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for people with disabilities

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Ohio Department of Job and Family Services
Office of Legal Services
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To Whom It May Concern:

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, along with Advocates for Basic Legal Equality, Legal Aid of Western Ohio, Legal Aid Society of Columbus, Northeast Ohio Legal Services, Ohio State Legal Services Association and Southeastern Ohio Legal Services, submit these comments to the proposed rules implementing the Medicaid School Program, O.A.C. 5101:3-35-01 through 5101:3-35-06.

The Medicaid Act has certain requirements which ensure that beneficiaries receive timely and adequate access to health care. These requirements include state wideness and comparability of services. State wideness requires that a State plan for medical assistance “be in effect in all political subdivisions of the State, and, ... be mandatory upon them.” 42 U.S.C. 1396a(a)(1). Therefore, all medically necessary health services must be available to each child regardless of what county that child resides in. It appears that the Medicaid School Program would violate the statewide requirement as medically necessary services will only be available under this program to children who live in districts where the school district chooses to participate.

Moreover, the Medicaid Act provides that there shall be comparability of services in that medical assistance “shall not be less in amount, duration, or scope than the

medical assistance made available to any such other individual.” 42 U.S.C. 1396a(10)(B)(i). Based on the Medicaid School Program rules, there is concern that children will not be provided with at least the same amount, duration and scope of services available to others.

While waivers allow certain requirements, such as state wideness and comparability of services, to be waived, the Medicaid School Program is not operating through a waiver, and therefore these requirements must be met.

5101:3-35-01

Issue: (A)(5) “Eligible child”.

Concern: Only children with an individualized education program (IEP) are included in the definition, not children who have Section 504 plans or children who are Medicaid eligible but who do not have IEPs. Medicaid eligible children may be denied services or not be identified because of this limited definition.

Further, 5101:3-35-05(B)(7) refers to an “eligible child without an IEP”. This language is confusing. Based on the definition of “eligible child” the only way a child can meet this definition is if that child has an IEP.

Recommendation: The definition of "eligible child" should be changed to include children who might, if assessed, be eligible for an IEP and/or Medicaid eligible children who have disabilities or developmental or other conditions for which services available in the school setting would be medically necessary to ameliorate their conditions.

Issue: (A)(7) “Habilitation”.

Concern: Medicaid requires that medically necessary services be provided to eligible children. Exclusion of services from coverage under MSP that assist children to gain skills, prevent a loss of skills or correct or ameliorate physical or mental conditions, will impermissibly limit the services to which children are entitled under Medicaid. The distinction between whether a person has a skill and lost it (rehabilitation) versus having never gained the skill and needing assistance in learning it (habilitation), is largely inapplicable to children whose disabilities or conditions make it difficult or impossible to develop the same skills as children

who are non-disabled. The U.S. District Court Southern District of Ohio opined that a "...restrictive interpretation of 'rehabilitative' would mean that no child who is born with a disability, could ever receive rehabilitative services. This does not comport with the broad coverage afforded under the EPSDT mandate." *Parents League for Effective Autism Services (PLEAS), et. al., v. Helen Jones-Kelley, et. al.*, 565 F. Supp. 2d 905, 916 (S.D. Ohio 2008).

EPSDT requires the provision of services to children that are necessary to "correct or ameliorate" their physical and mental conditions. See *Id.*, 565 F. Supp. 2d at 916; 42 U.S.C. 1396d(a)(13) and 42 U.S.C. 1396d(r)(5). Such covered services includes those that are preventive. Preventive services are defined as

services provided by a physician or other licensed practitioner of the healing arts within the scope of his practice under State law to: 1) prevent disease, disability and other health conditions or their progression; 2) prolong life; and 3) promote physical and mental health and efficiency. 42 C.F.R. 440.130(c).

Behavioral and psychological services for children with disabilities, by necessity, are designed to assist a child to acquire life skills that enable the child to cope more effectively with the demands of the child's environment and must, to be effective, work on developing skills necessary to raise the level of the individual's personal, physical, mental, and social efficiency. Children with IEPs need these services to assist them in developing skills that, because of their disability and age, they have not and probably will not develop, without the services.

