



February 4, 2008

Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-2237-IFC
P.O. Box 8016
Baltimore, MD 21244-8016

Re: File Code: CMS-2237-IFC

Dear Sir(s) or Madam(s):

The Council for Exceptional Children (CEC) is the largest professional organization of teachers, administrators, parents, and others concerned with the education of children with disabilities, gifts and talents, or both. CEC appreciates the opportunity to provide written comment on File Code CMS-2237-IFC, Interim Final Rule on Optional State Plan Case Management Services. This notice was published in the *Federal Register* on December 4, 2007.

CEC has significant concerns about the potential impact that the CMS interim final rule for Case Management Services will have on the availability of a key coordinating function for children and youth with disabilities and their families. Case management services are a critical Medicaid benefit that help millions of low-income children with disabilities gain access to needed medical, social, educational and other services. All states, in compliance with the EPSDT mandate, provide medically necessary case management services to children. The restrictions on case management included in this rule would inevitably shift the financial responsibility for case management to states, school districts and other agencies across the nation.

CMS's decision to have this rule go into effect on March 3, 2008 without allowing for an adequate time period for CMS to consider any change based on public comment is troubling. In addition, the limited time given to states to implement these significant changes will make it virtually impossible given the need for states and school districts to change policies and procedures, to revise billing software, and to provide appropriate training and technical assistance to providers in order to ensure compliance with the new CMS case management rules.

This interim final rule goes well beyond the policies established by the Congress in the Deficit Reduction Act of 2005 (DRA, PL 109-171). We recommend that the Centers for Medicare and Medicaid Services (CMS) review and revise the interim final rule so that it comports with the statutorily-enacted policies of the DRA. We urge you to remove the additional policy restrictions not specifically authorized by the Congress in the DRA. According to CMS's projections, the interim final rule would save \$1.28 billion over five years, an impact well above the \$760 million in savings projected by the Congressional Budget Office (CBO) when scoring the policy changes enacted by Congress in the DRA. This difference in the estimated



impact on Medicaid spending itself is one indication that the rules go beyond what Congress intended.

Overall, CEC requests that this interim final rule be withdrawn.

CEC's specific comments and recommendations are listed below:

Eliminate new restrictions that: (1) narrow the scope of Medicaid-eligible children who can receive case management services in school and community early childhood settings; and (2) narrow the activities that can be reimbursed.

All children in Medicaid are eligible for case management services when the services are medically necessary. Some states provide medically necessary case management services to children with disabilities in school and community early childhood settings to ensure that they can receive a free and appropriate public education (FAPE). The interim final rules would allow the provision of case management for children with disabilities in these settings only when case management is designated as a required service in the child's Individualized Education Program (IEP) or an infant or toddler's Individualized Family Service Plan (IFSP). The rule specifically disallows the provision of case management when it is part of a child's plan under Section 504 of the Rehabilitation Act.

Regulations implementing Section 504 [34 CFR 104.33] require that public school systems must provide FAPE to each qualified child with a disability, regardless of the nature or severity of the child's disability. For purposes of the regulation, the provision of an appropriate education is the provision of regular or special education and related aids and services. Implementation of an IEP developed under IDEA is one means (but not necessarily the only means) of meeting the FAPE standard under Section 504. Case management services are often needed by children with disabilities covered by Section 504, and school and community preschool settings are an appropriate and effective environment for ensuring that children receive the services they need.

In addition, CEC is very concerned that the interim final rule eliminates reimbursement for several important IDEA Part B and Part C case management functions. These include IEP and IFSP development, providing prior written notice, preparing for or conducting the IEP and IFSP meeting, and scheduling or attending the IEP or IFSP meeting. This rule creates an artificial and unnecessary distinction between various case management activities.

CEC believes this change is inconsistent with Section 1903(c) of the Title XIX of the Social Security Act states that "nothing in this title shall be construed as prohibiting or restricting, or authorizing the Secretary 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." Clearly the proposed regulations would be in direct

conflict with this provision of law and would not further the purposes of Title XIX of the Social Security Act.

