan” is not defined. Development of a plan should not be required. If such a treatment plan is required above and beyond an IEP, such a requirement will restrict Medicaid payment by requiring the unnecessary development of a treatment plan in addition to an IEP, thereby violating the Social Security Act and the IDEA.

Sixth, we object to the removal of a licensed practical nurse as an individual qualified to deliver nursing services. Such board licensed nurses are qualified to deliver nursing services in the context of Medicaid reimbursement. To restrict Medicaid reimbursement in this instance violates the Social Security Act and the IDEA.

Seventh, the regulation has added various “areas of knowledge” that a rehabilitative assistant must possess:<sup>10</sup>

- I. Personal care and nutrition, if performing these tasks;
- II. Infection control and universal precautions designed to prevent the transmission of infectious diseases;<sup>11</sup>
- III. Safety and emergency procedures, including basic first aid and 911 protocols;
- IV. Proper lifting techniques;
- V. Medicaid recipient rights and the reporting of abuse and neglect;
- VI. Record-keeping and documentation, including the penalties associated with improper recordkeeping and documentation<sup>12</sup>

The regulation is unclear as to a rationale regarding why many of these standards apply to rehabilitative assistants in the context of the delivery of covered services ordered pursuant to an IEP or Section 504 plan and are thus unduly burdensome. The regulation is also unclear as to what documentation a district would be required to produce in a Medicaid audit to demonstrate knowledge in the enumerated areas, thus subjecting districts to a subjective standard of review by a Medicaid auditor, thereby leading to the risk of negative audit findings and the loss of Medicaid reimbursements. In sum, jeopardizing Medicaid reimbursements pursuant to subjective and unduly burdensome regulations, absent a federal statutory or regulatory mandate, violates the Social Security Act and the IDEA.

---

<sup>9</sup> *In re Search Warrant for 1832 Candia Road, Manchester*, 171 N.H. 53, 59 (2018)

<sup>10</sup> He-W 589.04(af)(4). How will a school district demonstrate that a paraprofessional has the requisite “knowledge” in an audit? What is the objective standard of review by a Medicaid auditor regarding the required level of knowledge?

<sup>11</sup> Why does a paraprofessional in the school setting need to understand infection control?

<sup>12</sup> What penalties? What standard of record keeping and documentation in the context of school records retention policies and FERPA? What defines “improper” record keeping?

Eighth, the regulation mandates that “[t]he creation, storage, retention, disclosure, and destruction of documentation required by this part shall comply with all federal and state privacy and security laws and rules including the Health Insurance Portability and Accountability Act of 1996 and the substance use disorder patient records regulations pursuant to 42 CFR Part 2.” He-W 589.08(d). As such, HIPAA and other record requirements are thrust upon school districts and subjects districts to Medicaid audit paybacks if districts are not compliant with such standards. The United States Departments of Health and Human Services and Education have made it clear in joint guidance that school districts are not subject to HIPAA in this regard: “Because student health information in education records is protected by FERPA<sup>13</sup>, the HIPAA Privacy Rule excludes such information from its coverage. See the exception at paragraph (2)(i) to the definition of ‘protected health information’ in the HIPAA Privacy Rule at 45 CFR § 160.103.”<sup>14</sup> By extension, because FERPA provides the federal standard for the protection of student education records, it sets the standard for such protection in the context of Medicaid reimbursements across the realm of all covered services.

Additionally, the authority to promulgate standards relative to the protection of educational records rests squarely with the DOE, and thereafter district school boards must develop a policy that complies with such standards, pursuant to RSA 189:66, V.<sup>15</sup> For DHHS to mandate records protection policies that are within the authority of the DOE to regulate violates the NH Administrative Procedures Act, RSA 541-A:22, III(f): “...An agency shall not by rule... [a]dopt rules under another agency’s authority.”

Development of record keeping requirements is the responsibility of district school boards, pursuant to RSA 189:29-a and RSA 33-A:3-a, CXIX. As a result, where the regulation purports to require additional records protection and retention standards beyond those already mandated by federal and state law, the regulation is contrary to federal guidance and violates state law, and places an unnecessary administrative burden on districts that will restrict Medicaid reimbursements in violation of the Social Security Act and the IDEA.

We appreciate the opportunity to provide comment regarding the regulations.

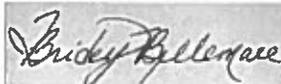
Sincerely



Dr. Carl M. Ladd  
Executive Director, NHSAA



Barrett Christina, Esq.  
Executive Director, NHSBA



Jane Bergeron-Beaulieu  
Executive Director, NHASEA

Bridey Bellemare  
Executive Director, NHASP

---

<sup>13</sup> The Family Educational Rights and Privacy Act

<sup>14</sup> Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to Student Health Records, November 2008, p. 4. <https://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>

<sup>15</sup> “The department shall establish minimum standards for privacy and security of student and employee data, based on best practices, for local education agencies. Each local education agency shall develop a data and privacy governance plan which shall be presented to the school board for review and approval by June 30, 2019....”