By defining MSP services in such a way that they could be excluded as "habilitation" services, the MSP rules, in effect, are excluding the very services that should be provided under this program. For example, the definition of "habilitation" is so broad that it could be construed as excluding occupational therapy, speech therapy, physical therapy, and the other skilled services discussed in these rules. Occupational therapy defined in 3301-51-10(B)(52)(b)(vii) includes services that can be construed as "habilitation" as defined in the rules of the MSP. For example, occupational therapy services include:

- (b)(i) *improving, developing*, or restoring functions *impaired* or lost through illness, injury or deprivation,
- (ii) *improving* ability to perform tasks for independent functioning if functions are *impaired* or lost and,

- (iii) *preventing*, through early intervention, *initial* or further *impairment* or loss of function.

O.A.C. 3301-51-10(B)(52)(b)(vii). (Emphasis added).

Additionally, speech-language pathology services in O.A.C. 3301-51-10(B)(52)(b)(xix)(d) include “provision of speech and language services for the *habilitation or prevention* of communicative impairments”. (Emphasis added). This language conflicts with the language used in MSP rules and thereby would exclude these services from coverage under the MSP.

The broad definition of habilitation in MSP and the exclusion of services that fit this definition raise many questions. It is unclear whether, under MSP, a child who has cerebral palsy can receive speech-language pathology services at school when the child has not yet learned to speak. It is unclear what services are available to children with mental retardation or developmental disabilities.

Recommendation: The MSP rules should ensure that the services will be provided to children if those services are recommended by a licensed practitioner of the healing arts to correct or ameliorate physical or mental conditions.

Issue: (A)(11) “Medicaid authorized prescriber”.

Concern: Rather than using a broader term such as licensed practitioner, this definition limits a prescriber to an advanced practice nurse. By limiting to an advanced practice nurse, there is concern that fewer services will be available.

Recommendation: Use the same language as 42 U.S.C. 1396d(a): “licensed practitioner of the healing arts within the scope of their practice under state law.”

Issue: (A)(13) “Medically necessary”.

Concern: The definition is restricted to skilled services. As noted on page 5 of these comments regarding section (A)(16), the definition of skilled services is unclear. Additionally, this definition of medically necessary is not appropriate for children. Since MSP is a program for children, the definition addressing medical necessity for children as set out in the EPSDT program must be used. Finally, it is not clear who is determining medical necessity – the child’s physician or other qualified licensed practitioner or the school nurse.

Recommendation: Amend the definition by removing the reference to skilled services and including the definition from EPSDT, 42 U.S.C. 1396d(r)(5), “Such other necessary health care, diagnostic services, treatment, and other measures described in section 1905(a) to *correct or ameliorate defects* and physical and mental illnesses and conditions....” Clarify that the child’s physician or other qualified practitioner determines medical necessity.

Issue: (A)(16) “Skilled Services”.

Concern: This definition is unclear and raises confusion about whether a school can bill for medical services that are delegated. For example, it is unclear whether a school could bill for medical services provided under the supervision of a R.N. or L.P.N., but not performed by a R.N. or L. P.N.

Recommendation: Remove the “complexity and sophistication” language from the definition and replace with services that are provided by a licensed practitioner of the healing arts practicing within the scope of his or her license. Alternatively, remove the definition of skilled services all together and define services that can be provided by a licensed practitioner of the healing arts based on services that a practitioner can provide under his or her license.

5101:3-35-04

Issue: (C)(1) Referral to prior authorization.

Concern: This rule refers to the prior authorization process but there is no explanation of the process. It is unclear whether there will be a separate prior authorization process for children eligible for the MSP.

Recommendation: Provide a prior authorization process for children that applies the correct standard of medical necessity under EPSDT, to correct or ameliorate defects and physical and mental illnesses and conditions, as described in our comments regarding 5101:3-35-01(A)(13) on pages 4 - 5. Clarify that the school is still required to provide the services listed on the IEP, regardless of whether or not the service is reimbursable under Medicaid.

Issue: (C)(2) “Services defined as medical assistance are defined in 42 U.S.C. 1396(a)”.

Recommendation: Correct citation of definition of medical assistance to 42 U.S.C. 1396d(a).

Issue: (B) “Covered Services”.