When establishing billing rates, states do not differentiate the activities this interim final rule would prohibit and activities the rule would continue to allow. Existing state reimbursement rates were not established making this distinction. Adjusting these rates to distinguish among these case management activities would be costly and time consuming.

CEC recommends:

- Revise the interim final rule § 441.18(c)(4) to permit medically necessary case management services to be provided in school settings to all children, without regard to whether the services are part of an IEP or IFSP under IDEA.
- Revise the interim final rule § 441.18(c)(4) to eliminate the restrictions on certain IDEA case management activities.

Promote the reduction in the number of Medicaid case managers serving each individual, but permit state flexibility to allow multiple case managers in certain circumstances.

These rules would also limit state flexibility by prohibiting a state from providing a child with more than one case manager even when the complexity of the child's condition demands the expertise of more than one program. CEC recognizes the importance of limiting the number of case managers that may be involved with an individual child. However some children have multiple and complex needs that intersect several service delivery systems of care. These could include health, special education, mental health, developmental disabilities as well as services related to abuse and neglect. It is very unlikely that one individual will possess the knowledge and expertise necessary to negotiate the provision of services across these multiple systems.

CEC recommends:

- Revise § 441.18(a)(5) to include an exception, as follows: “; except when, as part of a comprehensive assessment of the child's needs for service planning that involves parents and other relevant participants, it is determined that it is not appropriate to limit the child to a single case manager due to the complex and diverse nature of their needs or the challenges of coordinating services across various public and private programs, as documented by their plan of care.”

Eliminate provisions that impose unworkable documentation requirements on providers and limit state flexibility to establish payment practices and procedures.

A central tenet of the federal-state partnership to operate Medicaid is that states must follow federal guidelines but retain broad flexibility in establishing payment rates and determining payment policies. Disregarding this tenet, the rules arbitrarily restrict state flexibility to determine payment methodologies in a way that could make Medicaid payments less efficient.

The rules would prohibit states from making fee-for-service payments for case management services in any way other than paying for units of service that do not exceed 15 minutes. States often use case rates, per diem rates, or other payment methodologies to pay for case management. CEC has serious concerns that states will be unable to implement the required changes to comply with this provision of the rule by March 3, 2008. States must make substantial changes to established practices to comply with the regulations including analyzing current costs, establishing and publishing rates, modifying information technology systems, changing business practices to convert to 15 min units, and providing appropriate training and technical assistance to providers. The implementation date for the rule is impossibly short. States cannot come into compliance with this rule in the time provided, potentially putting federal funds in jeopardy. Even if we concurred with the content of this final rule, the rule makes no provisions for states to develop transition implementation plans over a reasonable timetable in order to come into compliance with the regulations.

CEC recommends:

- Withdraw in its entirety § 441.18(a)(8)(vi).

Eliminate 441.18(c)(5) “Activities that meet the definition of case management services in Sec. 440.169 and under the approved State plan cannot be claimed as administrative activities under Sec. 433.15(b).”

A number of states have CMS approved state plans that support the incorporation of case management into administrative activities. Given the implementation timeline for this rule, states cannot change their state plan to move case management out of administrative claiming. The end result will be a loss of Medicaid revenue to the state. This would result in the use of limited state and local funds to pay for a service that is a legitimate Medicaid expense.

CEC recommends:

- Withdraw 441.18(c)(5) in its entirety.

In summary, the Congress could not have been clearer in its intent that Medicaid should support the goals of IDEA. We believe that these interim final rules are inconsistent with that intent. CEC strongly recommends that the Secretary of Health and Human Services withdraw this interim final rule or at a minimum make the changes we have recommended.



If you need additional information, please contact Deborah Ziegler, Associate Executive Director for Policy and Advocacy Services at debz@cec.sped.org or 703-264-9406.

Sincerely,

A handwritten signature in cursive script that reads "Deborah A. Ziegler".

Deborah A. Ziegler, Ed.D
Associate Executive Director
Policy and Advocacy Services