Concern: The reference to "covered services" as a listing of specific services / equipment is problematic as children are entitled to receive Medicaid services beyond what is a "covered" service in a particular state's Medicaid plan if medically necessary to correct to ameliorate their conditions. The only limit on EPSDT services is that they be medically necessary. 42 U.S.C. 1396d(r)(5); See also *PLEAS*, 565 F. Supp. 2d at 912.

Recommendation: Ensure that the language comports with the requirements of EPSDT.

5101:3-35-05

Issue: (B)(6)(c) Mental health services.

Concern: Mental health services should be covered if medically necessary. However, (B)(6)(c)(i) and (iv) both seem to limit services available to an overly restrictive definition of “rehabilitative treatment”. Pursuant to the EPSDT program, mental health services are not limited to an overly restrictive definition of rehabilitative treatment as referenced on pages 2 – 4 of these comments regarding 5101:3-35-01(A)(7). Services to be provided to children include those that “correct or ameliorate defects and physical and mental illnesses and conditions”. 42 U.S.C. 1396d(r)(5). In *PLEAS*, the court concluded that “there is no requirement that the services be ‘rehabilitative’ but only they ameliorate or correct a condition”. *PLEAS*, 565 F. Supp. 2d at 917. Further, the *PLEAS* court stated that “[t]he only limit on EPSDT services is that they be ‘medically necessary’.” *Id.* at 912. In *Rosie D. v. Romney*, 410 F. Supp. 2d 18 (D. Mass. 2006), the court found that there is not a requirement that the services be rehabilitative and “if a licensed clinician finds a particular service to be medically necessary to help a child improve his or her functional level, this service must be paid for by a state’s Medicaid plan pursuant to the EPSDT mandate.” *Rosie D.*, 410 F. Supp. 2d at 26. The court in *S.D. v. Hood*, 391 F. 3d 581, 590 (5th Cir. 2004), stated that “every Circuit which has examined the scope of the EPSDT program has recognized that states must cover every type of health care or service necessary for EPSDT corrective or ameliorative purposes that is allowable under § 1396d(a)”.

Recommendation: Remove the overly restrictive “rehabilitative treatment” language from this rule. Ensure that mental health services will be provided to children if those services are recommended by a licensed practitioner of the healing arts to correct or ameliorate physical or mental conditions.

Issue: (B)(6)(d) Mental health services – unallowable activities.

Concern: There are no definitions of the terms used in this section, specifically “sensitivity training” and “sexual competency training”, and it is unclear as to their meaning. Further, family therapy that is not as a direct benefit to an eligible child is listed as an unallowable activity. Parent counseling is a related service under the Individuals with Disabilities Education Act (IDEA) if necessary to “help parents to acquire the necessary skills that will allow them to support implementation of their child’s IEP.” O.A.C. 3301-51-01(52)(b)(x)(c).

Recommendation: Clarify the definition of these terms. Ensure that the MSP rules do not preclude the provision of parent counseling as a related service under IDEA even though counseling is not reimbursable under the MSP.

Issue: (C)(1) List of non-reimbursable items – Development of the IEP.

Concern: It is unclear whether this section excludes solely attending the IEP meeting or whether it also excludes evaluations, drafting goals and/or the treatment plan and other activities that are completed prior to the IEP meeting. Additionally, it is unclear whether this section also excludes observations of the child and data collection to develop a functional behavior assessment and positive behavior support plan, and training provided to teachers and parents.

Recommendation: Clarify what “development” of the IEP means. By clarifying the “development” of the IEP, skilled service providers and others involved in the IEP meeting are ensured that their services performed in preparation for the IEP meeting are paid for, whether through Medicaid or another source.

Issue: (C)(16) Failure to show progress.

Concern: There is a concern that if a child fails to show progress, this will be used as a reason to deny continuation of the services on the IEP. This is problematic for a few reasons. The IEP team is required to develop an IEP and goals that are reasonably calculated to ensure progress. The IEP team has to continue to work towards progress even if it appears that a child is not making expected gains in a certain area. If a child has a functional or academic deficit, the IEP team must address it and provide services that are necessary to facilitate access to a free and appropriate education. Sometimes the services provided do not always lead to immediate results. Also, for certain children, it may appear as though no progress was made or the progress was insufficient, when in fact it may have been adequate progress for that child or prevented regression.

The proposed rule does include language that requires documentation that the methods / techniques applied have been modified to improve progress and it appears that so as long as the team documents that modifications have been made, continued services will be billable. However, it is unclear about who makes the determination of whether progress is being made. Pursuant to IDEA, this has to be an IEP team decision.

Further, if a particular service is denied based upon lack of progress, it is unclear whether the denial will require parents to challenge the denial in a state hearing with the Department of Job and Family Services consistent with *Goldberg v. Kelly*, 397 U.S. 254 (1970), through an impartial due process hearing under the IDEA, or both. Moreover, it is unclear whether the money will have to be recovered by Medicaid.

Recommendation: The determination of whether a child is making "progress" should be determined by the IEP team as required under the IDEA. Additionally, clarify the due process hearing issue to determine how disputes will be resolved and ensure that program participants receive the due process to which they are entitled.

Issue: (C)(17) Services provided as a part of the eligible child's waiver services.

Concern: It is unclear whether a child who receives nursing services on a waiver, for example, can also receive nursing services at school through MSP.

Recommendation: Children should not be precluded from getting the same amount of services they need, because of the setting in which the service is provided. If a

child is currently able to receive nursing services through a waiver, and nursing services at school through MSP, the child should not be precluded from continuing to receive these services in both settings. Clarify this section to allow service provision in multiple settings.

Issue: (D) “[S]ervices provided shall be medically necessary and the type, frequency, scope and duration of the services shall fall within the normal range of services considered under acceptable standards of medical and healing arts professional practice, as appropriate”.

Concern: Similar language is also used in 5101:3-35-06(C). The rule, as written, ignores the expanded amount, scope and duration of services available to children through EPSDT when those services are medically necessary.

Recommendation: Remove this rule or clarify that children are entitled to services in greater amount, scope and duration, if medically necessary, than adults.

5101:3-35-06

Issue: (B)(1) Specialized Medical Transportation Services to transport the child to and from the Medicaid school provider to receive medically necessary Medicaid services.

Concern: Some children may need specialized transportation while others do not require it. Children are required to be served in the least restrictive environment. Therefore, if a child is able to use regular transportation, that child should be permitted to do so and not be required to use specially adapted transportation that is not needed.

Recommendation: Include language in the rule that incorporates a least restrictive environment analysis when determining whether specialized transportation is required.

Issue: (B)(2) “Targeted Case Management (TCM)”.

Concern: This section implicates confidentiality and Family Educational Rights and Privacy Act (FERPA) issues. Parents are not required to agree to TCM. The

school has to provide a free appropriate public education (FAPE) regardless of whether parents consent to TCM. Further, if a parent agrees to TCM, it is unclear whether that parent can exercise the right to limit the information that the school can exchange with the child's medical providers.

Recommendation: This section should be clarified to ensure that services to a child are not denied or discontinued when a parent does not want to give permission to the school to coordinate with the child's doctor, or only wants to give limited permission.

Issue: (B)(2)(f)(iii) TCM Services.

Concern: It is problematic that under this section services are only allowed to be provided to children with developmental disabilities who do not have a waiver. Children with mental health needs are excluded under this section. There does not seem to be a rationale for limiting TCM services only to children with developmental disabilities.

Recommendation: Children with mental health needs often lack needed case management services and should be able to receive those service through MSP if the service is necessary.

Issue: (B)(3)(c) "Medical supplies and equipment".

Concern: This section needs to be clarified as to whether children on home instruction and whether children who need to use assistive technology devices at home in order to receive FAPE are allowed to access necessary equipment at home. Based on the language of this section, it appears that access would be prevented when equipment will be used outside the school.

Recommendation: Modify the language to allow equipment use outside of the school setting for the use of the supplies and equipment outside the school setting is listed on the IEP.

Issue: (D) "Services provided must be listed in a plan of care that is part of the IEP".

Concern: Plans of care and IEPs are subject to different standards and definitions of service provision which may conflict if the documents are combined. For example, schools are not required to provide, through an IEP, "medical services" except to identify a disability that would qualify the child for special education. See definition of "medical service" in O.A.C. 3301-51-01(B)(52)(b)(vi). Through a plan of care, and pursuant to other standards, schools are required to provide related services that are medical in nature that are not required to be performed by a licensed physician if the service is necessary for the child to remain in school. See definition of "related services" in 20 U.S.C. 1401(26)(A).

Recommendation: To avoid potential definitional conflicts and conflicts based on standards, and to ensure that necessary services to children are not limited by any conflicts, the documents should not be combined.

GENERAL CONCERNS

Issue: Whether parents must permit billing to Medicaid.

Concern: IDEA regulations specifically give parents a choice whether to allow the use of their public benefits to pay for services at school. 34 C.F.R. 300.154(d). Additionally, IDEA states that parents cannot be required to use private insurance to provide services for children at school.

Recommendation: Ensure that parents are informed of their choice whether to allow billing to Medicaid for their child's services at school and that parents are advised of any effects an agreement to allow such billing would have on their child's benefits outside of the school setting. Further, parents should be clearly informed that the services necessary for their child to receive a FAPE must be provided under IDEA regardless of whether the parent agrees to allow the use of public or private insurance benefits. Parental consent is defined in 34 C.F.R. 300.9.

Issue: Whether MSP affects the amount of skilled services (occupational therapy, physical therapy, speech-language pathology services, audiology services, nursing services, and mental health services) children can receive outside of school when children receive skilled services at school.

Concern: Some children need an increased provision of a skilled service than would be provided in a school setting. This is a common situation for children

with complex needs, and arises because the school applies an educational standard to the provision of skilled services (i.e., the amount necessary for the child to benefit from his education). Non-school based providers do not apply the educational standard, but rather the standard applicable to their profession. Additionally, for some children, a school might determine that a child does not need skilled services in school, but there has been a medical recommendation that the child needs a skilled service. It is unclear how the MSP would impact this type of situation, and whether the child would be prevented from receiving skilled services outside of school.

Recommendation: 34 C.F.R. 300.154(d) prohibits a public agency from using a child's benefits if the use would 1) decrease the available lifetime coverage or other insured benefit for the child; 2) result in a family paying for services that would otherwise be covered by the public benefit or insurance program and that are required for the child outside of the time the child is in school; and 3) increase premiums or lead to the discontinuation of insurance benefits or risk the loss of eligibility for home and community based waivers based upon aggregate health related expenditures. These prohibitions need to be reflected in the MSP rules.

Issue: Clarification of parental consent. Consent for the provision of one benefit does not indicate consent for all services; individual opportunities to consent are required under 34 C.F.R. 300.154(d)(2)(iv).

Concern: Consent from parents and guardians must be given separately for each benefit or service provided. A signature or opportunity to consent arises multiple times and a parent must consent separately to: the IEP, Medicaid eligibility, billing Medicaid for services, contact with the child's medical provider, etc.

MSP rules should be clear that parents are not required to agree to bill Medicaid for a service, that they have a right to refuse to agree to a release of their child's medical records for this purpose or limit the release to certain records, and to be advised that their child's receipt of the services is not dependent on their consent to bill Medicaid for these services. A notice must be provided to parents if the billing of the service to Medicaid by the schools will in any way limit their ability to obtain these services outside of the school setting or impact their benefits.

Recommendation: Require separate opportunities to consent for each matter. Provide notice to parents of the ramifications of consent on benefits.

Issue: Screens – It is unclear what is meant by the term "screen".

Concern: School screening is distinct and separate from screenings required by EPSDT. There are different definitions for screens used in the educational setting and screens performed through the Medicaid program. For example, EPSDT requires the use of specific screens that are separate from a school's obligations to screen. See 42 U.S.C. 1396d(r)(1)(EPSDT screening obligations). In the school setting, multiple screens may be used and may be conducted through a school's intervention assistance team (IAT) process, prior to a child receiving an IEP.

Recommendation: Clarify what is meant by the use of the term screen. Clarify whether the MSP rules are intended to require schools to conduct EPSDT screens.

While we appreciate your thoughtful consideration of these comments, the parties have raised substantive and legal concerns with the original rules that were filed with JCARR on November 26, 2008. Moreover, it should be noted that the Department "emergency filed" these same rules on December 1, 2008 and they will remain in effect until March 1, 2009. Should a client request OLRs' representation to remedy a violation of rights OLRs may pursue administrative or other legal action should these rules not be amended to comply with the law.

Comments prepared by:

Ohio Legal Rights Service

Comments joined by:

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